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DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO Court Address: 7325 S. Potomac St. Centennial, CO 80112 --- **Plaintiff:** PEOPLE OF THE STATE OF COLORADO **vs.** **Defendant:** JAMES E. HOLMES and, **Non-Party Movants:** ABC, Inc.; The Associated Press; Cable News Network, Inc. ("CNN"); CBS News, a division of CBS Broadcasting Inc., and CBS Television Stations, Inc., a subsidiary of CBS Corporation; *The Denver Post*; Dow Jones & Company; Fox News Network, LLC; Gannett; KCNC-TV, Channel 4; KDVR-TV, Channel 31; KMGH-TV, Channel 7; KUSA-TV, Channel 9; *Los Angeles Times*; National Public Radio; NBCUniversal Media, LLC; The New York Times Company; The E.W. Scripps Company; Tribune Publishing Company, LLC; and *The Washington Post*	Filed JUN 03 2014 CLERK OF THE COMBINED COURT ARAPAHOE COUNTY, COLORADO ▲ 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. 12-CR-1522 Division: 22
MEDIA PETITIONERS' OPPOSITION TO DEFENDANT'S MOTION TO CLOSE VOIR DIRE [D-154a]	

Movants, ABC, Inc.; The Associated Press; Cable News Network, Inc. ("CNN"); CBS News, a division of CBS Broadcasting Inc., and CBS Television Stations, Inc., a subsidiary of CBS Corporation; *The Denver Post*; Dow Jones & Company; Fox News Network, LLC; Gannett; KCNC-TV, Channel 4; KDVR-TV, Channel 31; KMGH-TV, Channel 7; KUSA-TV, Channel 9; *Los Angeles Times*; National Public Radio; NBCUniversal Media, LLC; The New York Times Company; E.W. Scripps Company; Tribune Publishing Company, LLC; and *The Washington Post* (collectively, the "Media Petitioners"), by and through their undersigned counsel at Levine Sullivan Koch & Schulz, LLP, hereby respond in opposition to the Defendant's Motion [D-154a] asking the Court to close voir dire to the public, in which the People have joined, in part.

As grounds for their Opposition, the Media Petitioners state as follows:

1. Both the Defendant and the People have asked the Court to close to the public some or all of the voir dire. As demonstrated below, neither party has satisfied, nor can satisfy, the stringent First Amendment standard for such closure.

2. The Supreme Court held in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), that the First Amendment conveys an affirmative, enforceable right of public access to criminal proceedings, just as the right of association, right of privacy, right to travel, and right to be presumed innocent are implicit in other provisions of the Bill of Rights. *Id.* at 577 (Burger, C.J.). And, in *Press-Enterprise Co. v. Superior Court* (*Press-Enterprise I*), 464 U.S. 501, 508 (1984), the Court specifically extended this right to juror selection in a high profile criminal prosecution – there a capital murder case. The trial court in that case closed voir dire out of a concern that, "if the press were present, juror responses would lack the candor necessary to

assure a fair trial." 464 U.S. at 503. The Supreme Court reversed, observing that openness "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Id.* at 508.

3. Thus, it is firmly established that the public's right to attend voir dire is guaranteed by both the First Amendment to the U.S. Constitution, and by article II, section 10 of the Colorado Constitution. *See Press*-Enterprise *I*, 464 U.S. at 507; *Presley v. Georgia*, 558 U.S. 209, 211-214 (2010); *Star Journal Publ'g Corp. v. Cnty. Ct.* (*Star Journal*), 591 P.2d 1028, 1029-30 (Colo. 1979) (adopting ABA Standards of Criminal Justice, Fair Trial and Free Press, Standard 8-3.2 (1978) for closure of all criminal proceedings).

4. Accordingly, the entire voir dire process – from the Court's welcoming remarks and instructions/admonishments to the potential jurors in the courtroom, through the swearing of twelve jurors and twelve alternate jurors – is subject to a strong presumption of openness which

> may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

Press-Enterprise I, 464 U.S. at 510.

