

DISTRICT COURT ARAPAHOE COUNTY, COLORADO Court Address: Arapahoe County Justice Center 7325 S. Potomac St., Centennial, CO 80112	Filed MAY 31 2013 CLERK OF THE COMBINED COURTS ARAPAHOE COUNTY, COLORADO COURT USE ONLY
THE PEOPLE OF THE STATE OF COLORADO vs. Defendant: <p style="text-align: center;">JAMES EAGAN HOLMES</p>	Case Number: <p style="text-align: center;">12CR1522</p> Division/Ctrm: <p style="text-align: center;">26</p>

PEOPLE’S MOTION FOR VICTIMS TO BE PRESENT AT ALL CRITICAL STAGES OF THE CRIMINAL JUSTICE PROCESS AND TO BE EXEMPT FROM SEQUESTRATION [PEOPLE’S MOTION P-44]

CERTIFICATE OF CONFERRAL

The prosecution conferred with the defense counsel prior to the filing of this motion, and the defense counsel has indicated that they will file a response to this motion.

This Motion is filed by the District Attorney for the 18th Judicial District.

Introduction

1. This matter has been set for trial. Due to the nature of this case, the People believe that it is likely that the Defense may attempt to sequester victim-witnesses during potential future hearings, trial, and sentencing in this case. The People file this motion pursuant to the Colorado Victims’ Rights Act (VRA) in anticipation of any requests to sequester the victims from pre-trial motions, trial, sentencing, post-conviction motions or any other critical stages of the criminal justice process. Many of the victims have expressed to the District Attorney’s office their desire to exercise their rights to be present during many of the critical stages of this case, and it is possible that some of the victims may be called as witnesses to testify at various critical stages of this case. The People request that the Court honor the victims’ constitutional and statutory rights to be present during any critical stages of this case and request that the victims be exempt from any potential sequestration requests from the Defense.

Argument

a. The Colorado Constitution, the Colorado Victims' Rights Act, and Colorado Precedent are legal mandates that guarantee the victims' rights to be present at all critical stages of the criminal justice process.

2. In this case the Defendant is charged with multiple counts of Murder in the First Degree pursuant to Colo. Rev. Stat. §18-3-102(1)(a) and (d); and multiple counts of Attempted Murder in the First Degree pursuant to Colo. Rev. Stat. § 18-3-102(1)(a) and (d); 18-2-101.
3. Due to the charges in this case, the Victims in this case are Victims of crimes enumerated in Colorado's Victims' Rights Act (VRA): "Victim means any natural person against whom any crime has been perpetrated or attempted. . . or other lawful representative or, if such person is deceased or incapacitated, the person's spouse, parent, child, sibling, grandparent, grandchild, significant other, or other lawful representative." *See* Colo. Rev. Stat. § 24-4.1-302(1)(a),(1)(dd),(5) (2012)."
4. As a result, the Victims are afforded all of the rights in Colorado's VRA, the implementing legislation for Colorado's Constitutional Amendment for victims of crime:

Any person who is a victim of a criminal act, or such person's designee, legal guardian, or surviving immediate family members if such person is deceased, shall have the right to be heard when relevant, informed, and present at all critical stages of the criminal justice process. Colo. Const., Art. II § 16(a). *See also* Colo. Rev. Stat. § 24-4.1-302.5(1)(b) , (b.5).¹

5. "Critical stages" include, but are not limited to, "any hearing on motions concerning evidentiary matters or pre-plea or post-plea relief," "any subpoena for records concerning the victims' medical history, mental health, education, or victim's compensation," "any disposition of the complaint or charges against the person accused," "the trial," "any sentencing hearing," "any appellate review or appellate decision," and "the execution of an offender in a capital case." Colo. Rev. Stat. § 24-4.1-302(2)(e), (e.5), (f), (g), (h), (i), (s).

¹ The District Attorney's Office has standing to enforce the VRA on behalf of crime Victims and Witnesses and is required by the VRA to ensure that Victims are afforded the rights provided to them by Colorado law. *See*, Colo. Rev. Stat. § 24-4.1-303 (procedures for ensuring the rights of victims of crimes); Colo. Rev. Stat. § 20-1-102(1), (2009); (stating that the District Attorney has the general authority to appear and participate in proceedings to which the People of the State are party). *See also*, *People v. Spykstra*, 234 P.3d 662, 666-667 (holding that "as the prosecuting party, the District Attorney has an interest in the case's management, particularly in the prevention of witness harassment..."); *People v. Brothers*, 2013 CO 31, (May 28, 2013) ¶3 (holding that the District Attorney has standing to file motions to quash witness subpoenas, finding that "the District Attorney has an independent interest in ensuring the propriety of subpoenas...and avoiding witness harassment.").

