REDACTED

FILED IN THE DISTRICT AND COUNTY COURTS OF EL PASO COUNTY, COLORADO
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DR. LYNETTE CORNELIUS CLERK OF COURT

DISTRICT COURT, EL PASO, COLORADO Court Address: 270 South Tejon Colorado Springs, CO 80903 **Plaintiff:** PEOPLE OF THE STATE OF COLORADO **vs.** **Defendant:** ROBERT LEWIS DEAR, JR. and, **Non-Party Movants:** ABC, Inc.; The Associated Press; Cable News Network, Inc. ("CNN"); CBS News, a division of CBS Broadcasting Inc., and KCNC-TV, owned and operated by CBS Television Stations Inc.; *Colorado Springs Independent*; *The Denver Post*; Dow Jones & Company; First Look Media; Fox News Network, LLC; *The Gazette*; KDVR-TV, Channel 31; KMGH-TV, Channel 7; KRDO-TV, Channel 13; KTTV-TV, Channel 11; KUSA-TV, Channel 9; KWGN-TV, Channel 2; NBCUniversal Media, LLC; The New York Times Company; Rocky Mountain PBS; The E.W. Scripps Company; TEGNA, Inc.; Tribune Media Company; and the Washington Post Company	▲ COURT USE ONLY ▲
Attorneys for Movants: Steven D. Zansberg, #26634 Thomas B. Kelley, #1971 Christopher P. Beall, #28536 LEVINE SULLIVAN KOCH & SCHULZ, LLP 1888 Sherman Street, Suite 370 Denver, Colorado 80203 Phone: (303) 376-2400 FAX: (303) 376-2401 szansberg@lskslaw.com	Case No. 15-CR-5795 Division: 10 Courtroom W570

MOTION TO UNSEAL FORTHWITH THE AFFIDAVITS OF PROBABLE CAUSE IN COURT FILE AND TO ENTER A FURTHER CASE MANAGEMENT ORDER REQUIRING THE PARTIES TO FILE REDACTED VERSIONS OF ALL FUTURE MOTIONS AND PAPERS FOR PUBLIC POSTING ON THE COURT'S WEBSITE

(With request for expedited hearing)

Movants, ABC, Inc.; The Associated Press; Cable News Network, Inc. ("CNN"); CBS News, a division of CBS Broadcasting Inc., and KCNC-TV, owned and operated by CBS Television Stations Inc.; *Colorado Springs Independent*; *The Denver Post*; Dow Jones & Company; Fox News Network, LLC; *The Gazette*; KDVR-TV, Channel 31; KMGH-TV, Channel 7; KRDO-TV, Channel 13; KTTV-TV, Channel 11; KUSA-TV, Channel 9; NBCUniversal Media, LLC; The New York Times Company; Rocky Mountain PBS; E.W. Scripps Company; TEGNA, Inc.; Tribune Media Company; and the Washington Post Company (collectively "Media Petitioners"), by their undersigned counsel at Levine Sullivan Koch & Schulz, LLP, respectfully move this honorable Court to unseal forthwith the affidavits of probable cause in support of arrest warrant and search warrants, which have been fully executed and returned to the court.

As grounds for this Motion, movants show to the Court as follows:

INTRODUCTION

The Defendant in this action stands accused of 179 felony counts, including eight counts of first degree murder and 130 counts of attempt to commit murder. The crimes charged were committed over the course of a multi-hour standoff with law enforcement the day after Thanksgiving, at a Planned Parenthood medical clinic. The tragic events of that day garnered massive media attention worldwide, as have the initial stages of this criminal case.

More than two weeks have transpired since the date of alleged crimes. The People have had sufficient time to clear and release the crime scene, law enforcement vehicles, etc., and to file the Complaint and Information on December 9, 2015. The defendant has appeared before the Court on two occasions. A status conference is set for December 23, 2015.

To date, the public has been denied access to the affidavits of probable cause that were filed in the County Court on November 27, 2015, one of which stated the justification for the warrantless arrest of the defendant; the second of which prompted County Court Judge Stephen J. Sletta to authorize a search warrant for the defendant's residence.

Although the sealing of a probable cause affidavit is routine practice prior to the execution of the warrant, for good and obvious reasons, it is the ordinary practice, even in high-profile felony cases, to unseal such affidavits once the warrant(s) have been executed and the People have completed their preliminary investigation and filed charges thereon. Because the trial in this case – if there is to be a trial– is months away, and there are multiple means to protect a defendant's fair trial rights, there is no basis for continued denial of the public's First Amendment right to access judicial records that are on file in this Court.

While the public's right of access to court records is a qualified one—not absolute—judicial records may properly be sealed from public inspection only where findings have been made, on the record, that continued sealing is necessary to protect a governmental interest "of the highest order," *and*, that no "less restrictive" alternative means exist to adequately protect

that interest. Such findings have not been made, nor could they be made, with respect to the affidavits of probable cause on file in this Court.

Through this Motion, the Media Petitioners respectfully seek the immediate unsealing of the affidavits of probable cause, and all other records currently on file in this Court for which the constitutionally-required findings have not been made.

With respect to future filings in this criminal case, the Media Petitioners seek contemporaneous access to such filings, as is mandated by case law and is critical to the maintenance of public confidence in the criminal justice system. As Chief Justice Warren Burger once stated: "People 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." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980). Accordingly, Media Petitioners respectfully urge the Court to enter an amended Case Management Order that will provide for such access.

THE INTEREST OF THE MEDIA PETITIONERS

1. Each of the Media Petitioners is engaged in gathering news and other information on matters of public concern, including these judicial proceedings, and disseminating it, on various platforms—print, broadcast, cable, internet and mobile devices—to the general public.

2. Media Petitioners appear before this Court on their own behalf, as members of the public, entitled to the rights afforded them by the Constitution of the United States, the Colorado Constitution, all applicable statutes, and the common law. In addition, they appear on behalf of the broader public that receives the news and information gathered and disseminated by these media outlets. *See, e.g.*, *Richmond Newspapers, Inc.*, 448 U.S. at 573-74 (the print and electronic media function "as surrogates for the public"); *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 863 (1974) (Powell, J., dissenting) (in seeking out the news the press "acts as an agent of the public at large").

ARGUMENT

I. THE MEDIA PETITIONERS HAVE STANDING TO ASSERT THE RIGHT OF PUBLIC ACCESS TO COURT RECORDS

3. The First Amendment to the United States Constitution, article II, section 10 of the Constitution of the State of Colorado, C.J.D. 05-01, the Colorado Criminal Justice Records Act, § 24-72-301, C.R.S. (2015), *et seq.* ("CCJRA") and the common law all protect the right of the people to receive information about the criminal justice system through the news media, including access to judicial records on file in this court, and the right of the news media to gather and report that information.

4. Movants' standing to be heard to vindicate those rights is well established. *See Star Journal Publ'g Corp. v. Cty. Ct.*, 591 P.2d 1028 (Colo. 1979) (newspaper's successful challenge to closure of preliminary hearing); *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 609 n.25 (1982) (recognizing press' right to be heard prior to closure of criminal trial); *Times-Call Publ'g Co. v. Wingfield*, 410 P.2d 511 (Colo. 1966) (press permitted to be heard in asserting their rights to access documents on file in civil action, which are founded upon federal and state constitutions' provisions); s*ee also In re N.Y. Times Co.*, 878 F.2d 67 (2d Cir. 1989); *In re Dow Jones & Co.*, 842 F.2d 603, 606-08 (2d Cir. 1988).[1]

5. The press routinely has been permitted to be heard in criminal cases in Colorado for the limited purpose of challenging the sealing of court files, and have succeeded in such challenges before both trial courts and Colorado's Supreme Court. *See People v. Thompson*, 181 P.3d 1143, 1148 (Colo. 2008) (granting media petitioners' emergency petition under C.A.R. 21 and ordering trial court to unseal indictment in murder trial, prior to preliminary hearing); *People v. Holmes*, No. 12-CR-1522 (Arapahoe Cty. Dist. Ct. Apr. 4, 2013) (recognizing Media Petitioners' right to seek unsealing of court file and ordering affidavits of probable cause in support of arrest unsuppressed) (attached as **Ex. 1**); *People v. Cox*, No. 10-CR-861 (Douglas Cty. Dist. Ct. June 22, 2011) (district court's order granting media organizations' motion to unseal arrest warrant affidavit in sexual assault case, after defendant had waived preliminary hearing) (attached as **Ex. 2**).

II. THE PUBLIC HAS A QUALIFIED RIGHT TO ACCESS JUDICIAL RECORDS

6. There are four separate bases for the Media Petitioners' rights asserted herein. First, the public's right to inspect court records is enshrined in the common law. *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978) ("the courts of this country recognize a general right to inspect and copy . . . judicial records and documents"); *In re NBC, Inc.*, 653 F.2d 609, 612 (D.C. Cir. 1981) ("existence of the common law right to inspect and copy judicial records is indisputable"); *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 120 (2d Cir. 2006) (same).

7. The common law access right "is not some arcane relic of ancient English law," but rather "is fundamental to a democratic state." *United States v. Mitchell*, 551 F.2d 1252, 1258 (D.C. Cir. 1976), *rev'd on other grounds sub nom. Nixon*, 435 U.S. 589. The common law right of access to judicial records exists to ensure that courts "have a measure of accountability" and to promote "confidence in the administration of justice." *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995); *accord United States v. Hubbard*, 650 F.2d 293, 314-15 (D.C. Cir. 1981).

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[1] In addition, the Colorado Rules of Civil Procedure authorize a motion by "any person" to review an order limiting access to a court file. Colo. R. Civ. P. 121(c) § 1-5(4) (2015) (provision also cited as instructive in Colo. R. Crim. P. 57(b)).

8. Second, court records in criminal cases are also subject to public access under the CCJRA[2]; *see Thompson*, 181 P.3d at 1145. Here, an order of the Court bars the custodian from releasing the criminal justice records at issue, *see* § 24-72-305(1)(b), C.R.S., so this Court, not the custodian, must determine whether the sealing order should be lifted. *See also* **Ex. 2** at 4 (recognizing that requiring a party seeking to lift an existing sealing order to file a separate legal action "is unnecessary, unduly burdensome and an inefficient use of court resources and time.").

8. Third, and most importantly, the public's right to inspect and obtain copies of certain court records is also protected by the First Amendment to the Constitution of the United States. *See, e.g., Press Enter. Co. v. Super. Ct.* (*Press Enterprise I*), 464 U.S. 501, 510-11 (1984) (transcripts of jury *voir dire*); *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) ("The First Amendment presumes that there is a right of access to proceedings and ***documents*** which have 'historically been open to the public' and where the disclosure of which would serve a significant role in the functioning of the process in question." (emphasis added)); *Associated Press v. Dist. Ct.*, 705 F.2d 1143, 1145 (9th Cir. 1983) (recognizing First Amendment right to inspect various pretrial documents); *In re N.Y. Times Co.*, 585 F. Supp. 2d 83, 89 (D.D.C. 2008) (finding First Amendment and common law right to search warrant materials relating to the 2001 anthrax attacks). As Judge Samour found, in his ruling unsealing probable cause affidavits in *People v. Holmes*,

> Media Petitioners contend that they and other members of the public have a constitutional right protected by the First Amendment to the information sought which may only be curtailed by the showing of an overriding and compelling state interest. The Court agrees.

Ex. 1 at 8 (citation omitted).

9. Finally, when, as here, documents in the court's file involve a matter of public concern, such as a multiple-count murder case, access to such records is also guaranteed by article II, section 10 of the Constitution of Colorado. *See Wingfield*, 410 P.2d at 513-14; *Office of State Ct. Adm'r v. Background Info. Servs.*, 994 P.2d 420, 428 (Colo. 1999). Colorado's courts have recognized that this state constitutional provision provides greater protection for freedom of speech and press than the First Amendment does. *See, e.g., Bock v. Westminster Mall Co.*, 819 P.2d 55 (Colo. 1991); *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044 (Colo. 2002).

10. Under the standard the Colorado Supreme Court adopted in applying article II Section 10 of the Colorado Constitution to closure of court proceedings, the press and public cannot be denied access to the records of this Court unless such access would create *a clear and present danger* to the administration of justice, or to some equally compelling governmental interest, *and* no alternative exists to adequately protect that interest. *See* ABA Standards on

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[2] CJD 05-01 declares that court records in criminal cases are to be provided to the public, in accordance with § 24-72-301, C.R.S.

Criminal Justice, Fair Trial and Free Press, Standard 8-3.2 (2d ed.1978), adopted in *Star Journal Publ'g Corp.*, 591 P.2d at 1030.[3] Moreover, this standard requires "that the trial judge issue a written order setting forth specific factual findings in this regard." *Id.*

11. Colorado Supreme Court Chief Justice Directive 05-01 entitled "Directive Concerning Access to Court Records" reinforces this standard by requiring a specific court order before judicial records may be withheld from the public. The Directive applies to this Court and provides that all court records are presumed open for public inspection and copying unless specifically identified as not accessible to the public or as a result of a court order. C.J.D. 05-01 § 4.00; *see also Office of State Court Adm'r*, 994 P.2d at 430.

III. UNDER THE CONTROLLING LEGAL STANDARD, NO PROPER BASIS EXISTS FOR THE CONTINUED SEALING OF THE AFFIDAVITS OF PROBABLE CAUSE

12. As explained in the *Media Guide to Colorado Courts* (6th ed. 1998), published by the Colorado Supreme Court's Committee on Public Education:

> Generally, court records in criminal cases are open for public inspection. *This includes search warrants and search warrant affidavits . . . and other information contained in the file*. . . . The First Amendment require[s] the party seeking to seal the file to show that there is *a clear and present danger to the fairness of the trial* and that the prejudicial effect of such information on trial fairness *cannot be avoided by any reasonable alternative means*.

Id. at 50 (emphasis added) (copy attached as **Ex. 4**).[4]

13. Regularly, and routinely, courts have held that arrest warrant affidavits must be made available to the public after a defendant's arrest and initial charging. *See, e.g.*, *Commonwealth v. Fenstermaker*, 530 A.2d 414, 418-19 (Pa. 1987); *Greenwood v. Wolchik*, 544 A.2d 1156, 1158 (Vt. 1988) ("Public access to affidavits of probable cause is all the more important because the process of charging by information involves no citizen involvement, such as is present with juries and grand juries.").