5. Before the public's right of access to voir dire may be restricted, those seeking closure must bear the burden of satisfying four distinct factors:

(1) Compelling Interest. No proceeding may be closed without express factual findings that public access is likely to harm a compelling governmental interest. *See, e.g.*, *Richmond Newspapers, Inc.*, 448 U.S. at 581; *Press-Enterprise I*, 464 U.S. at 510; *Press-Enter. Co. v. Super. Ct.* (*Press-Enterprise II*), 478 U.S. 1, 13-14 (1986).

(2) No Alternative. No portion of the voir dire may be closed unless the court expressly finds that no alternative to closure can adequately protect the threatened interest. *See Presley*, 558 U.S. at 213-14; *Press-Enterprise II*,

478 U.S. at 13-14; *Press-Enterprise I*, 464 U.S. at 511; *Star Journal*, 591 P.2d at 1030; *P.R. v. Dist. Ct.*, 637 P.2d 346, 354 (Colo. 1981). As the Supreme Court said, as recently as 2010, with respect to voir dire, "Trial courts are *obligated* to take *every reasonable measure* to accommodate public attendance . . . ." *Presley*, 558 U.S. at 215 (emphasis added).

(3) Narrow. If no adequate alternative exists, any closure order must be no broader than necessary to protect the threatened interest. *See, e.g., Richmond Newspapers, Inc.*, 448 U.S. at 581; *Press-Enterprise II*, 478 U.S. at 14. If a more narrowly tailored means of protecting the interest exists, it must be employed to limit any impact on the public's access rights. *See Press-Enterprise I*, 464 U.S. at 510.

(4) Effective. Any order *limiting* access must be effective. The public's rights must not be restricted for a futile reason. *See Press-Enterprise II*, 478 U.S. at 14 (party seeking secrecy must demonstrate "that closure would prevent" harm sought to be avoided); *Associated Press v. U.S. Dist. Ct.*, 705 F.2d 1143, 1146 (9th Cir. 1983) ("there must be 'a substantial probability that closure will be effective in protecting against the perceived harm'"); *People v. Sigg*, No. 13-SA-21 (Colo. Feb. 21, 2013) (en banc).

6. As demonstrated below, neither party has made any showing that would allow the Court to enter such findings.

7. To justify the extraordinary (indeed, unprecedented) closure of judicial proceedings they seek, both the People and the Defendant have argued, essentially, that there has never been another case, anywhere, like this one, i.e., an excessively highly-publicized mass killing in which the death penalty is being sought. With all due respect (and unfortunately), that simply is not the case. One need only look back 17 years, to the trials in U.S. District Court in Colorado of Timothy McVeigh and Terry Nichols, for murdering 168 innocents in Oklahoma City in 1995. McVeigh was tried, convicted, and sentenced to death (and subsequently executed). In *United States v. McVeigh*, the ***entire*** voir dire process was open to the public, with

the exception of challenges for cause which were heard in chambers.[1] In *McVeigh*, voir dire questioning commenced on March 31, 1997 and a jury was seated on April 23, 1997.

8. Indeed, the procedures employed by Judge Matsch in the *McVeigh* and *Nichols* cases are instructive: "On February 14, 1997, the district court sent out jury summons to hundreds of people living in the Denver area, notifying them that they had been randomly selected as potential jurors for the McVeigh trial. *The notification admonished its recipients to avoid publicity concerning the case* that might interfere with their ability to remain impartial." *United States v. McVeigh*, 153 F.3d 1166, 1180 (10th Cir. 1998) (emphasis added), *partially overruled on other grounds by Hooks v. Ward*, 184 F.3d 1206, 1227 (10th Cir. 1999).[2]

9. Furthermore, in *McVeigh*, the moment the summoned potential jurors arrived and completed their juror questionnaires, the court instructed them "beginning right now to *avoid any news reports of any kind or any communication or publication of any kind that concerns any issues related to the charges in this case*." 153 F.3d at 1181 (emphasis added).