6. Colorado precedent also holds that victims and victims' family members have constitutional and statutory rights to be present at all critical stages of the criminal justice process, including trial. *People v. Coney*, 98 P.3d 930, 935 (Colo. App. 2004) ("article II, § 16a of the Colorado Constitution and § 24-4.1-302.5, C.R.S. 2003, of the victims' rights act take precedence over CRE 615 regarding witness sequestration."); *see also Gansz v. People*, 888 P.2d 256, 258 (Colo. 1995); (while a victim's rights to be heard are limited, her right to be present is not).

7. In *Coney*, the trial court excluded the murder victim's father from the courtroom following his testimony. 98 P.3d at 935. The father was the People's first witness, and his testimony mainly covered identification of his daughter, the victim. The court of appeals disapproved the trial court's exclusion of the victim's father, holding that "[t]he mandate contained in article II, § 16a and § 24-4.1-302.5 permitted the victim's father to remain in the courtroom. CRE 615 does not provide authority for departing from the constitution and statute." *Id.*

8. Nationally, courts also hold that states' victims' rights acts and the federal crime victims' rights act grant substantive rights to victims guaranteeing victims the right to be present at critical stages and exempt from sequestration rules. *See e.g., State v. J.M.*, 941 So.2d 686, 693-694 (La. App. 3rd Cir. 2006) (rejecting a sequestration claim based on the fact that three incest victims were permitted to stay in the courtroom while each other were testifying); *Nicely v. State*, 733 S.E.2d 715, 719 (Ga. 2012) (holding that the statutory exemption from sequestration in the victims' rights act promotes legitimate state interests, namely the interest of the state in according to crime victims the same right to be present as the Constitution accords to the accused); *State v. Lyles*, 858 So.2d 35, 48 (La. App. 5th Cir. 2003) (finding that there was no error in the court's permitting the victims to remain in the courtroom while tapes of their prior statements were presented to the jury prior to their testimony); *Hernandez-Guerrero v. Commonwealth*, 617 S.E.2d 410, 412 (Va. App. 2005) (holding that victim-witnesses have statutory rights to be exempted from sequestration orders unless the victims' presence in court would impair the conduct of a fair trial); *State v. Uriarte*, 981 P.2d 575, 577 (Ariz. Ct. App. 1998) (concluding that "the statutes and rules read together are meant to allow the parent of a child to be declared a victim, and exercise all the victim's rights, including the right to be present during trial"); *United States v. Johnson*, 362 F. Supp. 2d 1043, 1054 (N.D. Iowa 2005) *aff'd in part*, 495 F.3d 951 (8th Cir. 2007) (holding that the victims' rights act expressly provides victims with a right not to be excluded from the proceedings, unless the court finds "by clear and convincing evidence" that the testimony of victims would be materially altered by hearing other testimony); *United States v. West*, 607 F.2d 300, 306 (C.A.Cal., 1979) (holding that crime victims' rights act abrogated Rule 615, at least with respect to crime victims, the court found that the mere possibility that a victim-witness may alter his or her testimony as a result of hearing others testify was insufficient to justify excluding him or her from trial);

People v. Meconi, 746 N.W.2d 881, 886 (Sawyer, J., concurring) (Mich. Ct. App. 2008) (concluding that victims' rights constitutional amendment granted the victim the right to be present at the entire trial to the same extent that the defendant had a right to be present, including the right to be present at portions of the trial that occurred before the victim testified, including opening statements).

b. Victims and victims' lawful representatives should be exempt from sequestration orders.