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[3] In 2013, the Colorado Supreme Court adopted the "substantial probability of prejudice" test that is contained in the current version of Standard 8-3.2 of ABA Standards on Criminal Justice, Fair Trial and Free Press. *See People v. Sigg*, No. 2013SA21 (Feb. 21, 2013) (copy attached as **Ex. 3**).

[4] Arguably, this 1998 publication is no longer accurate; after *People v. Sigg*, the first prong of this two-part test is no longer "clear and present danger," but the "substantial probability of prejudice" standard. *See supra* n. 3.

14. Courts similarly have found search warrant affidavits on file with the court to be subject to the public's right of access. *See, e.g.*, *In Re Sealed Search Warrant*, Nos. 04-M-370 & 04-M-388, 2006 WL 3690639, at *3 (N.D.N.Y. Dec. 11, 2006) (holding that the presumption favoring access to judicial records is at its apex for search warrant affidavits because those documents "adjudicate[] the right of individuals under the Fourth Amendment not to be subjected to government intrusion into areas in which they might reasonably have expected privacy absent a judicial determination of sufficient cause."). Because "[t]he judicial determination whether to permit the government to enter and search a person's private property and possessions" is an exercise of power "at the heart of the performance of judicial functions," the common law presumption of access to search warrant affidavits also "carries the maximum possible weight." *Id.*

15. "Public scrutiny of the search warrant process – even after the fact – can shed light on how and *why a warrant was obtained*, and thereby further the public's interest in understanding the justice system." *United States v. Loughner*, 769 F. Supp. 2d 1188, 1194 (D. Ariz. 2011) (emphasis added). And more importantly, "[p]ublic access to search warrants may also serve to deter unreasonable warrant practices, either by the police or the courts." *Id.* "Permitting inspection of the search warrants [and] the accompanying affidavits . . . will further public understanding of the response of government officials . . . and allow the public to judge whether law enforcement functioned properly and effectively . . . ." *Id.*

16. Recognizing the compelling importance of public access to such probable cause affidavits, the U.S. District Court for the Western District of North Carolina rejected a criminal defendant's argument that the right of access should be abridged because a search warrant affidavit contained statements that would not be admissible at trial and publicity given to such statements could compromise his right to a fair trial. *See United States v. Blowers*, No. 3:05CR93-V, 2005 WL 3830634, 34 Media L. Rep. (BNA) 1235 (W.D.N.C. Oct. 17, 2005). Courts regularly have required search warrant affidavits to be disclosed under the common law presumption of access. *See, e.g.*, *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 65 (4th Cir. 1989) (common law right of inspection attaches once a search warrant affidavit is filed with the clerk); *In re Eye Care Physicians of Am.*, 100 F.3d 514, 517 (7th Cir. 1996) (same); *In re Search of 1638 E. 2nd Street*, 993 F.2d 773, 775 (10th Cir. 1993) (same); *In re Search Warrant for Secretarial Area*, 855 F.2d 569, 573 (8th Cir. 1988) (same).

17. Other courts have concluded that the First Amendment independently protects public access to warrant affidavits on file in a court. As the U.S. Court of Appeals for the Eighth Circuit held:

> [T]he **first amendment right of public access *does* extend to the documents filed in support of search warrant applications**. First, although the process of issuing search warrants has traditionally not been conducted in an open fashion, search warrant applications and receipts are routinely filed with the clerk of court without seal. Under the common law[,] judicial records and documents have been historically considered to be open to inspection by the public. Second,

> public access to documents filed in support of search warrants is important to the public's understanding of the function and operation of the judicial process and the criminal justice system and may operate as a curb on prosecutorial or judicial misconduct.

In re Search Warrant for Secretarial Area, 855 F.2d at 573 (emphasis added) (citations omitted). *See also, In re N.Y. Times Co.*, 585 F. Supp. 2d at 89.[5]

18. While not expressly addressing search warrant affidavits, the Colorado Supreme Court has also recognized that "Public confidence cannot long be maintained where important judicial decisions [e.g. authorizing an arrest or search warrant] 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*." *P.R. v. Dist. Ct.*, 637 P.2d 346, 353 (Colo. 1981) (emphasis added) (quoting *United States v. Cianfrani*, 573 F.2d 835, 851 (3d Cir. 1978)).

19. This conclusion is based not solely on the First Amendment right of access, but also on the broader protections conferred to free speech by article II, section 10 of the Colorado Constitution. *P.R.*, 637 P.2d at 354; *see People v. King*, 19 Media L. Rep. (BNA) 1247, 1249-50 (Denver Cty. Ct. July 29, 1991) (recognizing that the Colorado Supreme Court decision in *Star Journal* established a constitutional right of access to affidavits on file with the court) (copy attached as **Ex. 5**).

20. Absent disclosure of the factual bases for the issuance a warrant, the public cannot properly assess the propriety of the government's conduct. As Chief Justice Burger observed:

> When a shocking crime occurs, a community reaction of outrage and public protest often follows, and thereafter, the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. . . .
>
> **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,**

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[5] In some instances, courts have declined to apply the constitutional access right to search warrant affidavits before charges have been brought, to avoid interference with an on-going investigation. *See Baltimore Sun Co. v. Goetz.*, 886 F.2d 60, 62-65 (4th Cir. 1989); *Times Mirror Co. v. United States*, 873 F.2d 1210, 1221 (9th Cir. 1989).

and the appearance of justice can best be provided by allowing people to observe it.

Richmond Newspapers, Inc., 448 U.S. at 571-572 (emphasis added) (citations, quotation marks, and minor alterations omitted).

21. In the immediate aftermath of the January 2011 shooting of United States Congresswomen Gabby Giffords, in Tucson, Arizona, which resulted in six fatalities, the court refused to unseal search warrants and associated affidavits due to the then-ongoing criminal investigation; however, the Court ordered those affidavits unsealed after the grand jury returned an indictment and the government acknowledged that its active investigation was completed (i.e., that no additional charges were expected to be filed). *Loughner*, 769 F. Supp. 2d at 1190, 1197 ("once the investigation has concluded and the indictment has issued" there is an historical and well-supported right of access under the First Amendment); *see also In re Application & Affidavit for a Search Warrant (Wash. Post Co. v. Hughes)*, 923 F.2d 324, 331 (4th Cir. 1991) (affirming order unsealing search warrant at post-indictment but pre-trial phase).

A. THE DEFENDANT'S FAIR TRIAL RIGHTS ARE ADEQUATELY PROTECTED WITHOUT DEPRIVING THE PUBLIC OF INFORMATION CONCERNING THE CONDUCT OF PUBLIC INSTITUTIONS

22. At this early stage of these criminal proceedings, the Defendant cannot possibly meet his burden of demonstrating that unsealing records in the court file, including the probable cause affidavits, will create either a "clear and present danger" or a "substantial probability of prejudice" to his fair trial rights, which is the first of two prerequisites for continued sealing. *See Star Journal Publ'g*, 591 P.2d at 1030; *see also United States v. Noriega*, 917 F.2d 1543, 1549 (11th Cir. 1990) (finding "a conclusory representation that publicity might hamper a defendant's right to a fair trial is insufficient to overcome the protections of the First Amendment"); *People v. Hodges*, 657 N.Y.S.2d 857, 860-61 (N.Y. Sup. Ct. 1997) (finding First Amendment and common law right of access and denying motion to seal copy of defendant's handwritten confession).

23. Courts have recognized that boilerplate concerns about "high-profile" criminal cases posing a difficulty to empanelling an impartial jury are frequently overstated. *See, e.g., see Skilling v. United States*, 561 U.S. 358, 398 (2010) (finding no presumption of prejudice arising from pervasive negative pre-trial publicity and approving of trial court's *voir dire* to empanel an impartial jury); *CBS, Inc. v. U.S. Dist. Ct.*, 729 F.2d 1174, 1179 (9th Cir. 1984) ("even when exposed to heavy and widespread publicity many, if not most, potential jurors are untainted by press coverage"); *In re Charlotte Observer*, 882 F.2d 850, 855-56 (4th Cir. 1989) ("Cases such as those involving the Watergate defendants, the Abscam defendants, and more recently, John DeLorean, all characterized by massive pretrial media reportage and commentary, nevertheless proceeded to trial with juries which – remarkably in the eyes of many – were satisfactorily disclosed to have been unaffected (indeed, in some instances, blissfully unaware of or untouched) by that publicity."); *see also United States v. McVeigh*, 153 F.3d

1166, 1180-81, 1184 n.6 (10th Cir. 1998) (noting that more than one half of potential jurors were unaware of Timothy McVeigh's purported *confession* to having bombed the Alfred P. Murrah building in Oklahoma City despite ubiquitous press coverage given to that confession on the eve of trial).

24. In highly publicized cases "'[t]he relevant question is not whether the community remembered the case, but whether the jurors . . . had such fixed opinions that they could not judge impartially the guilt of the defendant.'" *Mu'Min v. Virginia*, 500 U.S. 415, 430 (1991) (quoting *Patton v. Yount*, 467 U.S. 1025, 1035 (1984)).

25. Moreover, under binding case law, any party who seeks to continue the sealing of a court record must *show*, ***in addition to*** a "substantial probability of prejudice" to fair trial rights necessarily flowing from disclosure of the sealed information, *that there are no less restrictive measures available* to protect the defendant's fair trial rights short of continued sealing. *See P.R.*, 637 P.2d at 354 (holding that a finding of clear and present danger to the fair administration of justice, by itself, is not sufficient to warrant sealing; such a finding merely "triggers the next level of inquiry – that is, whether reasonable and less drastic alternatives *are available*" (emphasis added)); *Star Journal Publ'g*, 591 P.2d at 1030 (same); *Press-Enter. Co. v. Super. Ct.* (*Press-Enterprise II*), 478 U.S. 1, 14 (1986) (same); *Richmond Newspapers, Inc.*, 448 U.S. at 580-81(same).

26. Myriad alternative measures exist to protect the Defendant's fair trial rights, *see Press-Enterprise II*, 478 U.S. at 15, that would properly balance the Defendant's fair trial rights with the news agencies' free press rights, such as:

> The trial judge may: (1) cause extensive voir dire examination of prospective jurors; (2) change the trial venue to a place less exposed to intense publicity; (3) postpone the trial to allow public attention to subside; (4) empanel veniremen from an area that has not been exposed to intense pretrial publicity; . . . or [(5)] use emphatic and clear instructions on the sworn duty of each juror to decide the issues only on the evidence presented in open court.

People v. Botham, 629 P.2d 589, 596 (Colo. 1981); *see also Associated Press*, 705 F.2d at 1146 ("[W]e believe that careful jury selection is an alternative that can adequately protect the right to a fair trial. In a large metropolitan area . . . it is unlikely that 'searching questioning of prospective jurors . . . to screen out those with fixed opinions as to guilt or innocence' and 'the use of emphatic and clear instructions . . . to decide the issues only on evidence presented in open court' will fail to produce an unbiased jury, regardless of the nature of the pre-trial documents filed." (quoting *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 563-64 (1976)).

27. Under applicable law, therefore, the issue is not whether the Defendant or the Court would *prefer* not to resort to "cumbersome" measures such as change of venue, extensive jury *voir dire* or detailed jury instructions. Rather, binding U.S. Supreme Court case law (and the ABA Standards for Free Press/Fair Trial as adopted by the Colorado Supreme Court) make clear that before continued sealing may constitutionally be ordered, the alternatives must be

considered and expressly found by the Court to be *unavailable* or *inadequate*, based on specific reasons that the court must articulate on the record. *Press-Enterprise I*, 464 U.S. at 513; *ABC, Inc. v. Stewart*, 360 F.3d 90, 102 (2d Cir. 2004); *P.R.*, 637 P.2d at 354; *see also Rockdale Citizen Publ'g Co. v. State*, 463 S.E.2d 864, 866 (Ga. 1995) (holding that news media have a right of access to pretrial evidentiary hearings where the availability of a potential change of venue eliminates any basis for a claim of prejudice).

28. The argument that press reports might expose jurors to information in the probable cause affidavits that may not ultimately be admissible at a possible trial is not sufficient to constitute a "clear and present danger" to Defendant's fair trial rights; nor does it mean that less restrictive measures than sealing the affidavit would not be available or adequate if there were to be a trial. As the Supreme Court noted more than thirty years ago, in any "important case,"

> Scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irwin v. Dowd, 366 U.S. 717, 722-23 (1961) (citations omitted). This same sentiment was echoed by the Colorado Supreme Court:

> [A]n important criminal case can be expected to generate much public interest and usually the best qualified jurors will have heard or read something about the case. **To hold that jurors can have no familiarity through the news media with the facts of the case is to establish an impossible standard in a nation that nurtures freedom of the press. It is therefore sufficient if jurors can lay aside the information and opinions they have received through pretrial publicity.**

People v. McCrary, 549 P.2d 1320, 1325 (Colo. 1976) (emphasis added).

29. Moreover, empirical research confirms that jurors are able to set aside their conclusions, based on extensive and prejudicial pretrial publicity, and to base their verdict solely on the evidence admitted in the course or the trial. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1054-55 (1991); *see Skilling*, 561 U.S. at 396-98 (holding that defendant had "failed to establish that a presumption of prejudice arose or that actual bias infected the jury" because "[i]t is sufficient if the juror[s] can lay aside [their] impression[s] or opinion[s] and render a verdict based on the evidence presented in court" where trial was held amidst massive press coverage concerning Enron's collapse and alleged crimes perpetrated by firm's management, including the defendant) (quotation omitted); *id.* at 391 n.28 (citing numerous cases where, despite extensive pretrial publicity, the court was able to seat an impartial jury).