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[1] *See, e.g.*, Jane Kirtley, *Hiding the Identity of Potential Jurors*, AM. JOURNALISM REV. (June 1997) ("Most of the juror questioning, or voir dire, was held in open court. But when attorneys challenged potential jurors for 'cause' . . . the matter was heard in closed sessions from which the press and public were barred."), *available at* http://ajrarchive.org/article.asp?id=1778. *But see Morris Publ'g Grp., LLC v. State*, --- So. 3d ----, 2014 WL 1665920 at *9-10 (Fla. Dist. Ct. App. Apr. 25, 2014) (holding that trial court's exclusion of public and press from purported "bench conferences" in which trial counsel exercised challenges for cause violated the First Amendment).

[2] "The notification [also] advised the potential jurors that '[t]here have been many things written and said about the explosion in Oklahoma City. Much of it may be speculation, rumor and incorrect information.' The notification further stressed the need for all potential jurors to be impartial and willing to base their decision solely on the law and the evidence. The notification concluded with a short, *preliminary questionnaire* which included a question asking if 'there is any ... reason that would prevent you from serving on this jury.'" *United States v. McVeigh*, 153 F.3d 1166, 1180 (10th Cir. 1998) (emphasis added).

10. Such prophylactic measures – specifically instructing all prospective jurors from the summons forward to avoid *all publicity* concerning the case – is a readily available "less restrictive means" to closing the voir dire to the public. Under the First Amendment test, before closing voir dire, the Court must enter a finding that such measures, as approved by the Tenth Circuit in *McVeigh*, are not adequate alternatives to closure.

I. THERE HAS BEEN NO SHOWING MADE THAT THE COURT'S OFFICIAL CONDUCT IN INSTRUCTING THE POTENTIAL JURORS CAN OR SHOULD BE CLOSED TO THE PUBLIC

11. Both the People and the Defendant have urged the Court to prohibit the public from observing the Court's (and the Jury Commissioner's) delivery of preliminary remarks, instructions, and admonishments to the potential jurors when they are first brought into the courtroom to receive the two-pocket folders and to complete the Jury Questionnaires. At the hearing on May 29, 2014, the Court indicated it was inclined to make a closed circuit television transmission of this portion of voir dire available for public viewing in another location within the courthouse, owing to space limitations in the courtroom. It should do so.

12. A fundamental reason the First Amendment guarantees the right of public access to judicial proceedings is to allow the public to observe the exercise of judicial authority,[3] which serves to hold judicial officers accountable, and to foster public confidence that the criminal justice system is administered fairly:

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[3] *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 592 (1980) (public access to criminal trials 'is an effective restraint on possible abuse of judicial power.'" (Brennan, & Marshall, J.J., concurring) (citation omitted)); *see also Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) (public access and press coverage "guard[] against the miscarriage of justice by subjecting the police, prosecutors, and *judicial processes* to extensive public scrutiny and criticism" (emphasis added)).

> The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.

Press-Enterprise I, 464 U.S. at 508 (citing *Richmond Newspapers, Inc.*, 448 U.S. at 569-71).

13. The only tendered justification for closing this portion of the voir dire, as articulated by the parties at the hearing on May 29, 2014, was that the jurors would purportedly feel intimidated or "chilled" merely by knowing that the court's instructions and admonishments are being observed in another remote location.[4] Such completely speculative and conjectural concerns about how potential jurors *may* respond to open judicial proceedings is, as a matter of law, an insufficient basis to overcome the public's First Amendment right to attend criminal trials. *See, e.g.*, *Star Journal*, 591 P.2d at 1030 (holding that a trial court's order closing judicial proceedings must be based "on more than mere conjecture and allegations."); *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995) (closure order cannot be based "on the basis of hypothesis or conjecture.").

14. Accordingly, there has been no showing that the Court's (and Jury Commissioner's) introductory remarks, instructions, and admonishments to the potential jurors should be closed to the public.

