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: **201**

ORDER REGARDING PEOPLE'S MOTION TO LIMIT THE PUBLIC DISPLAY OF SOME ADMITTED EXHIBITS, SPECIFICALLY AUTOPSY PHOTOGRAPHS, CRIME SCENE PHOTOGRAPHS CONTAINING IMAGES OF HOMICIDE VICTIMS, AND CRIME SCENE VIDEOS CONTAINING IMAGES OF HOMICIDE VICTIMS, AND TO LIMIT VIEWING TO THE PARTIES, TO THE COURT, AND TO THE JURY (P-118-B)

In Order C-137, the Court addressed two requests for expanded media coverage of the trial filed by numerous news media organizations (hereafter "the Media Organizations"). Both requests were opposed by the People and the defendant. The Court granted one request in part and denied the other request. Order C-137 at p. 2. Therefore, the Court allowed the Media Organizations to access the transmission from the Court's closed-circuit camera, but prohibited them from having cameras in the courtroom and from video recording or photographing any part of the trial. *Id.* at pp. 8-9, 26.

In Motion P-118, the People requested that the Court "order that photographs and videos taken during autopsies, at hospitals, and at the crime scene of homicide victims (collectively 'Graphic Images') be visible only to the jury, the Court, and the parties, but not to people seated in the public gallery and public gallery overflow rooms, and that the Graphic Images not be broadcast or disseminated in any manner other than to the parties, the jury, and the Court in this case for trial and any potential appellate purposes." Motion at pp. 1-2. The People proposed that the Court "allow the placement of a television viewing screen at the top of the square column next to the video-camera on that column," with "installation and equipment at the expense of the People through the direction of the Court, out of view of the public and the media." *Id.* at p. 2.

With the Court's permission, the People served a copy of their motion on Steven Zansberg, the legal representative of the Media Organizations. Zansberg later informed the People that his clients did not oppose the motion, and no other member of the media submitted an objection to the motion. Accordingly, the Court granted the motion. However, the Court noted that the People's proposal to install a screen at the top of the square column next to the closed-circuit camera in the courtroom was not feasible because the column is not sufficiently sturdy to hold a screen. Therefore, the Court indicated that it would have to find a different location in the vicinity of the camera for the installation of the screen.

On March 18, the Court informed the prosecution that it had looked into finding an alternate location for the installation of a screen that would allow the Court, the parties, counsel, and the jury, but not the public or the media, to view the Graphic Images. The Court explained that it had been unable to find an appropriate place for the screen and that all other options will present major logistical difficulties, greatly complicate the proceedings, and substantially increase the risk of error. In light of these obstacles, the Court gave the prosecution an opportunity to be heard further on why it is necessary to conceal the Graphic Images from the public and the media. The prosecution filed a supplemental motion titled "Pleading P-118-B."[1] The prosecution advances two reasons in support of its request: (1) to allow the family members of some of the deceased victims (hereinafter "family members")[2] to attend the proceedings without being exposed to the Graphic Images; and (2) to protect the privacy of the family members and their deceased relatives.

For the reasons articulated in this Order, the Court makes most, but not all, of the accommodations requested by the People. First, the Court will prohibit the

[1] After reviewing Pleading P-118-B, the Court conducted legal research to determine whether any other court had dealt with the issues raised in Motion P-118 and Pleading P-118-B in a homicide case. This Order reflects the results of that research.

[2] The "family members" do not encompass all of the deceased victims' relatives who qualify as victims in this case pursuant to the August 28, 2013 Order and Order D-181-A. The "family members" group also does not include the surviving victims and relatives of the surviving victims who qualify as victims under the August 28, 2013 Order and Order D-181-A.