30. Following the indictment of Jared Lee Loughner for the fatal shootings in Tucson, Arizona, the federal district court ruled that Loughner's fair trial rights would not be compromised by release of the warrant affidavits because the court, "with the assistance of counsel . . . intends to develop a comprehensive jury questionnaire, which will help identify the extent of exposure prospective jurors may have had to the news coverage about th[e] case and assist counsel in ferreting out people with fixed opinions." *See Loughner*, 769 F. Supp. 2d at 1196. Further, the court noted it would "permit counsel to personally and extensively voir dire prospective jurors" and would "consider granting additional peremptory challenges to each side, if voir dire establishes that is necessary." *Id.*

31. In 2006, in this Judicial District, in *People v. Lamberth*, No. 2006CR001048, the accused was charged with murdering Detective Jared Jensen of the Colorado Springs Police Department. Judge Larry Schwartz ordered the affidavits of probable cause supporting Lamberth's arrest unsealed, over the defendant's objections, four months before the preliminary hearing. *See* **Ex. 6** (Minute Order of Mar. 27, 2006 unsealing affidavits). Judge Schwartz stated from the bench that evidence establishing probable cause to hold Lamberth over for trial would be presented in open court at the preliminary hearing, which would occur closer in time to the actual trial, so there was no sound basis to withhold that information from the public until the time of the preliminary hearing. Judge Schwartz so ruled notwithstanding the fact that the unsealed affidavit included Lamberth's confession to having murdered Officer Jensen. *See* **Ex. 7** (Dick Foster, *Arrest Affidavit: Suspect Admitted Killing Detective*, Rocky Mountain News, Mar. 28, 2006, at 13A).

32. Lastly, in the recent high-profile multiple murder case in Arapahoe County, *People v. Holmes*, where the affidavits in support of arrest and search warrants were unsealed far in advance of trial, *see* **Ex. 1**, the Court was able to seat a jury of impartial death-qualified jurors; following his conviction and sentencing, the defendant announced he would not appeal the verdict.

33. Because numerous prophylactic measures (e.g., change of venue, extended *voir dire*, jury admonitions and instructions) remain available, and in the absence of any showing that such alternative measures would be ineffective in protecting the Defendant's right to a fair trial, the Court must conclude that the Defendant cannot meet his burden of showing the lack of any alternative measures short of continued sealing. *See Stewart*, 360 F.3d at 102; **Ex. 6** at 5, 7.

B. THE AFFIDAVITS SHOULD BE UNSEALED FORTHWITH, TO PROTECT THE PUBLIC'S RIGHT OF *CONTEMPORANEOUS* ACCESS TO JUDICIAL RECORDS

34. The Court should not countenance any contention that sealing now is appropriate because the public will be fully informed later, either at the preliminary hearing or at the time of trial. It is firmly established that the public's right of access to judicial records is a right of *contemporaneous* access. *See Lugosch*, 435 F.3d at 126-27 ("Our public access cases and those in other circuits emphasize the importance of *immediate* access where a right of access is

found." (emphasis added) (citations omitted)); *Grove Fresh Distribs.*, 24 F.3d at 897 (noting that access to court documents "should be immediate and contemporaneous").

35. Since the public's presumptive right of access attaches as soon as a document is filed with the Court, any delays in access are, in effect, denials of access, even though they may be limited in time. *See, e.g., Associated Press*, 705 F.2d at 1147 (even a 48-hour delay in access constituted "a total restraint on the public's first amendment right of access even though the restraint is limited in time"); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 507 (1st Cir. 1989) ("even a one to two day delay impermissibly burdens the First Amendment"); *Courthouse News Serv. v. Jackson*, No. H-09-1844, 38 Media L. Rep. (BNA) 1890, 2009 WL 2163609, at *3-4 (S.D. Tex. July 20, 2009) (24 to 72 hour delay in access to civil case-initiating documents was "effectively an access denial and is, therefore, unconstitutional").

36. As the Supreme Court observed in *Nebraska Press Association v. Stuart*, "[d]elays imposed by governmental authority" are inconsistent with the press' "traditional function of bringing news to the public promptly." 427 U.S. 529, 560-61 (1976).

37. Accordingly, any unnecessary delay in affording the public with access to judicial records on file in this case constitutes an infringement of the movants' rights under the First Amendment.

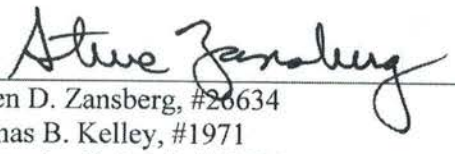
38. In recognition of the strong presumption of contemporaneous public access to judicial records in criminal cases, Chief Judge William Sylvester, then presiding in the Aurora theater shooting case, entered an Amended Case Management Order that required the parties to file a redacted version of all future pleadings, for instantaneous release to the public on the Court's website. *See* **Ex. 8** (*Holmes*, Order C-11 entered Sept. 7, 2012 as further amended by C-013, entered Oct. 25, 2012). A similar Order should be entered herein.

WHEREFORE, the Media Petitioners respectfully request that the Court forthwith enter an order unsealing the affidavit(s) of probable cause in support of any warrants or orders for production of records, and any other judicial records in the court file for which no showing of necessity for continued sealing has been made. In addition, the Media Petitioners respectfully request the Court to enter an Amended Case Management Order, requiring the Parties to file all future motions and other papers in a redacted form, for instantaneous release to the public via the Court's website.

In light of the asserted right of the public for *contemporaneous* access to judicial records on file in criminal cases, the Media Petitioners hereby respectfully further request that the Court provide them the opportunity to be heard on the issues presented herein at the earliest practical time.

Respectfully submitted this 17th day of December, 2015, by:

LEVINE SULLIVAN KOCH & SCHULZ, LLP



Steven D. Zansberg, #26634
Thomas B. Kelley, #1971
Christopher P. Beall, #28536

Attorneys for Media Petitioners

CERTIFICATE OF MAILING

I hereby certify that on this 17th day of December, 2015, a true and correct copy of this **MOTION TO UNSEAL FORTHWITH THE AFFIDAVITS OF PROBABLE CAUSE IN COURT FILE AND TO ENTER A FURTHER CASE MANAGEMENT ORDER REQUIRING THE PARTIES TO FILE REDACTED VERSIONS OF ALL FUTURE MOTIONS AND PAPERS FOR PUBLIC POSTING ON THE COURT'S WEBSITE** was delivered via EMAIL to the attorneys below and was deposited in the U.S. Mail, postage prepaid, correctly addressed to the following:

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REDACTED

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: **26**

ORDER REGARDING MEDIA PETITIONERS' MOTION TO UNSEAL AFFIDAVITS OF PROBABLE CAUSE IN SUPPORT OF ARREST AND SEARCH WARRANTS AND REQUESTS FOR ORDERS FOR PRODUCTION OF DOCUMENTS (C- 24)

INTRODUCTION

This matter is before the Court on Media Petitioners' Motion to Unseal Affidavits of Probable Cause in Support of Arrest and Search Warrants and Requests for Orders for Production of Documents [C-24], which was filed on January 16, 2013 (hereafter "Motion").[1] Media Petitioners ask the Court to unseal and release: (1) the

[1] 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*; The McClatchy Company; National Public Radio Company; and *The Washington Post.*

EXHIBIT
tabbies
1

probable cause affidavits in support of all arrest and search warrants (hereafter "affidavits"); and (2) any requests seeking the production of records (hereafter "records warrants").[2] The parties filed responses opposing the Motion. The defendant objects to the Motion in its entirety and the People object to the Motion in part. For the reasons articulated in this Order, the objections are overruled and the Motion is granted.

PROCEDURAL HISTORY

This case involves an alleged shooting on July 20, 2012. On that same day, the Court entered an Order to Seal Search Warrants, Affidavits, Orders, and Case File. As the litigation has unfolded, however, the Court has gradually unsealed and released documents in accordance with Colorado case law and the statutory legal standards set forth in the Colorado Criminal Justice Records Act ("CCJRA"), § 24-72-301, C.R.S. (2012).

The affidavits and records warrants remain sealed pursuant to the rationale articulated by the Court in previous Orders, including: (1) the Order Re: Motion to Unseal Court File (Including

[2] The Court infers that in referring to requests seeking the production of records, Media Petitioners mean records search warrants with attached affidavits in support thereof.

Docket)/("Suppression Order") (C-4c), issued August 13, 2012; (2) the Amended Order Unsuppressing Court File (C-12), issued September 25, 2012; and (3) the Order Re: Media's Motion to Unseal Redacted Information (Victims' Identities) (C-13), issued October 25, 2012 (hereafter "C-13 Order").

In a previous Order, the Court explained that it was reluctant to release the affidavits and records warrants before the combined preliminary hearing/proof evident-presumption great hearing (hereafter "preliminary hearing"). *See* C-13 Order at pg. 10. The preliminary hearing was completed on January 7, 8, and 9 of 2013, after the C-13 Order was issued. Following the hearing, the Court issued extensive findings of fact and conclusions of law in the Order Re: Preliminary/Proof Evident Hearing (C-19), issued January 10, 2013 (hereafter "C-19 Order"). The C-19 Order included a detailed summary of the evidence presented during the preliminary hearing. Media Petitioners filed their Motion on January 16.[3] The Motion was fully briefed and became ripe for ruling on April 2.

[3] Because of a clerical error, the Court did not become aware of the Motion until March 12, when the defendant was arraigned.

MEDIA PETITIONERS' MOTION AND PARTIES' OBJECTIONS

Media Petitioners seek to have the Court unseal and release the affidavits and records warrants. Media Petitioners remind the Court that it previously implied it would consider releasing the requested materials after the preliminary hearing was held. *See* C-13 Order at pg. 10 ("disclosure . . . would be imprudent at this stage of the proceedings where the [preliminary hearing] has yet to take place."). Relying on the Court's C-19 Order, which summarized in detail the evidence presented at the preliminary hearing, Media Petitioners note that there has been a "wealth of information already made public in the proceedings thus far." Thus, aver Media Petitioners, "there is no basis for the continued sealing of the documents" sought.

The People object to the Motion to the extent it seeks information identifying the named victims and witnesses, arguing that the release of such information at this juncture of the proceedings: (1) is detrimental to the administration of justice; (2) is contrary to the Colorado Victims' Rights Act and the Colorado Constitution; (3) jeopardizes the named victims' and witnesses' continued cooperation in this case; and (4) increases the named

victims' and witnesses' already heightened safety and privacy concerns. The People also object to the release of any police reports attached to the affidavits, as well as to the release of the records warrants, as being contrary to "the public interest."

The defendant opposes the Motion on the ground that the public's First Amendment right of access is fully satisfied by the ability to attend the hearings in this case, all of which have been held in open Court. According to the defendant, the additional requested disclosures will jeopardize his constitutional rights to due process, a fair trial, the presumption of innocence, and a fair and impartial jury.

ANALYSIS

A. Standing

At the outset, the Court concludes, as it has done in previous Orders, that Media Petitioners, as members of the public, have standing to be heard on the issue of whether the affidavits and records warrants should be unsealed and released. *See People v. Thompson,* 181 P.3d 1143 (Colo. 2008); *Star Journal Publ'g Corp. v. Cnty. Court.,* 591 P.2d 1028 (Colo. 1979); *see also* Colo. R. Civ. P. 121(c) §1-5(4) (Upon notice to all parties of record, and after

hearing, an order limiting access may be reviewed by the court at any time on its own motion or upon the motion of any person) (applicable as per Colo. R. Crim. P. 57(b)). Thus, the Court addresses the merits of their Motion.

B. Legal Standard Governing Motion

Under the CCJRA, the affidavits and records warrants are criminal justice records held by the Court in its official capacity. As such, these documents are subject to discretionary disclosure. *See* §§ 24-72-304, 305, C.R.S. (2012). The CCJRA states that records of criminal justice agencies that are not records of official action "*may* be open for inspection," unless such inspection would be "contrary to state statute, or is prohibited by any rules promulgated by the supreme court or by any order of the court." *Id.* at § 24-72-304(1), C.R.S. (emphasis added). Thus, subject to exceptions not pertinent here, "the General Assembly has consigned to the custodian of a criminal justice record the authority to exercise its sound discretion in allowing or not allowing inspection." *Harris v. Denver Post Corp.*, 123 P.3d 1166, 1170 (Colo. 2005).

While the Legislature did not establish a balancing test in the CCJRA for custodians considering the discretionary release of

criminal justice records to the public, the Colorado Supreme Court has concluded that such custodians should balance: "the pertinent factors, which include the privacy interests of individuals who may be impacted by a decision to allow inspection; the agency's interest in keeping confidential information confidential; the agency's interest in pursuing ongoing investigations without compromising them; the public purpose to be served in allowing inspection; and any other pertinent consideration relevant to the circumstances of the particular request." *Id.* at 1175. Additionally, the Supreme Court has cited with approval ABA Standard 8-3.2, which provides that a Court may properly suppress Court documents if unrestricted access would pose a substantial probability of harm to the fairness of the trial, if suppression would effectively prevent such harm, and if there is no less restrictive alternative reasonably available to prevent the harm. *Star Journal Publ'g Corp.*, 591 P.2d at 1030.

C. Application

In striking the balance required by *Harris*, the Court first analyzes the interests of Media Petitioners and the public. The Court then addresses the parties' objections.

1. The Interests of Media Petitioners and the Public

Media Petitioners contend that they and other members of the public have a constitutional right protected by the First Amendment to the information sought which may only be curtailed by the showing of an overriding and compelling state interest. The Court agrees. *See Star Journal Publ'g Corp.*, 591 P.2d at 1030 (stating that First Amendment rights "may only be abridged upon a showing of an overriding and compelling state interest.").

In *Gordon v. Boyles*, 9 P.3d 1106 (Colo. 2000), the Supreme Court described the vital role a free press plays in this nation's democracy as follows:

> Enlightened choice by an informed citizenry is the basic ideal upon which an open society is premised, and a free press is thus indispensable to a free society. Not only does the press enhance personal self-fulfillment by providing people with the widest possible range of fact and opinion, but it also is an incontestable precondition of self-government . . . . As private and public aggregations of power burgeon in size and the pressures for conformity necessarily mount, there is obviously a continuing need for an independent press to disseminate a robust variety of information and opinion through reportage, investigation, and criticism, if we are to preserve our constitutional tradition of maximizing freedom of choice by encouraging diversity of expression.

Id. at 1115–16 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 726–27 (1972) (Stewart, J., dissenting) (footnotes omitted)).

The question raised by the Motion is whether an overriding and compelling state interest has been advanced by the parties which takes precedence over the First Amendment interests of Media Petitioners and the public. The Court concludes that they have not.