9. Colorado Rule of Evidence 615 provides for sequestration of witnesses "at the request of a party" "so that [the witnesses] cannot hear the testimony of other witnesses," however, the application of the rule is neither mechanical nor absolute. C.R.E. 615; *Coney*, 98 P.3d at 935.
10. "The purpose of a sequestration order is to prevent a witness from conforming his [or her] testimony to that of other witnesses and to discourage fabrication and collusion." *People v. Scarlett*, 985 P.2d 36, 41 (Colo. App. 1998), quoting *People v. Wood*, 743 P.2d 422, 429 (Colo. 1987) (internal quotation marks omitted).
11. Whether to sequester particular witnesses or not is "entrusted to the sound discretion of the trial court." *Scarlett*, 985 P.2d at 41, citing *People v. Gomez*, 632 P.2d 586 (Colo. 1981); see also *People v. Watkins*, 553 P.2d 819, 821 (Colo. 1976); *People v. Cohn*, 160 P.3d 336, 346 (Colo. App. 2007); *People v. Graham*, 53 P.3d 658, 663 (Colo. App. 2001); *People v. DeBoer*, 829 P.2d 447, 449 (Colo. App. 1991); *People v. Wieghard*, 727 P.2d 383, 386 (Colo. App. 1986).
12. Factors considered on appeal of trial court decisions permitting testimony of non-sequestered witnesses include: (1) whether the defendant was prejudiced; (2) whether there is evidence of fabrication or collusion; (3) whether there was any danger that the witness would conform his testimony to that of other witnesses; (4) whether there was any bad faith on the part of the prosecution in permitting the witness to be present during the testimony of other witnesses; (5) whether the witness's testimony is collateral to the primary issue of the defendant's guilt or innocence; (6) whether the prior or prospective testimony of witnesses was tainted; (7) whether the witness conversed with other witnesses; and (8) whether the defendant disputes the witness's testimony. *Wood*, 743 P.2d at 429-30, referencing *Gomez*, 632 P.2d at 594, *People v. Fecht*, 701 P.2d 161, 164 (Colo. App. 1985), and *People v. Wright*, 678 P.2d 1072, 1074-75 (Colo. App. 1984).
13. Other states have held that, if the testimony to be given by a non-sequestered witness is unrelated to the testimony overheard by that witness, there is no risk that the witness will "tailor" her testimony. *State v. Williams*, 960 A.2d 805, 813 (N.J. Super. 2008); *State v. Swinton*, 847 A.2d 921, 962 (Conn. 2004).

14. “A criminal defendant has no federal constitutional right to exclude witnesses from the courtroom.” *Williams*, 960 A.2d at 813, citing *United States v. Edwards*, 526 F.3d 747, 758 (11th Cir. 2008). “On the other hand, [victims have] constitutional right[s] to remain in the courtroom under...” victims’ rights amendments to state constitutions. *Id.*
15. “A public trial should mean just that. And those who have had their lives forever maimed and changed by violent acts are not only part of the public but also have a special standing to be present and to observe the system at work. . . . The rights of the accused are set out in the constitution and the rights of a victim should be given, if not equal, at least recognizable constitutional status. This will aid victims if and when their exclusion from the courtroom is sought.” *Williams*, 960 A.2d at 814 (internal quotation marks omitted)².
16. Federal courts exempt victim-witnesses from sequestration unless the defendant shows “by clear and convincing evidence that the witness's testimony would be materially altered if the victim heard other testimony at that proceeding.” *Edwards*, 526 F.3d at 758, quoting the federal Crime Victims’ Rights Act, 18 U.S.C. § 3771(a)(3) (internal quotation marks omitted).
17. When a defendant seeks to exclude from the courtroom victim-witnesses, who have statutory and constitutional rights to be present, the court should balance “the rights of all involved” and only sequester the victim-witnesses “if there is a belief that the testimony of the witness who is about to testify would materially affect the testimony of any of [the victim-witnesses].” *Swinton*, 847 A.2d at 962 (emphasis in original) (rejecting defendant’s claims that (1) “the trial court improperly elevated the victims’ rights amendment over his right to sequester witnesses” and (2) “the state should bear the burden of demonstrating that he was not prejudiced”). Here, there is no risk that any of the victim-witnesses’ testimony will be materially affected by overhearing the testimony of other witnesses. The victim-witnesses have all given prior written statements, which are available to the Defendant to use for impeachment in the event that a victim-witness’s testimony differs significantly from that of her statement. Additionally, the victim-witness’s may be cross-examined regarding the fact that they were permitted to be present in Court to listen to the proceedings prior to testifying.
18. Barring evidence of collusion or prejudice, it is within the court’s broad discretion to exempt witnesses from sequestration orders, especially where it is shown that a victim has need of a “supporting figure” under the circumstances. *Cohn*, 160 P.3d at 346; see also *State v. Dorton*, 617 S.E.2d 97, 102 (N.C. App. 2005) (court properly exempted 18 year old sexual assault victim’s mother from sequestration because of the victim’s need for a supporting figure); *People v. Whitman*, 205 P.3d 371, 378-79

² Quoting former New Jersey Attorney General’s testimony before the state legislature concerning the then-proposed, now-enacted victims’ rights amendment to the New Jersey Constitution.