broadcast of the Graphic Images. Second, the Court will bar the display of the Graphic Images on the largest screen in the courtroom. The Graphic Images will only be displayed on the screen that is farthest from the gallery and on the smallest screen in the Courtroom which is behind the jury and can only be seen from certain locations in the gallery. Third, the Court will make arrangements for all of the family members to attend the proceedings in an overflow room in which they will not be exposed to the Graphic Images. If this overflow room is not large enough, then, at the inconvenience of 16 other divisions in this Courthouse who conduct jury trials, the Court will convert the Jury Assembly Room into an overflow room where the family members may attend the proceedings without viewing the Graphic Images. Fourth, the public and the media will not be provided access to copies of any of the Graphic Images, and the Court will take precautions to eliminate the possibility of any recording of any kind being made while the Graphic Images are displayed. Fifth, the Court will prohibit the sketching of any of the Graphic Images. Sixth, the parties are ordered to advise the Court before the Graphic Images are introduced so that the Court may give a cautionary instruction to the family members. Finally, the Court will allow the family members time to leave the Courtroom following such an announcement.

However, because the People have not presented a compelling and overriding interest that outweighs the defendant's Sixth Amendment right to a

public trial and the public's and the media's right of access to the proceedings under the First Amendment, the Court denies the request to conceal the Graphic Images from public view. As the Court explains in this Order, there are several other significant concerns that militate against granting the relief requested. Not only do the People fail to address these concerns, they do not appear to have thought about them.

A. Allowing the Family Members to Attend the Trial Without Being Exposed to the Graphic Images

The Court has reviewed the family members' remarks. The Court appreciates all of the comments submitted.

At the outset, the Court wishes to clarify that it has never questioned the notion that viewing evidence can be more difficult than hearing about it. The Court understands that visual observations of evidence may be more traumatizing than listening to testimony. What the Court said to the prosecution is that if the family members understandably wish to avoid viewing the Graphic Images as a coroner testifies about the autopsy of a loved one, they likely will wish to avoid hearing similarly graphic testimony from the coroner about the observations and findings made during that autopsy. The Court made this statement because it knows from experience that the testimony of a coroner regarding an autopsy is

generally graphic and can be traumatic and difficult for the deceased's relatives. The Court stands by the comment it made.[3]

Nevertheless, after reading the family members' moving and heartfelt comments, the Court is persuaded that reasonable accommodations must be made to allow them to attend the proceedings without having to view the Graphic Images. While the Court felt compelled to make the aforementioned observation, the family members must be allowed to decide for themselves how to proceed. Therefore, the Court will prohibit the display of the Graphic Images on the largest screen in the courtroom, the only screen within view of the closed-circuit camera. This will allow the family members to be shielded from the Graphic Images while watching the closed-circuit transmission of the proceedings in an overflow room. The Court will also ensure that there is sufficient space in such overflow room to accommodate all of the family members.

B. The Family Members' Desire for Privacy

The Sixth Amendment of the United States Constitution states, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI. The right to a public trial is a fundamental right of a criminal defendant. Because the right to a public trial is "a

[3] When the Court made the comment in question, none of the prosecutors disagreed with it or took issue with it. This is not surprising. It is difficult to believe that an experienced trial lawyer would ever dispute that the graphic testimony of a coroner about an autopsy can be traumatic and difficult for the deceased's relatives.

structural requirement of the Constitution," it is "a structural right, such that Sixth Amendment errors are categorically exempt from harm analysis." *Pena v. State*, 441 S.W.3d 635, 642 (Tex. App. 2014) (quotation omitted). However, this right, while fundamental, is not inviolate. The United States Supreme Court has ruled that "the right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." *Waller v. Georgia*, 467 U.S. 39, 45, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984). But "[s]uch circumstances will be rare, [] and the balance of interests must be struck with special care." *Id.* "The party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." *Id.* at 48, 104 S.Ct. 2210.

Recently, the Kansas Supreme Court commented on a defendant's constitutional right to a public trial:

> ***One of the fundamental rights of a criminal defendant is his right to a public trial. Trial court proceedings are generally required to be open and public, and a public trial is one which is public in the ordinary, common-sense meaning of the term. A public trial is not solely a private right of the parties, but one involving additional interests, including those of the public.*** The concept of a public trial implies that doors of the courtroom be kept open and that the public, or such portion thereof as may be conveniently accommodated, be

> admitted, subject to the right of the court to exclude objectionable characters.