2. People's Objections

The Court is sensitive to the named victims' and witness' privacy and safety concerns, and appreciates the additional grounds raised by the People in opposing the release of these individuals' identifying information. However, the named victims' and witnesses' identifying information has already been publicly released. During the past eight months, through pleadings and hearings, information identifying the named victims and witnesses has become public. Thus, the People's objection, while generally valid, does not have merit under the circumstances present here. Of course, the Court will vigorously demand compliance with the provisions of the Victims' Rights Act, § 24-4.1-301 *et seq.*, C.R.S. (2012), and the Colorado Constitution.

The People's objection to the release of the records warrants and the police reports attached to the affidavits is equally unpersuasive. The investigation in this case has entered its ninth month now. Since July 20, a lot of details of the alleged incident have been released through the pleadings and pretrial hearings, including the three-day preliminary hearing held in January and the extensive C-19 Order issued shortly thereafter. Under these circumstances, the Court cannot in good conscience conclude that the release of the records warrants and the police reports attached to the affidavits would be contrary to "the public interest."

In sum, inasmuch as the named victims' and witnesses' identification has already been disclosed, and given how long this investigation has been pending and the information that has previously been released, the Court concludes that the fundamental nature of the First Amendment rights of Media Petitioners and the public may not be abridged. The People have failed to show that the release of the requested documents would pose a substantial probability of harm to the fairness of the trial. The People have likewise failed to establish that, to the extent any harm would result from the release of the affidavits and records warrants, the

continued suppression of all, or even portions, of those documents would effectively prevent such harm. Accordingly, the People's objections to the Motion are overruled.

3. The Defendant's Objections

The Court is obviously mindful of the defendant's constitutional rights. Indeed, the Court has repeatedly made clear that it will do its utmost to ensure that all of the defendant's constitutional rights are given effect in this case. However, the defendant has failed to demonstrate, or even state with any degree of specificity, how the release of the affidavits and records warrants under the circumstances present here would pose a substantial probability of harm to the fairness of the trial or to any of his constitutional rights. Moreover, even assuming, for the sake of argument, that any harm would result from the release of the affidavits and records warrants, the defendant has not shown that the continued suppression of those documents would effectively prevent such harm. Therefore, the Court concludes that at this juncture in the proceedings, and under the circumstances present, the defendant's interests in keeping the affidavits and records warrants sealed are outweighed by the First Amendment rights of

Media Petitioners and the public in having those documents released.

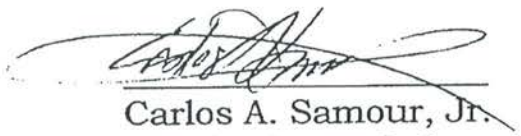
Based on the specific circumstances present at this stage in the litigation, the Court holds that the defendant has failed to advance an overriding and compelling state interest to abridge the First Amendment rights of Media Petitioners and the public. Accordingly, the defendant's objections to the Motion are overruled.

CONCLUSION

For all the foregoing reasons, the Court concludes that Media Petitioners' Motion has merit. Accordingly, it is granted. The Court hereby unseals and releases the affidavits and records warrants. To the extent that any of these affidavits and records warrants were suppressed, not sealed, they, too, are released. These documents shall be made available to Media Petitioners for inspection, subject to the requirements of CJD 05-01 and CJO 99-3, as well as the standard procedures of the Clerk's Office in the Arapahoe County Justice Center.

Dated this 4th day of April of 2013.

BY THE COURT:



Carlos A. Samour, Jr.
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2013, a true and correct copy of **Order regarding media petitioners' motion to unseal affidavits of probable cause in support of arrest and search warrants and requests for orders for production of documents (C-24)** was served upon the following parties of record.

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Sherilyn Koslosky
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Denver, CO 80203
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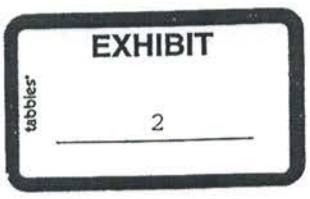
Cheryl Robinson

DISTRICT COURT, DOUGLAS COUNTY, COLORADO Court Address: 4000 Justice Way Castle Rock, CO 80109-7546	
Plaintiffs: THE PEOPLE OF THE STATE OF COLORADO Defendant: PERRISH EUGENE COX	Case Number: 10CR661 Ctrm.: Div. 1
ORDER	

THIS COURT, having reviewed the file, the sealed arrest warrant affidavit, the Motion to Unseal filed by the Denver Post and the Associated Press (the media) and having heard from counsel for the Defendant, the People, the victim and the media, hereby issues the following order:

The Defendant was arrested pursuant to an arrest warrant on December 9, 2010 and charged with Sexual Assault, a class three felony, in violation of Section 18-3-402(1)(h) and Sexual Assault, a class four felony, in violation of Section 18-3-402(1)(b). The arrest warrant affidavit, along with other documents, was sealed by the Douglas County Court at the request of the People on December 9, 2010. Certain documents were unsealed by the Douglas County Court on February 6, 2011. The arrest warrant affidavit was not unsealed. On March 10, 2011 the Defendant waived his right to a preliminary hearing and the matter was bound over to Division 1.

The media previously made requests of the Douglas County Court to release the arrest warrant affidavit. Those requests were denied. After the matter was bound over to district court the media renewed its request for the unsealing of the arrest warrant affidavit. The Court has heard argument from counsel for the media, counsel for the Defendant and the People and counsel for the victim. The Court shall now resolve the media's request for unsealing of the arrest warrant affidavit.



STANDING

The People, joined by the Defendant, object to the efforts of the media to secure the release of the arrest warrant affidavit in this criminal case. Relying on *People v. Ham* 734 P.2d 623 (Colo. 1987) and Section 24-72-301 *et.seq.* the People and the Defendant argue that the media has no standing to make a request for the release of the affidavit and that any request for the release of this document must be made in accord with the requirements of Section 24-72-308 *et.seq.* These arguments are misplaced.

People v. Ham does not preclude the media from making a request in this criminal action for the release of the arrest warrant affidavit. In *Ham* the Colorado Department of Corrections sought to intervene in a criminal case. The Department contested the legality of a sentence imposed by the trial court and also sought, pursuant to Colo. R.Crim. Pro 35(a) to correct what the department believed to be an illegal sentence. Neither the Defendant nor the People sought to challenge the sentence imposed by the trial court. Instead, the Department sought to challenge the sentence imposed by the Court by intervening in the litigation. The intervention was linked directly to an effort by the Department to insert itself into this case to change or modify the sentence handed down by the trial court. The Colorado Supreme Court noted that the Colorado Rules of Criminal Procedure made no provision for the intervention by a third party to a criminal prosecution. The intervention sought by the Department was made under color of Colorado Rule of Civil Procedure (C.R.C.P.) 24. The Supreme Court determined that intervention standards of C.R.C.P. 24 did not apply to a criminal prosecution.

"The concept of intervention proceeds from the principle that the efficient resolution of a civil controversy often requires the addition of other persons whose interests might be jeopardized by the resolution of the controversy between the original parties" *Ham* at p. 625. Employing this standard definition of intervention to the situation in this criminal prosecution, the Court finds that the media is not seeking to intervene in this criminal prosecution. The media is not seeking to insert itself in this

litigation because its interests might be negatively affected by the outcome of this criminal prosecution. Instead, the media wants to report on the proceedings. It does not have an interest in the outcome of this matter nor does it have an interest that must be addressed by the Court or the jury at the same time the Court and the jury are considering the allegations brought by the People against the Defendant. The media wants access to records in order to report on this criminal matter. It does not have an interest in the outcome of the prosecution, other than to report what has occurred. The media is not an intervenor as contemplated by C.R.C.P. 24. The media also has First Amendment rights of access to court proceedings and records. See *Star Journal Publishing Corp v. County Court* 591 P.2d 1028 (Colo. 1979); *Nixon v. Warner Communications* 435 U.S. 589 (1978); *Richmond Newspapers, Inc., v. Virginia*, 448 U.S. 555, 100 S. Ct. 2814, 65 L.Ed. 2d 973 (1980) and *P.R. v. District Court*, 637 P.2d 346 (Colo. 1981). Any request by the People or the Defendant to preclude the media from seeking access to the arrest warrant affidavit based on *Ham* is DENIED.

Section 24-72-301 *et.seq.*is the Colorado Criminal Justice Records Act (CCJRA). It provides for the inspection, release and sealing of arrest and criminal records information and criminal justice records. The People and the Defendant argue that this criminal prosecution is not the appropriate avenue for the media to obtain the arrest warrant affidavit. Instead, the People and the Defendant argue the media must make application under Section 24-72-304 for the inspection of the affidavit. This argument exalts form over substance.

First, the court notes that the Colorado Supreme Court in *People v. Thompson* 181 P.3d 1143 (Colo. 2008) considered a motion filed by the media in a pending criminal action to unseal a grand jury indictment. The Supreme Court did not require a separate filing before resolving the motion filed by the media. In oral argument to this Court in the present matter the prosecutor averred that there was no objection made in the *Thompson* case to the media making such a request in that criminal matter. Here both the People and the Defendant object to the media being permitted to make such a

request and argue that the media must seek relief under the CCJRA for the release of the records.

Second, criminal justice records are defined at Section 24-72-302(4) as all "books, papers, cards, photographs, tapes, recordings or other documentary materials, regardless of form or characteristics, that are made maintained or kept by any criminal justice agency in this state..." The Court finds that the sealed arrest warrant affidavit is a criminal justice record. This Court is a "criminal justice agency" pursuant to Section 24-72-302(3) and is entitled to maintain criminal justice records. Litigation involving criminal justice records and a denial of access to a criminal justice record are to be made in the district court wherein the record is found. See Section 24-72-305(7). Therefore, litigation involving this sealed arrest warrant affidavit would occur in one of the district court divisions here in Douglas County.

This Court has maintained this sealed record since this matter was bound over to district court. The release of all or a portion of the affidavit and its potential affect on the trial in this case are issues that should be resolved, if at all possible, by the trial court. To require separate litigation on the issue of the release of the affidavit is unnecessary, unduly burdensome and an inefficient use of court resources and time. This is particularly so, given the fact that the affidavit is contained in this court file; has been read and considered by this Court; this court has listened to argument of all counsel; and this Court has reviewed all motions and responses on this issue. In determining whether to release all, a portion or none of the affidavit this Court shall apply applicable CCJRA standards and also consider other appropriate case law. The joint request to require the media to file a separate action seeking the release of the arrest warrant affidavit is DENIED.

RELEASE OF THE AFFIDAVIT

Access to court proceedings and records is guaranteed and protected by the First Amendment. See *Star Journal,* and *United States v. McVeigh* 918 F. Supp. 1452

(W.D. Okla. 1996). The court system in Colorado also favors openness and transparency with respect to court proceedings and records. See Colorado Supreme Court Chief Justice Directive 2005-01 and the Media Guide to Colorado Courts (6th ed. 1998), published by the Colorado Supreme Court's Committee on Public Education. Indeed, as counsel for the media repeatedly asserted during argument to the Court, the continued sealing of the affidavit can occur only if the People or the Defendant can establish that 1) there is a clear and present danger to a fair trial should the affidavit be released and 2) there are no less restrictive means available short of the continued sealing of the affidavit. Counsel for the media asserted that neither the Defendant nor the People presented any evidence on the issue of clear and present danger. The People and the Defendant, with good reason, rely on the contents of the affidavit in support of their claim that there is a clear and present danger to the right to a fair trial should the affidavit be unsealed. This court has reviewed the affidavit. The media may well determine that the contents of the affidavit should be published. However, the fact that media reports about the contents of the affidavit might and probably will occur as a result of the release of the affidavit is not a sufficient reason, by itself, to continue with the sealing of the affidavit. There can be no presumption that everyone in the jury panel will read, follow and find important the media accounts of this case. Furthermore, there are methods that can be used by the Court to address widespread media coverage and protect the right to a fair trial. These methods include, but are not limited to, the following: extensive voir dire by either the Court, counsel or both; clear and emphatic instructions to the jury with respect to their sworn duty and that they cannot be swayed by prejudice and must rely on the evidence presented in the courtroom; continuing the trial; enlarging the size of the jury panel; increasing the number of preemptory challenges; and potentially changing venue. Whether implementation any of these methods is necessary will be determined by the Court as the trial approaches and after conferring with counsel.

More problematic is the right to privacy raised by counsel for the victim. There are privacy interests at issue here that go beyond the facts of the alleged sexual assault

and the results of any rape kit. These privacy interests are significant, personal and sensitive to the victim and others and are, in part, related to medical and other concerns. These interests are particularly concerning given the fact that the victim, by making a report to the police concerning this sexual assault, certainly did not authorize or seek the broadcast of these interests to the media or the general public. In addition there certainly are relevancy issues with respect to these sensitive personal matters that may preclude the admissibility of these matters at trial. This is an issue that would need to be addressed by the court in advance of trial. If the Court were to permit access by the media to these personal issues, only to determine later that these matters were not relevant and not admissible, it would be more than mere disservice to a victim. Certainly the ability to obtain a fair trial could be impacted. The Court has recognized that methods can be employed by the Court to safeguard the guarantee of a fair trial. However, the combination of the private and sensitive nature of a portion of the affidavit, along with the uncertain admissibility of this information coupled with the harm to the privacy of the victim and the potential harm to a fair trial lead the Court to address this privacy issue prior to any release of the affidavit. In doing so the Court is guided by the requirements of the CCJRA.

According to Section 24-72-301(2) it is the public policy of the State of Colorado to maintain records of official actions and that such records shall be open to inspection. As our Supreme Court noted in *People v. Thompson* court documents in criminal cases fall into one of two categories: 1) records of official actions (Section 24-72-302(7)) and 2) criminal justice records (Section 24-72-302 (4)). The Court has already determined that the arrest warrant affidavit is a criminal justice record.

Records of official actions are to be maintained and released by the appropriate criminal justice agency. While the release of records of official actions is mandatory, the release of criminal justice records is discretionary. See Section 24-72-304(1). However, the denial of the release or inspection of criminal justice records must be based on one of the following: 1) release or inspection would be contrary to state statute; 2) release or inspection is prohibited by rules promulgated by the Colorado

Supreme Court or by the order of any court; 3) release of results of biological testing pursuant to Sections 16-11-102.4 and 16-23-104; and 4) release of the records would be contrary to the public interest. See Section 24-72-305. If there is a denial of the release or inspection, the custodian of the records may be required to provide an explanation for said denial within 72 hours of the denial. See Section 24-72-305(6).