[4] Of course, Expanded Media Coverage is not permitted for any portion of voir dire; the closed circuit television signal cannot be broadcast or made available outside the courtroom where court personnel, using court equipment, will display it.

II. THERE HAS BEEN NO SHOWING MADE THAT INDIVIDUAL VOIR DIRE – OUTSIDE THE PRESENCE OF OTHER JURORS – CAN OR SHOULD BE CLOSED TO THE PUBLIC

15. Both the People and the Defendant have urged the Court to close to the public the portion of voir dire in which counsel will question jurors individually, outside the presence of other potential jurors in the courtroom, on the topics of hardship, the death penalty, and prior media exposure (and potentially, the insanity defense). The reason the People have stated for this request is that if the questioning of individual jurors were to be the subject of press reports, "all potential jurors" who would be summoned and/or questioned later in the day, week, or month(s), according to the People, "would be exposed to those questions in advance, and would learn how to answer the questions."

16. While a concern that subsequent potential jurors will read press reports about earlier voir dire proceedings, and thereby become "tainted" by exposure to that information may, as first blush, seem a legitimate concern, it falters on the application of the constitutionally-mandated test for closure: not only must the governmental interest asserted be of the "highest order," there must also be a *showing*, and a judicial *finding*, that no "less restrictive means" is available to adequately protect the asserted interest. *See Press Enterprise I*, 464 U.S. at 511 ("Absent consideration of alternatives to closure, the trial court could not constitutionally close the voir dire").[5]

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[5] As the Defendant notes, *In re Greensboro News Co.*, 727 F.2d 1320 (4th Cir. 1984), upon which he relies, D-154a at 9–10, ¶¶ 35-37, was initially decided prior to *Press-Enterprise I*. *Id.* ¶ 35. Although the court issued a supplemental opinion shortly after the issuance of *Press-Enterprise I*, that ruling has been criticized, and has never been cited by the Tenth Circuit. *See, e.g., ABC, Inc. v. Stewart*, 360 F.3d 90, 104 (2d Cir. 2004) ("*Greensboro* is of limited persuasive force because the Fourth Circuit's initial decision was handed down before *Press–Enterprise I*,

17. Here, there is one obvious and time-tested "less restrictive means" to avoid later-summoned and questioned jurors from being "exposed" to the earlier jurors' individual voir dire – a judicial admonition that no summoned juror is to read or watch any news reports of this proceeding. *See, e.g.*, *McVeigh*, 153 F.3d at 1180-81 (admonishment included in juror summonses); *see also* COLJI-Crim. No. C:10 (2008) (instruction to be delivered at the very outset of case, "Do not attempt to gather any information on your own. Do not engage in any outside reading on this case. . . . *do not read about the case in the newspaper, or obtain information about it from radio, television or any other media source*. . . . do not in any other way try to learn about the case outside the courtroom." (emphasis added)).

18. Although the Court has not yet publicly released the "script" of the introductory remarks it will deliver in person to all summoned jurors, it is reasonable to presume that those remarks will include an admonishment similar to the video-taped presentation shown to all jurors summoned for jury duty in Colorado:

> **You may not** conduct any independent research, **view or listen to media reports,** or access any information via the Internet or by any other means of research. You may not Google or conduct any Internet search **regarding this case, its participants, the type of case, definitions of words used in the courtroom, or any related subject matter.**

Colorado Jury Service Video, available at http://www.courts.state.co.us/Jury/ (follow "Colorado Jury Service Video" hyperlink).

19. Accordingly, even if the press *were* to devote any significant portion of their news coverage to the individual voir dire questioning,[6] to justify closure of the individual questioning

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and its supplemental opinion, written after *Press–Enterprise I*, did little to incorporate that decision's reasoning.").