State v. Cox, 304 P.3d 327, 333 (Kan. 2013) (emphasis added) (quotation omitted).

The United States Supreme Court has also concluded "that the press and the public have a qualified First Amendment right to attend a criminal trial." *Waller*, 467 U.S. at 44, 104 S.Ct. 2210 (citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980)). This nation's history "in part reflects the widespread acknowledgement, long before there were behavioral scientists, that public trials had significant community therapeutic value." *Richmond Newspapers*, 448 U.S. at 570, 100 S.Ct. 2814. "[P]eople sensed from experience and observation . . . [that] the means used to achieve justice must have the support derived from public acceptance of both the process and its results." *Id.* at 571, 100 S.Ct. 2814.

In *Richmond Newspapers*, the Court addressed an order by the trial judge that closed a criminal trial to the public:

> ***When a shocking crime occurs, a community reaction of outrage and public protest often follows. Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion.*** Without an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful "self-help," as indeed they did regularly in the activities of vigilante "committees" on our frontiers. The accusation and conviction or acquittal, as much perhaps

> as the execution of punishment, operate to restore the imbalance which was created by the offense or public charge, to reaffirm the temporarily lost feeling of security and, perhaps, to satisfy the latent urge to punish.
>
> Civilized societies withdraw both from the victim and the vigilante the enforcement of criminal laws, but they cannot erase from people's consciousness the fundamental, natural yearning to see justice done—or even the urge for retribution. ***The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is done in a corner or in any covert manner. It is not enough to say that results alone will satiate the natural community desire for "satisfaction."*** A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted. ***To work effectively, it is important that society's criminal process satisfy the appearance of justice, and the appearance of justice can best be provided by allowing people to observe it.***

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

The Court in *Richmond Newspapers* aptly noted that "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Id.* at 572, 100 S.Ct. 2814. "The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that ***anyone*** is free to attend gives assurance that established procedures are being followed and that deviations will become known." *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984)

(emphasis in original). Hence, openness "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Id.* (citation omitted).

The Court wants to make clear that it sympathizes with the concerns of the family members. Their pain is almost palpable in their comments. The Court is also sensitive to the family members' desire to maintain their privacy and the privacy of their loved ones. One of the family members predicted that if one of the deceased victims were the undersigned's relative, the undersigned "would want to exercise every option to present graphic evidence to the jury alone." Pleading P-118-B at p. 5. She is absolutely correct. But that is precisely why this nation's system of justice will not allow a judge to preside over the trial of the murder of his own relative. A judge could not be objective, fair, and impartial, much less apply the law faithfully, in such a trial.

The prosecution argues that "it is difficult to remember that the criminal justice field desensitizes us—to a certain degree—and it is very easy to forget—and very difficult to understand—the great hardship that our work often causes others." *Id.* at p. 8. Be that as it may, as this Order demonstrates, the Court's ruling is not based on its desensitization and is not the result of thoughtlessness. Nor is it difficult for the Court to understand the family members' hardship and pain. To the contrary, the Court, not the prosecutors, observed that attending the

testimony of the coroners who conducted the autopsies of the family members' loved ones, even without being exposed to the Graphic Images, will be very difficult and may be traumatic.

The Court recognizes that the Media Organizations did not object to the prosecution's requests in Motion P-118. However, there is no guarantee that a different member of the media will not do so later, even during the trial. Zansberg certainly does not represent all media entities in the world. Nor does the media speak for all of the members of the public. Just because the Media Organizations chose not to object to Motion P-118 does not mean that a member of the public will not show up during the trial and demand, pursuant to his or her First Amendment rights, to view the Graphic Images as they are displayed in the courtroom. Neither the parties nor the Media Organizations have the authority to bind all members of the public to an agreement to conceal from public view the Graphic Images.

Regardless, the defendant has a fundamental right to a public trial under the Sixth Amendment. It is true that the defense did not object to Motion P-118 either, but the defendant has not executed a voluntary, knowing, and intelligent waiver of his constitutional right to a public trial. Nor have defense counsel waived such right on the defendant's behalf as a strategic decision in this case. And, in the end, the law imposes an independent duty on the Court to ensure this trial is public.