In applying these criteria to the case at hand the Court notes that release of the affidavit would not be contrary to any state statute or any rule promulgated by the Colorado Supreme Court. Furthermore, information obtained pursuant to Sections 16-11-102.4 and 16-23-104 is not contained within the affidavit. Therefore, the only basis for the continued sealing of these records is that it would be contrary to the public interest to release the affidavit.

In analyzing this public interest issue the Court is cognizant, as noted in previous paragraphs, there is a strong preference, both from the constitution and our statutes, to access to hearings and documents in the criminal justice system. Concerns about the potential harm to the right of the Defendant and the People to obtain a fair trial, should the affidavit be released, can be addressed through certain preventive measures taken during the trial process. Public policy weighs in favor of access to and the release of the record as opposed to the continued sealing of the document.

However, this access is not unfettered. Section 24-72-304(4)(a) directs that the name **and any other information that would identify any victim of sexual assault** ... shall be deleted from a criminal justice record prior to its release. Furthermore, while the Court has found that public policy favors access to records, the Court finds that it must take into consideration the following: the sensitive and private nature of a portion of the affidavit; the uncertain admissibility of this information; the harm to the privacy of the victim; and the potential harm to a fair trial. Therefore the Court will redact from the affidavit the following:

1. The victim's name, date of birth, place of employment
2. Personal information of the victim and limited medical information.

3. The name of a friend of the victim associated with personal information of the victim and limited medical information of the victim.

The Court finds that this redaction relates directly to limiting information that would identify the victim or preclude information related to the personal issue previously discussed in this Order.

By this Order the Court is attempting to give life to the provisions of the statute that protect the identity of the victim and also attempting to protect certain privacy interests. While the Court has maintained control over the affidavit pending the resolution of this issue, the release of the redacted version ends the Court's supervision over the redacted affidavit. The parties may certainly disagree with the Court's order and seek appellate review. In light of that distinct fact the Court DIRECTS the following with respect to the dissemination of this Order and the redacted affidavit:

This order and copies of the redacted version of the arrest warrant affidavit shall be provided to counsel for the People, the Defendant and the victim. A copy of this order shall be provided to counsel for the media. The Court shall, absent any order from any appellate court, release the redacted affidavit to counsel for the media seven (7) days from the date of this order. Furthermore, if appellate review is taken of this Court's order the original sealed arrest warrant affidavit shall be made available to any reviewing court. The original sealed arrest warrant affidavit is **not to be** released to the media subject to further order of this Court or any reviewing Court.

Dated and signed this 22 day of June, 2011.

BY THE COURT:

PAUL A. KING
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a true, accurate and complete copy of said Order was emailed this 22 day of June, 2011, to the following:

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Char Hansen
Court Judicial Assistant

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	
Original Proceeding District Court, Jefferson County, 2012CR2899	
In Re: **Plaintiff:** The People of the State of Colorado, v. **Defendant:** Austin Reed Sigg.	Supreme Court Case No: 2013SA21
ORDER OF COURT	

Upon consideration of the Petition for Rule to Show Cause Pursuant to C.A.R. 21, together with the Answers and Reply filed in the above cause, and now being sufficiently advised in the premises and cognizant that the defendant's preliminary hearing is set for Feb 22, 2012,

The court finds that the district court has ordered the defendant's preliminary hearing closed without making specific findings demonstrating a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and that reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights, as required by Press-Enter. Co. v. Super. Ct., 478 U.S. 1 (1986).

It is therefore ordered that the Rule be Made Absolute and the District Court's orders of December 12, 2012 and January 18, 2013 closing the preliminary hearing in Case Number 2012CR2899 be vacated.

BY THE COURT, EN BANC, February 21, 2013.

Case Number: 2013SA21
Caption: People v Sigg, Austin Reed

CERTIFICATE OF SERVICE

Copies mailed via the State's Mail Services Division on February 21, 2013.

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MEDIA GUIDE TO COLORADO COURTS

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6th printing, Summer 1998

INTRODUCTION

> *"Law is the pride of the human intellect; the collected wisdom of ages combined with the boundless varieties of human concerns."* - Sir Edmund Burke.

This guide seeks to accomplish three primary goals: (1) to provide a basic understanding of the principles and procedures guiding Colorado's judiciary; (2) to answer some basic questions about the role of the judiciary; and (3) to assist in finding answers to other questions that may arise.

The authority of judges, is different than the authority of members of the executive and legislative branches of government. It is defined and limited by the state and federal constitutions, legislative enactments, common law appellate decisions and the facts of the case before the court. Judges have the responsibility of deciding cases fairly and impartially. That is the hallmark of the judicial function. Judicial decisions cannot be base on personal caprice or public outcry.

While attention often focuses only on some isolated aspect of a judge's decision, these decisions cannot be understood and therefore explained without reference to the branch as a whole. We hope this book will increase your understanding of the judicial branch and aid you in conveying that understanding to the public.

The Colorado Supreme Court
Committee on Public Education
The Hon. Thomas W. Ossola, Chair

This booklet is published by the Public Education Committee of the Colorado Supreme Court, with cooperation from the Freedom of Information Council, whose membership includes 16 organizations with an active interest in First Amendment issues.

It is intended to be a resource for journalists covering the courts and legal issues in Colorado. Its purpose is to supplement reference information about the law and the judicial branch. Information in this book is designed to guide reporters through the Colorado court system. The questions-and-answers, while based on Colorado law, are not endorsed by the Colorado Supreme Court. Sections could change as court decisions are issued and laws are passed after the publication of this booklet.

Please contact the Colorado Judicial Branch if you have questions or if you have suggestions on how this publication might be improved or changed:

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Open Records

Sources of Open Records Law

Colorado law generally requires that all court files in all courts remain open for inspection by the public during the hours that courts are open for business. There are three sources of this policy.

Colorado Revised Statutes Section 30-10-101(1) provides that all records in the offices of the clerk of the district and county courts are generally open to examination by any person during court hours.

In Times-Call Publishing Co. v. Wingfield, 159 Colo. 172, 410 P.2d 611 (1966), the Colorado Supreme Court held that the statute governing public access to court files authorizes access to the media because of First Amendment considerations and that access must be permitted where the subject matter of the case is of public interest.

Chief Justice Directive 98-05 provides policies for access of the public to documents and materials in the court. The directive: creates a public access committee to provide direction to the courts; authorizes the local court to enter a blanket order declaring certain types of materials shall not be made available to the public; authorizes the court to suppress publication of documents for good cause for a specific period of time; establishes procedures for accessing electronic data and sets out electronic data which shall not be released to the public.

Section 1-5 of Rule 121 of the Colorado Rules of Civil Procedure, applicable in civil cases, provides that access may be limited to court files only in certain circumstances and only by order of the court. This rule reflects the general policy that court files are open to the public unless otherwise ordered.

Criminal

Generally, court records in criminal cases are open for public inspection. This includes search warrants and search warrant affidavits, the information or indictment, motions, and other materials contained in the file. Nevertheless, court records may be sealed at the request of either the prosecution or defense. In criminal cases, the American Bar Association Standards for Fair Trial and Free Press, which were adopted by the Colorado Supreme Court in Star Journal Publishing Corp. v. County Court, 197 Colo. 234, 591 P.2d 1028 (1978), and the First Amendment require the party seeking to seal the file to show that there is a clear and present danger to the fairness of the trial and that the prejudicial effect of such information on trial fairness cannot be avoided by any reasonable alternative means. This is a higher standard than would be required to close a file in a civil case and must be met because the First Amendment guarantees the right of public access to court records in criminal cases and because the Sixth Amendment guarantees the right to a public trial.

There are certain specific exceptions to the presumption of open records in criminal proceedings. By statute, grand jury proceedings are kept secret until an indictment is made public or a grand jury report is issued. In sexual assault cases, Colorado Revised Statutes Section 24-72-304(4) requires that the name of any victim of certain sexual assaults or alleged sexual assaults be deleted from any court file before it is released to the public.

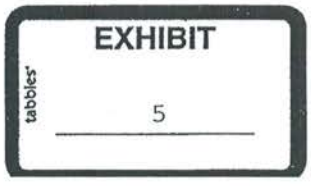
Civil

Under Section 1-5 of Rule 121 of the Colorado Rules of Civil Procedure, a court may limit public access to court files only upon a showing by a person in interest, i.e., a party or witness, that the public interest in access to the files is outweighed by the harm to that person's privacy that would be caused by public access. Typical cases where the court might be asked to seal the file include cases involving trade secrets or other proprietary information, and cases involving allegations of sexual misconduct, identities of minors, and psychiatric or mental health records. The court may also issue protective orders to restrict public access to materials obtained in discovery in civil litigation.

COLORADO v. KING

Colorado County Court
City and County of Denver

THE PEOPLE OF THE STATE OF COLORADO v. JAMES KING, No. 356315–12, July 29, 1991



NEWSGATHERING

Access to records—Judicial—Criminal—Pre-trial/discovery (§38.1503.04)

Access to records—Law enforcement—In general (§38.1701)

Affidavits filed in support of search warrants issued in murder investigation should be unsealed, in view of Colorado trial court's finding that disclosure of such records would not create clear and present danger to defendant's fair trial rights, and that any prejudicial effects upon that right can be avoided by other reasonable alternatives.

News media organizations sought access to sealed affidavits and other documents filed in support of search and arrest warrants.

Records ordered unsealed in bench ruling.

[Editor's Note: On Aug. 2, 1991, the Colorado Supreme Court denied the defendant's motion for a writ of prohibition].

A. Bruce Jones, Stephen A. Bain, and Gordon A. Greiner, of Holland & Hart, Denver; Elizabeth McCann, of Cooper & Kelley, Denver, for media organizations.

Walter L. Gerash, of Gerash, Robinson & Miranda, Denver, for defendant.

William P. Buckley and S. Lamar Sims, deputy district attorneys, Denver, for the state.

Transcript of Court's Ruling

Bohning, J.:

The record then will reflect we're back in open court regarding this matter in the—in the King matter. The record should reflect that this Court has completed an in-camera hearing with the district attorney, defense counsel, and the defendant present, for purposes of allowing them to record any specific objections they have to release of information contained in the affidavits that were ordered sealed previously by three other County Court Judges and a District Court Judge. The District Court Judge, Judge Fullerton, remanded certain sealed documents to this Court for purposes of hearing any proceedings regarding the propriety of unsealing or ordering that the matters remained sealed.

And I—the record should reflect that defense counsel's present, Mr. King is present, the deputy district attorneys are present, Ms. McCann, representing the *Denver Post* is present; and Mr. Jones is present, representing various media organizations.

Certainly, this is a very significant case which in all likelihood will be appealed, no matter what this Court holds. This Court having been a Denver County Court Judge 11-1/2 years, I'm going to make just a couple observations on warrants in Denver.

The vast majority of warrants issued in Denver are—are ordered upon order of the—one of the 17 County Court Judges; and I know from 11-1/2 years experience and being familiar with the practices of other Denver County Court Judges, that very, very few warrants are ordered sealed. In my—I have not taken a scientific count, but I myself have signed maybe several—at least several thousand warrants; and I can—I would conclude that not more than one percent of search warrants and arrest warrants in the City and County of Denver are ordered sealed. And that is, generally they are ordered sealed until the time of arrest or possibly until the time charges are filed. So it's hardly like the City and County of Denver is a bastion of sealed arrest warrants and sealed search warrants.

In fact, the cases cited by *Denver Post* in this matter, curiously enough, were all litigated in Boulder. It would lead me to believe that Boulder Judges order more warrants sealed than in the City and County of Denver. Now, of course, the Denver District Court Judges have to, by statute, act on warrants for wire-tapping investiga—investigations that involve wire-tapping. I can say, with almost certainty, that the district attorney in Denver does not request more than one percent of the warrants be sealed; and the Courts do not order records sealed, unless it's on a—on motion of the district attorney.

I've noted before reasons that warrants may be sealed. They may be sealed to assist ongoing investigations. They may be for protection of witnesses. They may involve confidential informants. They may involve possible attorney/client matters, other matters of confidentiality.

I might note that there's a split of authority in these cases cited by the par-

ties. In the cases cited by the attorneys for the media, there is not one—not one case that holds that the press has an absolute access to public records, including search warrants. That is, that each and every one of these decisions recognize some limited exception; and there is an absolute split of authority—as noted by Mr. Gerash, there's an absolute split of authority in the Federal Circuit Court cases. That is, for example, in the—the case cited previously, *Baltimore v. Getz* (phonetic) at 886 F.2d, specifically at page 64. That Court, in its decision, notes that the Federal Circuit Courts are split on the press's First Amendment right of access to search warrant affidavits. For example, the *Times Mirror Company v. Copley Press*, 873 F.2d 1210, found no First Amendment right of access. In regard to the search warrant for *Secretarial Area*, 855 F.2d 569, that Court, the Eighth Circuit, found a right—a First Amendment right of access.

As noted by Mr. Gerash, there was a Tenth Circuit Court of Appeals case that involved request for access to records; specifically, a plea bargain record. The Tenth Circuit Court of Appeals, which is the Federal jurisdiction that includes Colorado, found there was a common law right of access to inspect and copy judicial records. However, under a Federal Court Rule, the Tenth Circuit Court of Appeals found the District Court had discretion to grant or deny a hearing on defendant's motion to produce a sealed Court file. So there is a significant division of authority in the Federal Courts.

The Colorado Supreme Court has not yet been called upon to decide this specific issue about application for public access to search warrants; nor has the U.S. Supreme Court been called—or have they been called upon to decide this specific access issue to public records. However, many cases refer to the—the important role the press plays in reporting on trials. As noted in the *Gentile* case, many people rely on information in the media for their information about the judicial process; so this Court does certainly acknowledge the strong presumption in favor of the press for access to public documents.

Now I'm also aware of the publicity that has sometimes jeopardized cases. For example, a—one murder conviction was overturned because of prejudicial reporting by the *Denver Post and Rocky Mountain News*. And that was a case involving *Walker v. People*, a 1969 Colorado Supreme Court decision, 458 P. 2d 238. In that particular case, a young lady was murdered in Boulder; a man was tried and convicted by a jury. And the Colorado Supreme Court found that there had been massive, pervasive, and prejudicial publicity about the case that they overturned this murder conviction.