[6] Although such press coverage is itself unlikely, it is also worth mentioning that Courts and attorneys involved in extremely "high-profile" cases, such as this one, have been prone to

for fear of cross-contamination outside the courthouse, the Court must make a finding that the potential jurors cannot be trusted to abide by such clear judicial admonitions.

20. And, if they cannot be trusted and *presumed* to abide by admonitions against viewing or reading any press coverage of individualized voir dire, then jurors must also be presumed to disobey admonitions to avoid all press reports throughout the trial. The only logical judicial response to such presumed conduct is a sequestered jury for many months. But, of course, to the contrary, our judicial system is premised on the opposite reasonable assumption – that jurors *do* abide by their oaths and *do* obey judicial admonishments to avoid press coverage and other information about the case outside of the courtroom.

21. Thus, the Court simply cannot make the necessary finding, that there are no "less restrictive means" to avoid the taint of subsequent jurors through media exposure to prior jurors' answers in individual voir dire. Because such tried-and-true "less restrictive means" exist and have not been *shown* to be inadequate, there is no constitutionally sound basis to close the individual *voir dire* to the public.

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greatly exaggerate their estimates of how closely members of the general public are monitoring press coverage of the case. *See, e.g.*, *Skilling v. United States*, 561 U.S. 358, 391 n. 28 (2010) (citing numerous cases where despite extensive pretrial publicity, court was able to seat an impartial jury, and noting that "[t]his may come as a surprise to lawyers and judges, but it is simply a fact of life that matters which interest them may be less fascinating to the public generally." (citing *United States v. Haldeman*, 559 F.2d 31, 62-63, n. 37 (1976))); *see also CBS, Inc. v. U.S. Dist. Ct.* (*United States v. DeLorean*) 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"); *McVeigh*, 153 F.3d at 1180-81, 1184 n.6 (noting that more than half of the potential jurors summoned were completely unaware of McVeigh's purported confession, despite ubiquitous press coverage about it only one month prior to jury selection).

III. THERE HAS BEEN NO SHOWING MADE THAT THE GENERAL VOIR DIRE (OF THE PANEL OF 68) CAN OR SHOULD BE CLOSED TO THE PUBLIC

22. The People oppose the Defendant's motion to close the general voir dire questioning of the panel "in the box" to the public, and so do Media Petitioners. The only rationale the Defendant has articulated for requesting to close this portion of voir dire is Defense counsel's claim the jurors may well be "worried 'Who's going to call me on the phone, or come knocking on my door" as a result of their responding to voir dire questioning in open proceedings (identified only by number, not name). Also, according to the Defendant's counsel, if jurors are required to give answers "in front of the entire world," in his estimation, "there's no possibility [they will provide] candid responses." *See also* D-154a at 7-8 (similarly asserting, without any evidentiary support, that jurors' ability "to speak freely and candidly with the parties . . . will not be possible if the world is watching.").

23. If such unfounded speculation about how potential jurors are "likely" to behave were a sufficient basis to justify closure, there would be no *presumption* of public access to judicial proceedings. *Cf. Presley*, 558 U.S. at 215 ("If broad concerns of this sort were sufficient to override [the] constitutional right to a public trial, a court could exclude the public from jury selection almost as a matter of course."). The same predictions of "chilling" of candor would apply with equal force to the trial witnesses, and, under Defendant's theory of human behavior, *all* trials would be presumptively closed to the public. Thankfully, however, that too is not the law. Indeed it is just the opposite, as the Supreme Court recognized in *Press-Enterprise I*:

> No right ranks higher than the right of the accused to a fair trial. But the primacy of the accused's right is difficult to separate from the right of everyone in the community to attend the *voir dire* which *promotes fairness.*

> . . . Openness . . . enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system. . . .

464 U.S. at 508 (emphasis added) (citation omitted); *see also Globe Newspaper v. Super. Ct.*, 457 U.S. 596, 606 (1982) ("Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process . . .").