To conceal the Graphic Images from the public and the media would be to partially close the trial.[4] This is problematic. As another Court recently recognized, "ours is an open judicial system." *In re The Spokesman-Review*, 569 F. Supp. 2d 1095, 1105 (D. Idaho 2008). Closure of any part of the trial can only be justified by "a compelling interest that outweighs the lengthy history of public access to open court proceedings." *Id.*

Though the Graphic Images are disturbing, "they are direct evidence of the crimes and are necessary to the jury's consideration and must be presented to the jury." *Id.* Approximately 150 exhibits, including the silent 45-minute crime scene video, a significant item of evidence, comprise the Graphic Images. In other words, the partial closure sought by the prosecution is not insubstantial, even for a four-month trial that involves thousands of exhibits.

At least one Court has ruled that preventing the public and the media from watching graphic videos during a murder trial amounts to a partial closure of the trial. *Id.* In *In re The Spokesman-Review*, a capital case, the prosecution sought to prevent the public and the media from watching graphic videos during the trial. *Id.*

[4] On January 20, 2015, during a bench conference, the Court inquired about taking a very small portion of the testimony of Undersheriff Louie Perea at the bench outside the hearing of the public. The People objected on the ground that the trial must be open to the public, and requiring Perea to partially testify outside the hearing of the public would have been the equivalent of closing part of the proceedings. Later, during the same bench conference, as defense counsel made a particular request, the prosecution strenuously objected to the request being discussed outside the presence of the public because this is a public trial. The Court agreed with both of the prosecution's objections.

Although the Court was "sensitive to the family's interest in maintaining their privacy and the dignity of the victim," it concluded that such interest did not outweigh the public's and the media's right of access to the videos. *Id.* Therefore, the trial judge ordered that "the courtroom [would] remain open during the presentation of the videos in question." *Id.*[5]

It appears that in *In re The Spokesman Review*, the prosecution's request involved excluding the public and the media from the courtroom while the graphic videos were played. But there is no basis to believe that the Court's ruling would have been different if the partial closure sought by the prosecution had involved the specific procedure requested in this case. To the contrary, the Court explained that the proposed use of a less restrictive procedure did not alter its analysis. *Id.* at 1106. In response to a motion to reconsider, the Court indicated that it had considered and rejected the use of "reasonable time, place, and manner restrictions for the viewing of the video such as: limiting the number of representatives of non-trial/non-court participants and a limitation on the manner in which the video tape is presented." *Id.*

Notably, while the Court in *In re The Spokesman-Review* denied the prosecution's request to prevent the public and the media from watching the

[5] *In re The Spokesman-Review* was decided under the First Amendment, not the Sixth Amendment. However, "there can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public." *Waller*, 467 U.S. at 46, 104 S.Ct. 2210.

graphic videos shown during the trial, it granted the prosecution's request to close the courtroom during the testimony of the child victim and to subsequently provide a copy of the transcript of her testimony to the media. *Id.* at 1101, 1104. The Court explained that "[r]ecalling the details of the crimes in front of a group of disinterested peers [would] cause the minor victim . . . undue embarrassment, as well as psychological and possible physical harm." *Id.* at 1101. The child victim had experienced "multiple traumatic events . . . when she was eight years of age including the homicide of several family members, the abduction of she and her brother for several weeks during which time she and her brother were sexually assaulted and exploited, and the eventual murder of her brother." *Id.* In addition, "the minor victim suffer[ed] from ongoing and overwhelming concerns regarding [the] trial and further dissemination of information to the public regarding the substance of her testimony," and "her treatment providers [were] concerned about the re-exposure to the traumatic events that her testimony [would] require." *Id.* The Court concluded that "[t]hese concerns regarding the well-fare of the minor victim . . . [were] compelling" and outweighed the public's and the media's right of access. *Id.*

Thus, the decision in *In re The Spokesman-Review* highlights what type of compelling and overriding interest is required to outweigh the First Amendment's right of access and the Sixth Amendment's right to a public trial. The wishes of a

deceased victim's relatives for privacy, while completely understandable, are not sufficient to warrant partial closure of the trial as graphic images of the deceased victims are displayed in the courtroom.