In that particular case, for example, the *Denver Post* hired Earl Stanley Gardner; and he hired a nationally recognized expert on lie detectors, a nationally recognized expert in criminology. These people participated in the investigatory process to such a great extent that it was part of the reason this murder conviction was overturned. In that same case, the *Rocky Mountain News* reported, for example, the last minutes of the victim here; a one Theresa Catherine (phonetic) Foster. The *Rocky Mountain News* printed a picture of the eyes of the victim, as she would appear before she was murdered. The only trouble was, they weren't really her eyes; and this story was interspersed with the—her suspected last words were—which were the Hail Mary Prayer, throughout the article. So we can say, well, this is an older case. We hope the journalistic standards have become of higher magnitude here. But nevertheless, since this case was decided in 1969, the Colorado Supreme Court has referred to this case a number of times since then, so it is still a yardstick in this state.

It was referred to in *People v. Botham* (phonetic), where four murder convictions were reversed, based in part because of extensive pre-trial publicity. That case is found at Colorado 629 P. 2d 589. So I am not unmindful of these matters and have taken these matters into consideration on this motion to unseal the records.

While the Colorado Supreme Court has not acted specifically on this question of whether search warrants should remain sealed, or whether there is a right of public access by either the U.S. Constitution, the Colorado Constitution, by statute, or by common law right of access, after considering these matters, after considering all of the evidence introduced in this matter, after considering the arguments of all counsel, I'm going to find that the best yardstick that the Colorado Supreme Court has found to measure these matters is that set forth in *Star Journal Publishing Corporation v. County Court,* which held that criminal proceedings—or pre-trial proceedings in crimi-

nal cases are presumptively open, and a Court may close a hearing only, one, if the dissemination of information therefrom would create a clear and present danger to the fairness of the trial; and secondly—the second prong of the test is that the prejudicial effect upon the defendant's right cannot be avoided by any reasonable alternative means.

And after having reviewed the record in this matter, having reviewed all of these warrants in camera, allowing counsel for the district attorney and the defense to make specific objections to the motion to unseal the records, I'm going to find that—that opening these records for public access would not create a clear and present danger to the fairness of the trial, and that prejudicial effect upon the defendant's right can be avoided by other reasonable alternatives. For example, in the *Botham* case, Justice Erickson, writing for the Colorado Supreme Court, wrote that a trial Judge, one, may cause extensive voir dire examination of prospective jurors; change the trial venue to a place less exposed to intense publicity; three, postpone the trial to allow public attention to subside; four, impanel veniremen from an area that has not been exposed to intense pre-trial publicity; five, enlarge the size of the jury panel and increase the number of preemptory challenges; and six, use emphatic and clear instructions on the sworn duty of each juror to decide the issues only on the evidence presented in open court.

So I believe these are alternatives that are available. Even assuming—and there has not been a preliminary hearing conducted yet, so we don't know if probable cause will be found or not; but even assuming probable cause is found and the matter is set for trial in this matter, we know that all of those safeguards are in place to ensure a fair trial for the defendant in this matter.

Now, I would note that now the City and County of Denver has a population—total population of somewhere between 475,000 to 500,000; and noting that—

(WHEREUPON, the tape is changed.)

THE COURT: We would note that both the defense and the district attorney are opposing this motion to allow public access to these records, so I anticipate an appeal may be filed in this matter. I have made specific findings about the contents of the search warrants, arrest warrant, the in-camera proceeding that's been preserved for any Appellate Court action; but in order to give counsel—well, any counsel time to appeal this matter, I'm going to stay execution on this order. I'm going to allow through Thursday of this week, August 1st. If no appeal is filed by that time, then we'll order that the public have access to these documents as of Friday morning, August 2nd.

EVENT COMMENTS
.. 3/29/06 9:06 AM
District Court, El Paso County

Case #: 2006CR001048 Div/Room: 5 Type: Homicide

The People of Colorado vs LAMBERTH, JEREMY ALEXANDER

Status: SUPP

Record Type: EVT Minute Order (print)
Judge Initials: LES Clerk Initials: Reporter Initials:

3-27-06 SCHWARTZ/MDH/HOLIDAY/DDA MAY & MULLANEY HEAR
DPWC PD MARTINEZ, MCATEER & NELSON; ATTY SANDSBERG APP FOR DENVER POST AND FREEDOM; ATTY CHARLES GREENLEY APP FOR EPSO; MOTIONS HEARD AND RULED UPON; PLEADINGS IN FILE MAY BE RELEASED TO THE PUBLIC; PARTIES AGREE TO VACATE 4-3-06 CT DATE, CONT FOR REVW OF DISCOVERY 4-10-06 230PM (DEF PRESENCE WAIVED) AND SETTING OF PRELIM 5-8-06 230PM (DEF PRESENCE REQUIRED). CUST.

NewsRoom

3/28/06 Rocky Mtn. News 13A
2006 WLNR 5131206

Denver Rocky Mountain News (CO)
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March 28, 2006

Section: News

Arrest affidavit: Suspect admitted killing detective

Dick Foster, Rocky Mountain News

COLORADO SPRINGS

Jereme Lamberth confessed to police three hours after killing Detective Jared Jensen on Feb. 22 but never indicated he knew that Jensen was a police officer, according to an arrest affidavit.

In the affidavit, unsealed Monday by District Judge Larry Schwartz, Lamberth allegedly told a police interrogator that he pulled a .44-caliber pistol from his belt and fired two bullets at the police officer as the two struggled at a bus stop east of downtown.

Jensen, 30, was trying to arrest Lamberth on an attempted-murder warrant issued Feb. 2. Lamberth was wanted for allegedly stabbing his sister more than a dozen times during an argument.

Police received a tip on the morning of Feb. 22 that Lamberth was seen in the Prospect Lake neighborhood, east of downtown.

According to the affidavit, Lamberth told Detective Derek Graham after the shooting that he was sitting on a bench when a man approached him, telling Lamberth that he was "going with him" or the man would break his arm.

Lamberth said he used his right hand to draw the handgun from his waistband and shoot the man once, the affidavit stated.

"(Lamberth) said he was trying to shoot the individual in the arm at that time, however, he was not quite sure where the individual had been shot. He said after firing one round . . . the individual then fell to the ground," the affidavit stated.

Lamberth "then described how he waited for between one and two seconds and then fired a second round at the individual who was lying on the ground. Jereme Lamberth had indicated he did not want any more problems from this individual and that was the reason why he had fired the second shot," the affidavit stated.

Graham stated in the affidavit that "during the interview with Jereme Lamberth, he made no statements that he was aware this individual who had confronted him was a Colorado Springs Police Department officer."

However, Jensen's handcuffs and his police badge, which hung on a neck chain, were recovered where he was shot.

WestlawNext © 2015 Thomson Reuters. No claim to original U.S. Government Work

EXHIBIT
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DISTRICT COURT, EL PASO COUNTY, STATE OF COLORADO Court Address: 270 South Tejon Street Colorado Springs, CO 80903 **Plaintiff:** PEOPLE OF THE STATE OF COLORADO **Defendant:** JEREME LAMBERTH	▲ COURT USE ONLY ▲
	Case No.: 06CR1048 Division 5
ORDER	

Before the Court is the motion of Freedom Newspapers Company and Denver Post Corporation to substitute a corrected first page of their motion to unseal the court file. The Court, having reviewed the motion and being fully advised of its premises, hereby GRANTS the motion. The corrected first page of the Motion of Freedom Newspapers Company and The Denver Post Corporation to Unseal Court File shall be substituted in the court file.

DONE AND ORDERED this _____ day of March, 2006.

BY THE COURT:

_____

Lawrence Schwartz
District Court Judge

DNVR1:60338038.01

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO 7325 South Potomac Street Centennial, Colorado 80112	
Plaintiff(s): People of the State of Colorado **v.** **Defendant(s): Holmes, James Eagan**	REDACTED ♦ COURT USE ONLY ♦ Case Number: **12CR1522** Div.: **22**

SUPPLEMENTAL CASE MANAGEMENT ORDER (C-11)

The Court finds that it is in the interest of judicial efficiency to establish guidelines which will facilitate management of pleadings and maintain the integrity of the record, as well as assist third parties who have been subpoenaed in producing documents in this case. Accordingly, as a supplement to this Court's Initial Case Management Order (C-2), the following procedures are to be followed in this matter:

1. Counsel shall file an unredacted original and one redacted copy of all pleadings/motions (including exhibits to pleadings/motions) only with the Clerk of the Court. The unredacted original shall be stamped "District" by the Clerk. The redacted copy shall be stamped "Redacted" by the filing attorney. The filing attorney is responsible for ensuring that the "Redacted" copy has the names and locations of all endorsed witnesses and any personal identifying information, including, but not limited to, HIPAA information, medical information, social security numbers, identifying contact information, victims' contact information, as well as any other information required to be protected by law, blacked out. A copy MUST be filed and marked "Redacted" even if no redactions are required.

2. Counsel, if appropriate, may file documents under seal with the Court. Any documents filed under seal must be in an 8 ½" by 11" envelope. Counsel shall attach to the envelope a copy of the first page of the motion or pleading, which includes the caption, to the front of the envelope so that the Clerk's Office has the information immediately available. Unless the filing attorney asks the Clerk's Office to refrain from opening the sealed envelope, when the Clerk's Office receives the pleadings, the Clerk of the Court or her designated staff shall open them and make a copy of same. The filing shall then be resealed and maintained in the Clerk's Office. The copy shall be delivered to the trial judge, and access to the original filing thereafter shall be allowed only by order of the Court. If anything filed in this manner is something other than typical pleadings and instead carries evidentiary value, it must be identified as such on the envelope or package and shall not be first opened by the Clerk's Office, pending further order of the Court. Counsel may not file documents in the division or in open court, absent extenuating circumstances.

EXHIBIT
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3. Counsel shall continue to caption pleadings/motions with the format ordered in the Court's Initial Case Management Order (C-2). Only one issue may be addressed in each motion. The Court ORDERS parties not to file consolidated responses to motions and to instead address motions with separate responses.

4. The Clerk of Court is designated as custodian of the record for the case and shall receive all pleadings/motions and make the computer entry for all pleadings/motions.

5. The District and Redacted files shall remain in the custody of the Clerk of Court at all times.

6. The District file of the pleadings/motions is available only to counsel of record and their investigators, paralegals, and legal assistants under direct supervision of the Clerk.

7. Absent further Order of the Court, the Redacted file is the public file and remains suppressed except for certain documents authorized by the Court for release.

8. All motions or other filings that have **attachments** which include the names and locations of all endorsed witnesses or any personal identifying information, including, but not limited to, HIPAA information, medical information, social security numbers, identifying contact information, victims' contact information, as well as any other information required to be protected by law, shall be redacted by the filing attorney.

9. The Clerk's Office, prior to releasing any information, is to confirm it is in accordance with the Court's Order as well as the Order Re: Motion to Unseal Court File (Including Docket)/Suppression Order (C-4c); any such document must first go through the Court's internal screening procedures.

Furthermore, in order to clarify the Court's requirements with respect to documents ordered for production pursuant to a subpoena *duces tecum* (SDT), the Court has also established the following procedures:

10. SDTs are to be numbered consecutively just as motions are, pursuant to Initial Case Management Order (C-2). For example, the People's SDTs should be denominated "PSDT-1, PSDT-2," etc. Defendant's SDT's should be denominated "DSDT-1, DSDT-2," etc.

11. On the return date, third parties are to bring one set of the documents to Court. The documents shall be redacted for the following information: any personal identifying information of endorsed witnesses, including, but not limited to, HIPAA information, medical information, social security numbers, identifying contact information, victims' contact information, driver's license numbers, state identification numbers, as well as any other information required to be protected by law. The documents must be Bates-stamped and include the initials of the person or agency producing

them; e.g., University of Colorado records would be stamped "CU-1, CU-2"; documents produced by the Aurora Police Department would be stamped "APD-1, APD-2," etc. (Note: Any documents which have already been filed with the Court shall be Bates-stamped by Court staff in accordance with this procedure, should the Court determine that those documents are subject to disclosure.) Counsel serving the subpoena *duces tecum* is responsible for communicating these procedures to any third parties subject to such subpoena, and Counsel shall attach a copy of this Order to any SDTs issued.

12. In the event that a Motion to Quash the subpoena is filed, the Court shall set a briefing schedule and third parties are to keep the subpoenaed documents until the Court issues a written ruling on the Motion. Another SDT return date will be set. If the Motion to Quash is denied and the Court orders the subpoenaed documents released, third parties are to bring two redacted sets of the documents, and the Court will keep one set for the appellate record. If the Motion to Quash is granted, third parties are to preserve the documents requested in the event of an appeal.

Entered September 7, 2012.

BY THE COURT:

WILLIAM BLAIR SYLVESTER
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on SEPTEMBER 7, 2012, a true and correct copy of **SUPPLEMENTAL CASE MANAGEMENT ORDER (C-11)** was served upon the following parties of record.

Karen Pearson
Amy Jorgenson
Arapahoe County District Attorney's Office
6450 S. Revere Parkway
Centennial, CO 80111-6492
(via email)

Sherilyn Koslosky
Rhonda Crandall
Colorado State Public Defender's Office
1290 S. Broadway, Suite 900
Denver, CO 80203
(via email)

DISTRICT COURT, COUNTY OF ARAPAHOE, STATE OF COLORADO 7325 S. Potomac Street Centennial, Colorado 80112	▲ COURT USE ONLY ▲
Plaintiff: **People of the State of Colorado** v. Defendant: **Holmes, James Eagan**	Case No. **12CR1522** Division: **22**

ORDER RE: MEDIA'S MOTION TO UNSEAL REDACTED INFORMATION (VICTIMS' IDENTITIES) (C-13)

This matter comes before the Court pursuant to the People's Motion to Redact the Victims' Names from the Original Complaint and Information in the Public Court File and on the Court's Website (P-24), filed September 27, 2012; Media Petitioners' Motion to Unseal Redacted Information (Victims' Identities) (C-13), filed September 28, 2012; Media Petitioners' Motion to Unseal Excessively Redacted Information From Judicial Records and to Amend Supplemental Case Management Order C-11 (C-15), filed October 9, 2012; Defendant's Response to Court's Request for Defense Position on Media's Motion to Unseal Redacted Information (Victims' Identities) (C-13), filed October 9, 2012; the People's Response to Court Order C-13: Media's Motion to Unseal Redacted Information (Victims' Identities) (C-13), filed October 9, 2012; the People's Supplemental Response to Court Order C-13: Media's Motion to Unseal Redacted Information (C-13), filed October 22, 2012; Media Petitioners' Supplemental Pleading in Response to Court's Order Allowing Opportunity to Submit Additional Documents Re: Motion to Unseal Redacted Information (C-13); and Defendant's Response to Court's Order Allowing Opportunity to Submit Additional Documents Re: Motion to Unseal Redacted Information (C-13), filed October 22, 2012. Having heard oral argument by Media Petitioners, the People, and Defendant on October 11, 2012, and having reviewed the Motions, Responses, Supplements, and applicable law, the Court hereby Finds and Orders:

FACTS

Defendant in this case is charged with 166 counts of murder, attempted murder, possession of explosives, and crime of violence (sentence enhancer) in connection with a shooting at a theater. On July 27, 2012, the People filed the initial Complaint and Information ("Complaint") which listed 142 counts, including 140 counts of murder and attempted murder, one count of possession of an explosive or incendiary device, and one count of crime of violence.