(Colo. App. 2007) (court properly allowed teenage sister of testifying child-victim to sit beside the child-victim during her testimony because the child-victim was uncomfortable and needed emotional support).

c. The Defendant Does Not Have a Constitutional Right to Exclude Victims from Trial and His Right to a Fair Trial Will Not Be Implicated by the Victims' Presence.

19. The Defendant's constitutional rights under the Fifth and Sixth Amendments do not automatically require sequestration of victim-witnesses.
20. "The Confrontation Clause guarantees only *an opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *United States v. Owens*, 484 US 554, 559 (1988), quoting *Kentucky v. Stincer*, 482 U.S. 730, 739 (internal quotation marks omitted) (emphasis in original); *see also Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) ("trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination"). In fact, it is the very right of cross-examination that will permit the defendant to call to the jury's attention that a given victim-witness has been present during other testimony. This is a sufficient safeguard for the Defendant and the best way to balance the rights of all involved.
21. Further, the Sixth Amendment right to a public trial "does not guarantee the right to compel a private trial." *Gannett Co. v. DePasquale*, 443 U.S. 368, 382 (1979). The Defendant's right to a public trial is coextensive with the public's right to be present at criminal trials. *Press-Enter. Co. v. Super. Ct.*, 478 U.S. 1, 7 (1986). The Victims in this case and the victims' family members, as members of the public, have constitutional rights to be present at the critical stages of the criminal justice process.
22. Every federal appellate court which has addressed the question has held that defendants do not have a constitutional right to sequester witnesses. *See, e.g., Bell v. Duckworth*, 861 F.2d 169, 170 (7th Cir. 1988) (exclusion or separation of "witnesses until they testify is not a" requirement of due process); *supra* at ¶13 *Edwards*, 526 F.3d at 758; *Mathis v. Wainwright*, 351 F.2d 489, 489 (5th Cir. 1965) (denial of sequestration is not denial of constitutional rights); *see also United States v. Visinaiz*, 428 F.3d 1300, 1314-15 (10th Cir. 2005) (court properly allowed murder victim's son to remain in the courtroom after his testimony concluded).
23. State courts, likewise, have found no constitutional right to sequester witnesses. *See, e.g., Wheeler v. State*, 596 A.2d 78, 88 (Md. 1991) (state constitution does not contain "anything that might be seen as a right to limit those who may want to attend the trial); *Stephens v. State*, 720 S.W.2d 301, 303 (Ark. 1986) (no constitutional right to sequester victim-witness, especially since the "material parts of her testimony" "could not have been influenced by previous testimony"); *State v. Harrell*, 312 S.E.2d 230, 236 (N.C. Ct. App. 1984) ("Due process does not automatically require separation of

witnesses who are to testify to the same set of facts.”); *Rucker v. Tollett*, 475 S.W.2d 207, 208 (Tenn. Crim. App. 1971) (holding sequestration “raises no constitutional question”); *State v. Beltran-Felix*, 922 P.2d 30, 33 (Utah Ct. App. 1996) (holding victims’ rights legislation guaranteeing victims the right to attend trial did not violate defendant’s due process rights); *State v. Williams*, 960 A.2d 805, 813 (N.J. Super. Ct. App. Div. 2008) (“A criminal defendant has no federal constitutional right to exclude witnesses from the courtroom.”); *Landon v. State*, No. A-6479, 1999 WL 46543 at * 2 (Alaska Ct. App. 1999) (“[N]umerous courts have considered this issue and have concluded that a defendant has no constitutional right to exclude witnesses from the courtroom during the testimony of other witnesses. We see no reason not to follow the reasoning of these cases.”).

d. Public Policy Dictates that the Victims Be Present at Critical Stages of the Criminal Justice Process.