In *Pena v. State*, 441 S.W.3d 635 (Tex. App. 2014), the Court implied that the private display of graphic autopsy photographs would have affected the defendant's fundamental right to a public trial under the Sixth Amendment. There, the defendant argued that his conviction for murder should be reversed because the trial court judge "failed to hold a public trial," as "it closed the drape over the courtroom's windows to block the public's view" when certain "graphic photographs from the autopsy" were introduced into evidence, "in violation of [his] rights under the Sixth Amendment to the United States Constitution." *Id.* at 642. The Court rejected the claim because the defendant failed to object "to the alleged closing of the trial to the public." *Id.* at 643. In the alternative, the Court ruled that, even if the issue had been preserved, the defendant "failed to demonstrate that his trial was closed to the public . . . or that the trial court did not accommodate public viewing of the trial." *Id.* According to the Court, the record did not show "what the impact of [the drapes'] closure would have been on anyone's ability to attend or view the proceedings inside the courtroom." *Id.* To the contrary, it appeared to the Court "that the drape in question, if it was closed, would merely have prevented photography or videotaping by persons outside the

courtroom, which would not have violated [the defendant's] Sixth Amendment rights." *Id.*

State v. Cox also provides guidance, although the Court acknowledges that it is factually different. There, the Kansas Supreme Court reversed the defendant's conviction because the trial judge "clear[ed] the courtroom during the testimony of [a witness], while her photographs of the victims' genitalia were displayed and discussed." *Cox*, 304 P.3d at 332. "As soon as the 'graphic images' were no longer displayed, members of the public were allowed back into the courtroom." *Id.* at 333. On appeal, the Court rejected the State's argument that the defendant had a duty to request specific findings related to the partial closure, noting that "[t]he judge's independent duty to ensure that a criminal defendant receives a fair trial is . . . well established." *Id.* at 334 (citation omitted). The Court added that "[a] defendant is not required to prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee." *Id.* (citations omitted). Rather, pursuant to United States Supreme Court precedent, "a public-trial violation [can] not be considered harmless error." *Id.* "Other courts have also held that, when the Sixth Amendment right to public trial has been violated, the harmless error rule does not apply." *Id.* (citations omitted). The Court in *State v. Cox* concluded that reversal was required because the partial closure of the courtroom during the trial "was not a 'minor violation[] of the public trial guarantee'." *Id.* (citation omitted).

The cases on which the prosecution relies are unpublished decisions, in some instances completely devoid of precedential authority, and are inapposite. In *United States v. Kaufman*, 2005 WL 2648070, at *2 (D. Kan. 2005), the Court allowed "sexually-graphic videos of mentally ill victims" to be "shown in a manner so that they [would] not [be] viewable by individuals in the gallery." However, the Court acknowledged that this procedure impacted the First Amendment right of access of the public and the press. *Id.* ("the trial has been completely open to the press and the public ***with the exception*** that sexually graphic videos of mentally ill victims are shown in a manner so that they are not viewable by individuals in the gallery") (emphasis added). The Court approved partial closure of the proceedings because it "was necessary to protect the victims' right to be treated with fairness and with respect for the victims' dignity and privacy" under the federal Crime Victims' Rights Act). *Id.* (quotation omitted). Unlike this case, at issue in *Kauffman* were graphic videos depicting sexual acts of misconduct being perpetrated by the defendants on their mentally ill patients. *Id.* at *1.

Tennessee v. Vandenburg is a state trial court decision with no precedential value. It also dealt with graphic exhibits of a sexual nature.