Each count included a description of the charges and the name of each of the alleged victims. The People signed the Complaint on page 40 and attached an additional thirty pages titled "Witness List" directly to the Complaint. The "Witness List" listed the names and addresses of numerous witnesses; many of those witnesses also appear as victims in the Complaint. The final page of the initial Complaint, page 42, lists "Defendant Information" and "Case Information." At the time the People filed the Complaint, all seventy-two pages were suppressed by the Court.

At a hearing conducted on July 30, 2012, the following exchange occurred:

The Court: Now, unsealing. Mr. Edson, it looks like you're up. Essentially, let's take it one piece at a time, because we have several issues on the table.

The first is the release of the felony Information and Complaint. Quite frankly, the Information therein seems to me should be released, including the victims' names, as most of that has been out there. However, I'm happy to hear what you have to say. Let's take the felony complaint first, Mr. Edson. And we'll break it down one point at a time after that.

...

Mr. Edson: Judge, regarding that, what the Court just brought up regarding the Complaint, we don't have an objection. Our concern is regarding the witness list and releasing that information. So it would be our request that that information not be provided. Other than that, we do not have an objection.

The Court: Thank you. Ms. Brady.

Ms. Brady: Your Honor, our position at this point is that everything in the court file should be sealed at least until the preliminary hearing. We have, like I said, no discovery, and so we are operating simply on things that we've heard and things that we assume are going to come down. And so I think the safe position for the defense at this point is just request everything in the court file remain sealed.

The Court: How is it that by keeping the Felony Complaint sealed, it helps you or it hurts you if it was released?

Ms. Brady: Again, Your Honor, not knowing what the discovery provides, I don't know. I don't know whether names in there would jeopardize the defense. It's just hard to try and imagine into the future what it could be. So for consistency's sake and to be on the safe side, we're simply going to object to anything being unsealed.

The Court: This Court finds and rules as follows:

> That after considering the argument of counsel, the applicable law in this area, that it is proper to release the Felony Complaint. The witness list will not be released at this time pending further order of the Court.

(Hr'g Tr., July 30, 2012, 20:18-25; 21:1-4, 7-25; 22:1-16). After the hearing on July 30, 2012, the Complaint was duly released to the public file with the names of victims intact/unredacted. The Complaint was also posted on the judicial website. The witness list was completely redacted so that no information was revealed on pages 41 through 72.

On September 18, 2012, the People filed a Motion to Add Additional Counts 143-152 and Motion to Amend Counts. Both motions were granted. This time, the People provided, without explanation, copies of the added counts and the amended counts with all names of victims redacted and asked that these redacted copies be placed in the public file and posted on the judicial website. The Court accepted the redacted copies and placed them in the public file and posted them on the website.

In an Order issued September 21, 2012, the Court unsuppressed the file, effective September 28, 2012, and instructed the Parties to file redacted copies of documents that had been previously suppressed. On September 27, 2012, the People filed a Motion to Redact the Victims' Names from the Original Complaint in the Public File and on the Court's Website (P-24). The People also filed a Motion to Add Counts 153-166 and a Motion to Amend Counts on October 9, 2012, which were both granted. Again, the People provided copies of the added and amended counts with the names of victims redacted and asked that those copies be placed in the public file and posted on the judicial website. The Court accepted the redacted copies and placed them in the public file and posted them on the website. After this last filing, on September 28, 2012, Media Petitioners filed their Motion to Unseal Redacted Information (Victims' Identities) (C-13), seeking to have the names of the victims released/unredacted from all the motions and orders in the public file concerning additional and amended counts. At present, the original Complaint in the public file and posted on the website contains all the names of the victims, unredacted. The copies of the added and amended counts in the public file and posted on the website have the victims' names redacted. The original witness list in the public file and posted on the website remains redacted, as well as any witness names referenced in pleadings filed by the Parties.

The Court heard oral argument from the Parties and Media Petitioners on this issue at a hearing on October 11, 2012. In oral argument and in their Motion (P-24), the People claim that at the time they originally consented to the release of the victims' names, the entire court file was suppressed (P-24, ¶1) and that "[s]ubsequently, parts of the Court file were unsuppressed by the Court and thus the names of the [v]ictims that were listed in the original Complaint also became available to the public." (P-24, ¶2). The People also argue that fraudulent motions have been

filed using the victims' information (P-24, ¶¶ 3-4); that the continued release of the victims' and witnesses' names "potentially compromises the rights of the [v]ictims to be free from harassment or abuse throughout the criminal justice process" pursuant to the Colorado Victims' Rights Act ("VRA"), C.R.S. §§ 24-4.1-302.5(1)(a), 303(5) (P-24 ¶8); that many of the victims and witnesses have expressed concerns for their personal safety (People's Response to C-13, ¶2); that the victims have a constitutionally protected right to privacy (People's Response to C-13, ¶5); and that "[v]ictim and witness safety and privacy is a compelling governmental interest of the highest order" and "sealing the victims' names from the public Court record is one of the most effective ways that the Court and the People can affect [sic] this governmental interest and redacting [v]ictims' names…is a narrowly tailored means to accomplish this goal…Additionally, no reasonable alternative means exists to protect this compelling governmental interest." (People's Response to C-13, ¶6). The People have offered no evidence in the form of affidavits or testimony to support these allegations.

Defendant has also averred, through written pleadings and in oral argument, that any additional disclosures from the court file will jeopardize his constitutional right to receive a fair trial by an impartial jury. Defendant states that "victims and witnesses have been repeatedly intimidated by the intense media scrutiny this case has engendered" and cites instances where reporters have "contacted witnesses and threatened to release their names in connection with personal or sensitive information unless they agreed to submit to an interview or confirm the accuracy of the information." (Defendant's Response (C-13), ¶4). Defendant states that, as a result, witnesses have been reluctant to speak openly with defense attorneys and investigators; therefore, the media's behavior has already been detrimental to Defendant's ability to investigate and prepare his defense. (Defendant's Response (C-13), ¶¶4–5). As support for these allegations, Defendant has offered evidence in the form of an affidavit filed under seal with the Court. Defendant also states that "the media's constant and insatiable demands for access to information are becoming a significant distraction and hindrance." (¶6). Defendant therefore asks that the Court consider imposing limitations on the media's ability to file further pleadings in this case.

In their Motion (C-13), Media Petitioners maintain that neither the Colorado Criminal Justice Records Act, C.R.S.§ 24-72-304(4)(a), nor Chief Justice Directive 05-01 warrants the redaction of victims' names. (C-13, ¶5). Media Petitioners note that the redaction of victims' names in the added and amended counts is not effective in protecting any governmental interest, since six of the eight names redacted in those documents have already been publicly disclosed and remain available for inspection in the public case file and on the judicial website. (C-13, ¶9). As to the other five additional names, Media Petitioners argue that no compelling need exists to redact them and no showing has been made why these individuals should be treated differently from the other, previously disclosed names. (C-13, ¶10). Instead, Media Petitioners assert that crime victims "have no protectable right of privacy with respect to information directly relevant to that investigation," and that their "identities as alleged victims of attempted murder are

unquestionably already a matter of legitimate public interest and concern." (C-13, ¶11). Because this case does not involve "extraordinary factors suggesting there is any danger to the physical safety of any witnesses, or the substantial probability of attempted witness tampering," Media Petitioners ask the Court to release the names of all crime victims in the two remaining redacted Orders. (C-13, ¶12). In addition, at oral argument, Media Petitioners also asked that the witness list attached to the original Complaint, as well as any redacted victim or witness names in the pleadings, be unredacted.

STANDING

First, the Court, consistent with prior motions and resolutions on this issue, FINDS that Media Petitioners have standing to assert the right of public access to court records. *See People v. Thompson,* 181 P.3d 1143 (Colo. 2008); *Star Journal Publ'g Corp. v. Cnty. Ct.,* 591 P.2d 1028 (Colo. 1979); *see also* Colo. R. Civ. P. 121(c) §1-5(4) (2012) (stating, upon notice to all parties of record and after holding a hearing, an order limiting access may be reviewed by the court at any time on its own motion or upon the motion of any person) (applicable as per Colo. R. Crim. P. 57(b)).

ANALYSIS

In a number of previous orders, this Court has adopted a specific legal analysis to determine whether the public and the media should have access to court documents. That analysis, as always, begins with the Colorado Criminal Justice Records Act, C.R.S. §§ 24-72-301:309 (2012) ("CCJRA"). Because the CCJRA analysis is different depending on the type of criminal justice record, this Court will analyze the Complaint, the warrants and affidavits, and the pleadings in turn.

1. The Complaint

Under the CCJRA, criminal justice agencies (which include any court with criminal jurisdiction) "*shall* maintain records of official actions" and such records "*shall* be open for inspection." C.R.S. § 24-72-303(1) (emphasis added). "Official actions" are defined as "arrest; indictment; *charging by information*; disposition; pretrial or posttrial release from custody; judicial determination of mental or physical condition; decision to grant, order, or terminate probation, parole, or participation in correctional or rehabilitative programs; and any decision to formally discipline, reclassify, or relocate any person under criminal sentence." C.R.S. § 24-72-302(7) (emphasis added). Records of official action shall be open for inspection "except as provided in [the CCJRA] or as otherwise provided by law." C.R.S. § 24-72-303(1).

Clearly, the Complaint at issue falls under the CCJRA's definition of "official actions." *See* Colo. R. Crim. P. 7(b) (defining "information" and requisites of the information). The relevant

analysis for sealing or redacting a record of official action is outlined in *People v. Thompson,* 181 P.3d 1143 (Colo. 2008). There, the Colorado Supreme Court held that because a grand jury indictment was a record of an official action under the CCJRA, a trial court lacked discretion to seal factual allegations in support of a charge that were contained in the indictment, even if those allegations were superfluous. *Id.* at 1146–47. The *Thompson* court reasoned that, under the CCJRA, a record of official action must be available for public inspection unless one of the two exceptions denoted in § 24-72-303(1) applies: (1) non-disclosure is required by the CCJRA, or (2) non-disclosure is required by other law. *Id.* The court stated that "[c]onsequently, the CCJRA does not grant any criminal justice agency, including a court, any discretion as to whether to disclose a record of official action in its entirety, in part, or not at all." *Id.* at 1145–46. The supreme court noted that, because a grand jury indictment is a record of official action, the trial court could not redact any of the extensive factual allegations contained in the indictment, unless required otherwise by § 24-72-304(4)(a) (a provision of the CCJRA which provides for the redaction of the name and any other identifying information of any victim of sexual assault or of alleged or attempted sexual assault) or by any other law. Because some of the factual allegations in the indictment suggested a sexual assault, the *Thompson* court held that the CCJRA required the entire indictment be available to the public, subject to the statutorily required deletion of identifying information of any alleged sexual assault victims. *Id.* at 1148.

Because nothing in the CCJRA itself prohibits disclosure of victims' and witnesses' names[1] or specifically allows for the redaction of those names, the Court must determine whether redaction of the names is "required by other law." *Thompson*, 181 P.3d at 1146–47; *see also Freedom Colo. Info., Inc. v. El Paso Cnty. Sheriff's Dep't,* 196 P.3d 892, 900 n.3 (Colo. 2008) (finding that redaction may be proper to promote goals of the CCJRA). The People point to C.R.S. §§ 24-4.1-301:304, commonly called the Victims' Rights Act ("VRA"), as a statute that authorizes the Court to redact victims' names. The VRA requires that "[l]aw enforcement agencies, prosecutorial agencies, judicial agencies, and correctional agencies *shall* ensure that victims of crimes are afforded the rights described in § 24-4.1-302.5." C.R.S. § 24-4.1-303(1) (emphasis added). The VRA also requires that "[a]ll reasonable attempts shall be made to protect any victim or the victim's immediate family from harm, harassment, intimidation, or retaliation arising from cooperating in the reporting, investigation, and prosecution of a crime," C.R.S. § 24-4.1-303(5), and states that all victims have the right "to be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process," C.R.S. § 24-4.1-302.5.

[1] This Court notes that many of the names of the victims and the witnesses attached to the Complaint and Information may be one and the same, since the surviving victims are also necessarily listed as witnesses. However, while all victims are likely witnesses, all witnesses are not necessarily victims.

The Court notes that, initially, the People did consent with full knowledge to the release of the victims' names in the Complaint to the public and media—the People's assertions to the contrary notwithstanding—and while Defendant objected to the release of the victims' names, Defendant could cite only vague concerns about staying on the "safe side." (Hr'g Tr., July 30, 2012, 21:16–22:9). Even now, the People have offered no concrete evidence to support their assertions that "many of the [v]ictims and witnesses in this case are reluctant to speak to the District Attorney's Office because they are fearful that the members of the District Attorney's Office are actually media representatives posing as members of the District Attorney's Office" and that "other [v]ictims and witnesses have expressed fear of leaving their households with their minor children because the media is relentlessly trying to photograph and/or interview the minor children." (People's Supplemental Response C-13, ¶3). No affidavits of victims or witnesses have been filed in support of these statements.