24. Indeed, as the Court recognized, especially in cases such as this one, involving such a tragic loss of human life and widespread injuries afflicting an entire community, openness of jury selection not only promotes candor and honesty by prospective jurors, it also fulfills the important "therapeutic" value of public criminal proceedings more generally:

> Proceedings held in secret would deny this outlet and frustrate the broad public interest; by contrast, public proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct *by jurors fairly and openly selected.*

Press-Enterprise I, 464 U.S. at 509 (emphasis added).

25. Moreover, the Defendant's baseless prediction that *all* jurors will be "chilled" by having to respond to questions in open court, and will therefore not answer the counsel's questions frankly or candidly, is flatly refuted by Supreme Court precedent on this subject. For example, in *Globe Newspaper v. Superior Court*, 457 U.S. 596, the Supreme Court struck down as unconstitutional a state law that required closure of criminal proceedings during the testimony by minor victims of sex crimes. Precisely because the First Amendment will not tolerate blanket closure orders based on presumptions of trial participants being "chilled," the Court held, to pass constitutional muster, such determinations *must* be made on a case-by-case, individualized basis, even when considering testimony of minor victims of sexual assault. *See also ABC Inc. v. Stewart*, 360 F.3d 90, 102-03 (2d Cir. 2004) (holding that closure of voir dire in highly

publicized criminal case, based on presumption that jurors would not speak candidly if proceedings were open to the public, violated the First Amendment).[7]

26. Indeed, in *Press-Enterprise I*, the U.S. Supreme Court held, in a capital murder case, that even where the trial will address personal and sensitive subject matter, like the rape of a minor, the need for closure of voir dire must be made on a juror-by-juror basis, not by blanket presumption. In such circumstances, the Court held, trial judges should invite potential jurors to affirmatively request closed voir dire, *individually*, on particularly personal and private matters:

> The trial involved testimony concerning an alleged rape of a teenage girl. Some questions may have been appropriate to prospective jurors that would give rise to legitimate privacy interests of those persons. . . .
>
> [A] trial judge must at all times maintain control of the process of jury selection and should inform the array of prospective jurors, once the general nature of sensitive questions is made known to them, that those individuals believing public questioning will prove damaging because of embarrassment, may properly request an opportunity to present the problem to the judge *in camera* but with counsel present and on the record.

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[7] In *ABC, Inc. v. Stewart*, 360 F.3d 90, 100-101 (2d Cir. 2004), the Second Circuit summarized the district court's rationale for closing voir dire as follows:

> [M]embers of the media had shown an intense interest in the [Martha] Stewart prosecution, an interest beyond that exhibited in other high-profile cases and unprecedented in the district court's experience; that, in light of the extensive media coverage, which included editorial pronouncements of opinion about the underlying merits of the charges, many prospective jurors were likely to have prejudged the defendants; that it was essential for venire members to disclose any such preconceptions in order for the defendants to receive a fair trial; that there was a substantial risk that members of the media, if present at *voir dire* sessions, would disclose the names of prospective jurors in recounting the substance of the examinations; and that this possibility would inhibit venire members from giving full and frank answers to the questions posed.
>
> . . . [W]e conclude that these findings were not sufficient to establish a substantial probability that open voir dire proceedings would have prejudiced the defendants' right to an impartial jury.

By requiring the prospective juror to make an affirmative request, the trial judge can ensure that there is in fact a valid basis for a belief that disclosure infringes a significant interest in [juror] privacy. This process will minimize the risk of unnecessary closure.