Lastly, the prosecution relies on an email purportedly sent by one of the prosecutors in the case involving Oscar Pistorius. As the prosecution concedes,

this email is related to a case from another country and has no precedential value here. Moreover, the email includes a single sentence that states that the parties agreed to "certain image prohibitions" based on that country's "criminal procedure act." No such "procedure act" exists in the United States, and, in any event, there is no indication that the restriction in Pistorius' case included allowing images to be shown at trial only to the lawyers, the parties, and the judge. The rest of the email addresses what images were allowed to be broadcast, an issue the Court has already addressed in this case.[6]

Significantly, the prosecution can point to no homicide case, let alone capital case, in the rich history of American jurisprudence in which a trial court has granted the relief it requests here. The Court's research unearthed no such case. At the hearing on March 18, this District Attorney's Office admitted that it has prosecuted hundreds of homicides in this Courthouse, but it has never once sought the relief it requests in this case.

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[6] The prosecution's reliance on other unpublished cases, Motion P-118 at pp. 5-6, is equally misplaced. In *United States v. Patkar*, 2008 WL 233062, at *2 (D. Haw. 2008), the Court denied a motion by the Associated Press for access to "materials that comprised the basis of the [charged] extortion [scheme]." Here, no copies of the Graphic Images will be accessible to the public or the press. In *State in Interest of KP*, 709 A.2d 315 (N.J. Super. Ch. Div. 1997), the Court denied a motion by the press to access juvenile court proceedings. Of course, this case does not involve juvenile proceedings. In *United States v. Robinson*, 2009 WL 137319, at *1-3 (D. Mass. 2009), the Court denied a newspaper's motion for disclosure of the identity of a victim who was subject to extortion after a sex-for-fee relationship. No such issue of identification is involved in the case at hand. Lastly, in *Gueits v. Kirkpatrick*, 618 F. Supp. 2d 193, 198 n.1 (E.D.N.Y. 2009), *rev'd on other grounds*, 612 F.3d 118 (2d Cir. 2010), the Court decided not to publish the victim's name in a court decision. Again, there is no issue related to the identification of a victim in this case.

Given the current state of the law, the Court is not willing to risk error, much less structural error, in this capital case by ordering the partial closure of the trial. This does not mean that the Court lacks respect for the family members' rights under the Victims' Rights Act or that the Court is refusing to enforce those rights. The August 28, 2013 Order and Order D-181-A, allowing the hundreds of victims in this case (including those who are not named in any counts) to be present throughout the trial and at every other critical stage in these proceedings, speaks loud and clear on this point. But the Victims' Rights Act does not grant victims of crime the right to partially private proceedings. It grants them "the right to be treated with fairness, respect, and dignity." § 24-4.1-302.5(1)(a) (2014). The Court will ensure that the Graphic Images will be displayed in such a way that the victims' rights to be treated with fairness, respect, and dignity will be fully observed and enforced at all times by everyone involved.

In any event, the Court's concerns do not end with the law. There are other significant concerns that the People have failed to address, including two that lead the Court to question whether the People have thought through carefully their request for partial closure.

First, the prosecution does not explain why the family members are entitled to a partially private trial, but the surviving victims are not. Nor does the prosecution represent that the surviving victims and their relatives (hereinafter "the

surviving victims") are not interested in having the procedure in question extended to them. The Victims' Rights Act applies equally to both groups—the family members and the surviving victims. Both groups are entitled to be treated with fairness, respect, and dignity. If the graphic photographs of the surviving victims' injuries do not necessitate the procedure at issue, then presumably neither do the Graphic Images.

Many of the photographs of the injuries sustained by the surviving victims are graphic. [redacted] The surviving victims will be on the stand as these photographs are displayed in all three screens in the courtroom. This will undoubtedly be very uncomfortable for them and may run contrary to their wishes regarding their privacy. There is no explanation in Motion P-118 or Pleading P-118-B as to why the prosecution is not concerned with these individuals' desire for privacy or why it has not asked that any of the photographs of their injuries be concealed from public view. If the Court were to grant the relief requested to the family members, it would have no basis to deny the same request by any of the surviving victims. Theoretically, at

some point, this could become a substantially private trial with large portions of it closed to the public and the media.