However, the Court is aware that there has been some harm to at least some victims and witnesses. There have been two instances where it appears a third party has "stolen" the name of a victim or witness and used those names to file court documents in this case. Additionally, Defendant has offered an affidavit, filed under seal with the Court, which details instances where media contact with witnesses has harmed Defendant's investigation. The affidavit and redacted emails submitted by Defendant purport to show that unrestricted access to "additional victims' names would pose a substantial probability of harm to the fairness of the trial." (Defendant's Supplemental Response C-13, ¶7). Thus, the Court FINDS that there has been some harm and harassment of the witnesses and victims—though the Court notes again that it has not received any supporting affidavits from any of the actual victims or witnesses.

The legislature has stated that "an effective criminal justice system *requires* the protection and assistance of victims of a crime." C.R.S. § 24-4.1-101. Therefore, the Court FINDS that it is required to make all reasonable attempts to protect the victims and witnesses from harm and harassment under the VRA. That mandate in the VRA, under *Thompson*, may constitute an exception to the CCJRA provision requiring disclosure of a record of official action in its entirety. Colorado courts have not ruled extensively on the definition of "all reasonable attempts" that "shall be made" to protect victims from harassment, although the legislature has provided that the VRA is to be interpreted liberally. C.R.S. § 24-4.1-101. Certainly, case law exists which supports redaction of witnesses' names in cases where witnesses' lives have been threatened, *see People v. Ray*, 252 P.3d 1042, 1048–49 (Colo. 2011), though in this case neither Party has asserted that any victim's life has been threatened. To find that an exception to the CCJRA is provided by the VRA, the Court would have to determine that the redaction of the Complaint is a "reasonable attempt" to protect the victims and witnesses from "harm, harassment, intimidation, or retaliation arising from cooperating in the reporting, investigating, and prosecution of a crime." C.R.S. § 24-4.1-303(5). Looking to the plain meaning of the statute, "reasonable" is defined as, "[f]air, proper, just, moderate, suitable under the

circumstances; [f]it and appropriate to the end in view." *Black's Law Dictionary* 1265 (6th ed. 1990).

While it has the authority, the legislature has declined to mandate that courts shall, or even that courts may, redact the names of victims or witnesses from court documents, particularly to protect victims from harassment by the media, despite having addressed similar issues in comparative statutes. *See, e.g.*, C.R.S. § 24-4.1-303(2) (providing correctional officials shall keep victim information confidential upon request by the victim); § 24-4.1-303(5) (noting reasonable efforts should be made to minimize contact between the victim and the defendant); § 24-72-304(4)(a) (requiring the name and identifying information of a sexual assault victim be deleted from any criminal justice record). Nor does Chief Justice Directive 05-01, *Directive Concerning Access to Court Records* (2006) ("CJD 05-01"), require redaction of the name, address, or phone number of victims or witnesses. The CJD 05-01 was designed "to provide *reasonable* access to court records while simultaneously ensuring confidentiality in accordance within existing laws"; thus, this Court finds that directive instructive on what constitutes reasonable redaction. Despite the unusual and relentless media attention in this case, the investigation and proceedings in this case should, whenever possible, conform to the rules and usual practices of any other criminal case in Colorado. In an ordinary criminal case, victim and witness names and information would not be redacted from the court documents; thus, such disclosure is generally considered reasonable in criminal cases.

The Court's usual strict compliance with CJD 05-01 does require some redaction of identifying information. This provides at least some level of protection for the victims and witnesses. Additionally, as Media Petitioners point out, there are other methods of protection available to witness and victims, including, but not limited to, C.R.S. § 13-14-102 (civil protection orders), C.R.S. § 18-9-111 (criminal harassment), C.R.S. § 18-8-707 (tampering with a witness or victim), and C.R.C.P. 365 (injunctions, restraining orders, and orders for emergency protection). Any victim or witness can seek assistance from the District Attorney's Office, the county courts, or a local police station to bring criminal charges or to obtain a protection order if that individual believes he or she has been stalked, threatened, assaulted, or harassed. Thus, this Court's redaction of case documents is not the only remedy, and may not be the best remedy, for the attested harm to, and harassment of, the victims and witnesses.

Additionally, the Court finds that, to be considered "reasonable," an order designed to prevent harm must be likely to effectively prevent some degree of the harm. The Court suppressed the case file in its entirety for the first two months of the investigation, and it has allowed for many redactions by both parties with the intention of protecting the privacy and well-being of the victims and witnesses. To the dismay of the Court, many of these victims and witnesses have still been located, contacted, and, in some cases, harassed by the media and by third parties trying to use the names of victims and witnesses to intervene. The affidavit

submitted by Defendant and the assertions by the People illustrate that the attempts made by the Court have not been sufficient in preventing such harm to the victims and witnesses. Neither Party has articulated how court-ordered redaction of the names of the victims and witnesses at this time will better alleviate or remedy additional harm. Thus, redaction of the names of victims or witnesses at this point would be largely symbolic and have very little practical effect. This lack of efficacy, coupled with the availability of other remedies, cuts against the reasonableness of the redactions.

The Court notes that its analysis is statutory and does not involve the First Amendment or prior restraint, but case law regarding information in the public domain is instructive in analyzing the reasonableness of redacting the victims' and witnesses' names in this case. In *Oklahoma Publ'g v. Dist. Court*, 430 U.S. 308 (1977), the United States Supreme Court found that a court could not enjoin the media from publishing the name and photo of a juvenile defendant. The Court found that because the press had been allowed in the courtroom during the juvenile's first detention hearing with no objection by the parties, despite an Oklahoma statute that required juvenile proceedings be held in private, the information had been placed in the public domain and the order enjoining publishing that information violated the First and Fourteenth Amendments. *Id.* at 311–12. This Court finds itself in a similar situation: despite a statute providing for the Court to take action to alleviate victim and witness harm or harassment (the VRA), the information about the victims' and witnesses' identities is largely already in the public domain and was initially disclosed with the consent of the People. The *Oklahoma Publ'g* case indicates that attempting to redact information already in the public domain is often not reasonable, even if such redaction is done pursuant to a state statute designed to protect individuals from harm or harassment.

While the Court greatly empathizes with the plight of the People, Defendant, the victims, and the witnesses and wants to help prevent any additional harm to the Parties involved or the judicial proceedings, the Court must follow the law. Unfortunately for those victims and witnesses who have been harmed or harassed because of these proceedings, even applying the VRA liberally, the Court FINDS that redaction of victims' and witnesses' names that have already been released would not constitute a "reasonable attempt" to prevent harm under the VRA. The Court also FINDS it would not be a reasonable attempt to only redact the names of the few victims and witnesses not yet released, particularly given Media Petitioners' showing that they already know much about those individuals and have already contacted or interviewed some of them. Therefore, the Court ORDERS that the names and information of victims and witnesses shall be unredacted from the Complaint and the pleadings consistent with the CJD 05-01. Media Petitioners' Motion to Unseal is GRANTED with respect to the victims' and witnesses' names.

This Court notes that, under *Thompson*, a court must refrain from resolving constitutional questions or from making determinations regarding the extent of constitutional rights unless such determination is essential and the necessity of such is clear and inescapable. *Thompson*, 181 P.3d 1143, 1145. Since this Court resolves the issue of redaction of victim and witness names in the Complaint and Information under the CCJRA, no constitutional analysis is necessary.

2. Warrants and Affidavits

The Court refers back to and incorporates its analysis from its Order Re: Motion to Unseal Court File (Including Docket)/("Suppression Order") (C-4c), filed August 13, 2012. Records of criminal justice agencies that are not records of official action "may be open for inspection," C.R.S. § 24-72-304(1), unless such inspection would be "contrary to state statute, or is prohibited by any rules promulgated by the supreme court or by any order of the court," C.R.S. § 24-72-305(1). *See Harris v. Denver Post Corp.*, 123 P.3d 1166, 1170–71 (Colo. 2005). Under the CCJRA, affidavits of probable cause, search warrants, and arrest warrants are criminal justice records subject to discretionary disclosure. C.R.S. §§ 24-72-304:305. After considering once again the positions of Media Petitioners, the People, and Defendant, based on representations of the harm to the investigation and proceedings as articulated by the People and Defendant, the Court FINDS that under C.R.S. § 24-72-305(5), disclosure of affidavits of probable cause, arrest warrants, and search warrants continues to be contrary to the public interest. The Court also FINDS that, using the balancing test dictated in *Harris v. Denver Post Corp.*, 123 P.3d 1166 (Colo. 2005), and considering relevant public interest, such as the public's interest in knowing the contents of these affidavits and warrants versus the private interests of witnesses and victims and the interest of maintaining the integrity of the investigation and the proceedings, disclosure of such documents would be imprudent at this stage of the proceedings where the preliminary proof evident/presumption great hearing has yet to take place. Finally, the Court FINDS that, under the ABA Standard 8-3.2 for Criminal Justice Relating to Fair Trial and Free Press, unrestricted access to those documents would pose a substantial probability of harm to the fairness of the trial, continued suppression of those documents would effectively prevent such harm, and there is no less restrictive alternative reasonably available to prevent the harm.

Therefore, the Court ORDERS that any affidavits of probable cause, arrest warrants, and search warrants that are currently suppressed shall remain suppressed until further order of the Court. Media Petitioners' Motion to Unseal is DENIED as to the affidavits of probable cause, arrest warrants, and search warrants.

3. Pleadings in the Case File

Under this category, the Court considers the redactions in the general motions, responses, replies, and orders filed in this case. Specifically, the Parties have referenced the following

redactions: citations to statutes and case law, curriculum vitae of witnesses announced in open court, exhibits filed during the privilege hearing, and facts and information related to the package mailed to Dr. Lynne Fenton. These pleadings are criminal justice records subject to discretionary disclosure under the CCJRA. C.R.S. §§ 24-72-304:305. Thus, the Court *may* deny access to these records if disclosure would be contrary to the public interest or as otherwise provided by law. The Court and the Parties have undergone a number of hearings, substantial briefing, and extensive analysis and argument regarding the redaction of the case file. The Court agrees that there has been "excessive redaction" of some of the pleadings in the case file. Therefore, the Court FINDS that there would be no substantial harm in releasing any citations, quotations, or references to any statute or case law in the pleadings; to the contrary, it is in the public's interest—and the interest of the transparency of the proceedings at this point—to make those citations and references accessible. The Court ORDERS all such references to statutes and case law shall be unredacted.

Similarly, the Court FINDS that there would be no substantial harm in releasing the exhibits submitted to the Court during the hearing on privilege held August 23, 2012. The Court took judicial notice of the curriculum vitae of Dr. Lynne Fenton during that hearing. That information has been in the public domain for months, and there would be no harm in the Court unredacting that information from its pleadings. The two exhibits submitted to the Court during the hearing on August 23, 2012, were redacted by the parties at the time of submission to the Court to eliminate disclosure of any detailed medical or identifying information. Both documents were discussed extensively in open court. While the privilege issue has not been formally resolved, disclosure of these documents as redacted does not waive any claim of privilege Defendant might have. Therefore, the private and public interest in maintaining the redactions of these documents in their entirety does not outweigh the presumption of access to criminal justice records. The Court ORDERS that the curriculum vitae of Dr. Lynne Fenton and the two exhibits submitted to the Court on August 23, 2012, be released consistent with CJD 05-01. As noted by Media Petitioners, Dr. Fenton's curriculum vitae, in addition to being judicially noticed, is already in the public domain. (C-15 ¶6f). The curriculum vitae of Dr. Fox was never filed in open court or judicially noticed; it was simply attached to a pleading as a courtesy to the prosecution and is not in the public domain. Additionally, Dr. Fox has never testified in open court. Therefore, the Court FINDS that the public interest of upholding Defendant's constitutional rights to a complete and fair trial and Dr. Fox's private interest in redacting his curriculum vitae outweigh the small interest the public may have in accessing the document. The Court ORDERS Dr. Fox's curriculum vitae remain suppressed.

Regarding the facts and information related to the contents of the package, the Court FINDS that the relevant public and private interest mandate that information remains redacted. The Court has granted a hearing on the issue of the untimely release of details related to these facts. Because this issue is unresolved, the Court is concerned that unredacting these facts could

jeopardize the pending sanctions hearing. The Court, the Parties, and the public demand and deserve a full and fair trial on all of the issues in this case. To prevent any harm that could come from premature disclosure of privileged or sealed facts or information and to preserve judicial integrity, the Court ORDERS such references remain redacted pending the sanctions hearing.

CONCLUSION

The Parties have noted that litigating the media's right of access in this case has been a distraction that has taken this case off of the normal trajectory. Addressing the issues brought by Media Petitioners has necessitated substantial expenditure of valuable time and resources. To minimize the likelihood of further distraction, and to get this case back on a more normal track, the Court ORDERS that all redactions in court documents filed in this case shall comply with CJD 05-01, as well as with any appropriate statutes or law. The Court hereby amends its Supplemental Case Management Order (C-11), filed September 7, 2012, as follows:

1. Counsel shall file an unredacted original and one redacted copy of all pleadings/motions (including exhibits to pleadings/motions) only with the Clerk of the Court. The unredacted original shall be stamped "District" by the Clerk. The redacted copy shall be stamped "Redacted" by the filing attorney. The filing attorney is responsible for ensuring that the "Redacted" copy has any personal identifying information, including, but not limited to, HIPAA information, medical information, social security numbers, as well as any other information required to be protected by the CJD 05-01 or other law, blacked out. A copy MUST be filed and marked "Redacted" even if no redactions are required.

. . .

8. All motions or other filings that have attachments which include any personal identifying information, including, but not limited to, HIPAA information, medical information, social security numbers, as well as any other information required to be protected by law, shall be redacted by the filing attorney.

. . .

11. On the return date, third parties are to bring one set of the documents to the Court. The documents shall be redacted for the following information: HIPAA information, medical information, social security numbers, identifying contact information, driver's license numbers, state identification numbers, and any other information required to be protected by law. . . .

All other provisions of Case Management Order (C-11) remain in full force and effect.

Access to the public case file continues to be available at the Clerk's office Monday through Friday during regular court business hours. The Court notes that the judicial website is a courtesy provided to the public to facilitate public access to information about this case. However, the website also provides for the broad, world-wide access that is of particular concern to some of the victims and witnesses in this case. Therefore, the Court will continue to determine, *sua sponte*, what information shall be displayed on the judicial website.

DATED this 25th day of October, 2012.

BY THE COURT:

WILLIAM BLAIR SYLVESTER
DISTRICT COURT JUDGE