27. *Press-Enterprise I*, 464 U.S. at 511-12 (emphasis added). *But see* D-154a at 8-9, ¶ 32 (asserting that use of the above approach, expressly endorsed by the Supreme Court, "would unfairly place the onus on prospective jurors to speak up about their feelings of discomfort" and would be "cumbersome and unworkable").[8]

28. Moreover, the Supreme Court has recognized that even when highly personal and sensitive issue areas are explored, a "less restrictive means" to closure of voir dire exists: The court can instead maintain the anonymity of the potential jurors so that their responses are not associated with them. *See, e.g.*, *Press-Enterprise I*, 464 U.S. at 513 (finding constitutional error where trial court judge had closed voir dire but had failed to "consider whether he could disclose the substance of the sensitive answers while preserving the anonymity of the jurors involved.") Here, the Court has announced that it "is inclined" to refer to the potential jurors in open court by number only, not by name, *see* 154a at 8, ¶ 30, a process that Colorado's Supreme Court has approved of on three occasions. *Id.* (citations omitted). Therefore, under *Press-Enterprise I*,

[8] Nor do any of the cases cited in D-154a provide support for Defendant's position. *Mississippi Publishers Corp. v. Coleman*, 515 So.2d 1163 (Miss. 1987), affirmed a closure of voir dire on grounds that the court's release of a transcript, after the jury was seated, was a sufficient substitute, rendering the closure order, in that court's view, merely a "time, place, and manner" restriction. *Id.* at 1166. This erroneous view of closure orders has been roundly rejected. *See, e.g.*, *Stewart*, 360 F.3d at 99-100 ("Documentary access in not a substitute for concurrent access . . ." (citations omitted)). In *Commonwealth v. Berrigan*, 501 A.2d 226 (Pa. 1985), despite Defendant's characterization, "[a]ll members of the press, without limitation as to numbers, were freely admitted" to observe voir dire. *Id.* at 231. And Washington's courts have recognized that *State v. Momah*, 217 P.3d 321 (Wash. 2009) was "*sub silentio* overruled" by *Presley v. Georgia*, 558 U.S. 209 (2010). *See State v. Slert*, 282 P.3d 101, 107 (Wash. Ct. App. 2012) (citing *State v. Paumier*, 230 P.3d 212, 219 (Wash. Ct. App. 2010)).

there is no basis to bar the public from observing the questioning of jurors, even as to potentially sensitive and personal questions, if their identities are not divulged in open court.

29. Similarly, even if there *were* any evidentiary support (which there is not) for Defendant's pure conjecture that prospective jurors may harbor fears that they may be subject to physical or other forms of personal harassment *outside* the courthouse as this Court has previously recognized, there exist a panoply of "less restrictive means" to adequately protect against such remote contingencies. *See* Order re: Media/s Motion to Unseal Redacted Information (Victims' Identities) (C-13) at 8 (recognizing that several criminal statutes and rules of court prevent witness tampering or intimidation, and therefore, the Defendant's requested sealing of witnesses' names "is not the only remedy, and may not be the best remedy, for the attested harm to, and harassment of, the victims and witnesses.").

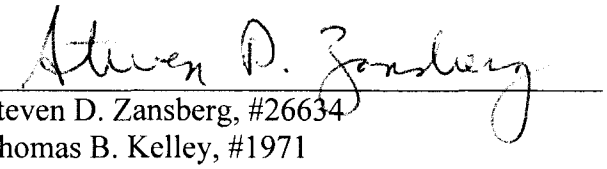
30. Accordingly, the Defendant has not made any showing that comes remotely close to satisfying the constitutional standard for closing the general voir dire to the public.

CONCLUSION

As demonstrated above, neither party has made the showing that would permit the Court to enter the findings constitutionally required to close any portion of the voir dire. Accordingly, the Court should deny the Defendant's motion to close the entirety of voir dire, and the People's and Defendant's joint request to close to the public the judge's instructions to the potential jurors and the individual voir dire.

Respectfully submitted this 3rd day of June, 2014, by:

LEVINE SULLIVAN KOCH & SCHULZ, LLP



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CERTIFICATE OF MAILING

I hereby certify that on this 3rd day of June, 2014, a true and correct copy of this **MEDIA PETITIONERS' OPPOSITION TO DEFENDANT'S MOTION TO CLOSE VOIR DIRE TO THE PUBLIC** was delivered via FACSIMILE to the attorneys below and was deposited in the U.S. Mail, postage prepaid, correctly addressed to the following:

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