Second, there are hundreds of victims in this case, *see* August 28, 2013 Order and Order D-181-A, and the prosecution has not represented that all of the victims (including relatives of some of the deceased victims) agree with the relief sought in Motion P-118 and Pleading P-118-B. If even one victim wishes to view the crime scene video or any other exhibit within the Graphic Images during the trial, he or she is entitled to do so under the First Amendment and the Colorado Victims' Rights Act. Indeed, the Court has ruled that all of the victims have a constitutional right to attend all parts of the trial. *See* August 28, 2013 Order and Order D-181-A. Yet, if the Court grants the prosecution's request for a partial closure of the trial, and a victim were to subsequently come forward and demand to view the Graphic Images as they are displayed in the courtroom, the Court would have no way to effectuate that victim's right to attend all parts of the trial. That victim's rights under the First Amendment and the Victims' Rights Act would have to yield to the family members' wishes for privacy. The Court is not aware of any authority that allows it to arbitrarily choose among victims' conflicting wishes, much less that allows it to ignore the Victims' Rights Act, as interpreted in the

August 28, 2013 Order and Order D-181-A, in order to effectuate certain victims' desire for privacy.[7]

Third, even if the family members' desire for privacy were deemed to outweigh the defendant's right to a public trial and the public's and the media's right of access, the accommodations requested cannot be reasonably made. The logistics surrounding this trial—including security, accommodations for the public in the courtroom and elsewhere in the Courthouse, accommodations for prospective jurors in the courtroom and elsewhere in the Courthouse, audio equipment in the courtroom, the electronic presentation of evidence, the media's presence, etc.—are already extremely complicated and the space available in the courtroom is already very limited. Despite great effort, the Court was not able to find an appropriate place for a single screen that would satisfy the family members' wishes.

Further, all other options, including those advanced by the prosecution in Pleading P-118-B, present major logistical difficulties, greatly complicate the proceedings, and substantially increase the risk of error. Both of the prosecution's suggestions in Pleading P-118-B would reduce the already limited space in the courtroom and would require counsel and the defendant to turn their backs to the Court and the witness to watch the Graphic Images on the new screens. In other

[7] None of the cases on which the prosecution relies involved a large number of victims. Those cases are distinguishable on this additional ground.

words, as a witness testifies about the Graphic Images, counsel and the defendant would be required to constantly turn back and forth between the witness and the new screens.

Both proposals would also involve equipment that would temporarily block the Court's view of parts of the gallery, as well as the view that some people sitting in the gallery have of the proceedings, including the witness. Because some witnesses who testify about the Graphic Images are also likely to testify about other exhibits that are not included in the Graphic Images, the Court would be required to have an electronic system in place that would allow it to switch back and forth from the three screens already in the courtroom to the two new screens.

In sum, as much as the Court understands and respects the family members' desire for privacy, under the law, this is not a compelling and overriding interest that outweighs the defendant's constitutional right to a public trial or the public's and the media's right of access to open proceedings. Furthermore, there are several other concerns the People have failed to address. Therefore, the Court cannot make the accommodations requested. The Court is confident that, pursuant to the restrictions and provisions set forth in this Order, the public display of the Graphic Images, while not consistent with the family members' wish for privacy, will not interfere with their rights under the Victims' Rights Act to be treated with fairness, respect, and dignity in all judicial proceedings.

For all the foregoing reasons, the prosecution's requests in Pleading P-118-B are largely, but not entirely, granted. This Order supersedes Order P-118-A.

Dated this 24th day of March of 2015.

BY THE COURT:

Carlos A. Samour, Jr.
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2015, a true and correct copy of the **Order regarding People's motion to limit the public display of some admitted exhibits, specifically autopsy photographs, crime scene photographs containing images of homicide victims, and crime scene videos containing images of homicide victims, and to limit viewing to the parties, to the Court, and to the jury (P-118-B)** was served upon the following parties of record:

Karen Pearson
Christina Taylor
Rich Orman
Jacob Edson
Lisa Teesch-Maguire
George Brauchler
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Sherilyn Koslosky
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Daniel King
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