24. Victims have “the right to be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the entirety of the criminal justice process.” Colo. Rev. Stat. § 24-4.1-302.5(1)(a). It is the intent of the General Assembly that “all victims and witnesses are honored and protected by law enforcement agencies, prosecutors, and judges in a manner no less vigorous than the protection afforded criminal defendants.” Colo. Rev. Stat. § 24-4.1-301. Exclusion of victim-witnesses from critical stages would violate the victims’ rights to fairness, respect, and dignity. Victims whose lives have been forever altered by the murder of their loved ones and forever altered by injuries that have changed their lives immeasurably deserve to have access to the criminal justice process and they deserve to have their constitutional rights to be present at critical stages honored and protected by this court—in the same way that the Defendant’s rights are honored and protected by this Court.
25. The prevalent adoption of Victims’ Rights legislation illustrates the national effort to respect a victim’s right to be present at the trial of his or her attacker. See Douglas E. Beloof & Paul G. Cassell, *The Crime Victim’s Right to Attend the Trial: The Reascendant National Consensus*, 9 Lewis & Clark L. Rev. 481, 504 (2005) (A comparison of forty-one state and the National Victims’ Rights Act).
26. There is “broad” societal interest in “public proceedings” because they “vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct” *Press-Enter. Co.*, 464 U.S. at 509. If the victim-witnesses in this case are excluded from critical stages, they are excluded from witnessing the criminal justice system at work in this case—public policy and Colorado’s constitution and statutes demand more for Colorado’s victims of crime.

27. Experts in the field of victims' rights have come to a similar conclusion: "A crime is often a very significant event in the life of a victim, and the trial, too, may be extremely important. Victims deserve to see in person whether justice is being done." Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act*, 2005 B.Y.U. L. Rev. 835, 905 (2005). All critical stages of the criminal justice process in this case are essential to the healing process of the victims. Excluding the victim-witnesses would unjustly frustrate this process.
28. The rights afforded to victims by the VRA not only serve the needs and concerns of victims, but actively contribute to and improve the criminal justice system. *See* Colo. Rev. Stat. § 24-4.1-301 (cooperation of victims and witnesses "is imperative for the general effectiveness and well-being of the criminal justice system"). To exclude the victim-witnesses from any of the critical stages in this case would contravene both goals with no ostensible benefit.
29. The People request a hearing on the issues raised in this motion and a proposed order is attached to this motion.

WHEREFORE, the People respectfully move this Honorable Court to allow the victims and their lawful representatives to be present during all critical stages of the criminal justice process, including, but not limited to, pre-trial motions, trial, sentencing, and post-trial motions and to exempt the victims from sequestration.

Respectfully submitted,

GEORGE H. BRAUHLER,
District Attorney

By 
Deputy District Attorney
Registration No. 35892

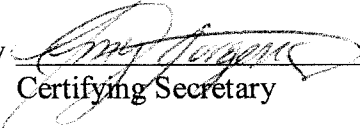
Case: 12CR1522
JAMES HOLMES

CERTIFICATE OF MAILING

I hereby certify that I have deposited a true and correct copy of the foregoing in the Public Defender's Mailbox located at 6450 S Revere Pkwy Centennial CO 80111, addressed to:

TAMARA BRADY, ESQ.
DANIEL KING, ESQ.
OFFICE OF THE PUBLIC DEFENDER

Dated: 5/31/13

By: 
Certifying Secretary

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THE PEOPLE OF THE STATE OF COLORADO vs. Defendant: JAMES EAGAN HOLMES	COURT USE ONLY
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COURT ORDER

RE: PEOPLE’S MOTION FOR VICTIMS TO BE PRESENT AT ALL CRITICAL STAGES OF THE CRIMINAL JUSTICE PROCESS AND TO BE EXEMPT FROM SEQUESTRATION [PEOPLE’S MOTION P-44]

THE COURT, having considered the prosecution’s motion, the response of the defense, and being duly apprised of the relevant facts and law, hereby ORDERS as follows:

1. The victims in this case have constitutional rights to be present at all critical stages including pre-trial motions hearings, trial, sentencing and post-trial motions hearings pursuant to Colo. Const., Art. II § 16(a) and Colo. Rev. Stat. § 24-4.1-302.5(1)(b), (b.5).
2. CRE 615 does not provide authority for departing from Colorado’s constitution and statutes.
3. Absent a particularized showing of undue prejudice that would violate the People’s and Defendant’s rights to a fair trial, the victims are exempt from sequestration and may be present at all critical stages of this case including, but not limited to, all pre-trial motions hearings, trial, sentencing and post-trial motions hearings.

Dated this ___ day of _____, 2013

BY THE COURT

 Honorable Carlos A. Samour, Jr.
 District Court Judge