ITEM _____ SEARCH WARRANT, DECEMBER 26, 1996
DECEMBER 27, 1996
DECEMBER 29, 1996

COUNTY COURT, COUNTY OF BOULDER, STATE OF COLORADO
Search Warrants of 755 15th Street, City and County of Boulder, State of Colorado including the premises, a 1995 Jaguar 4 door with Colorado license plates #MAN8301 which is located in attached garage, a 1996 Jeep Cherokee utility vehicle with Colorado license plate #MAN5615 which is located in the attached garage, and the curtilage of the premises.

BRIEF IN SUPPORT OF MOTION FOR EXTENSION OF THE ORDER SEALING WARRANTS, AFFIDAVITS, RETURNS, INVENTORIES, AND OTHER DOCUMENTS SUBMITTED IN SUPPORT OF THE WARRANT

PEOPLE OF THE STATE OF COLORADO,

Plaintiff

vs.

755 15TH STREET, CITY AND COUNTY OF BOULDER, COLORADO,

Defendant

The People, through ALEXANDER M. HUNTER, DISTRICT ATTORNEY FOR THE TWENTIETH JUDICIAL DISTRICT, COLORADO, submit this brief in support of their motions for extension of the order sealing the warrants, affidavits, returns, inventories, motion for extension of time to return warrant, affidavit in support of motion to seal, and other documents submitted to this Court.

I. FACTUAL BACKGROUND

These motions involve documents associated with three search warrants issued in connection with the murder investigation of six year old Jonbenet Ramsey on December 26, 27, and 29, 1996. These search warrants have been executed and returns made. The documents associated with these warrants have been sealed at the request of the People, but the Court has scheduled a review on whether to extend the stay. The documents associated with these warrants contain much of the same supporting material and information.

This investigation is still in progress. Much of the evidence seized during the various searches is still being tested, examined, analyzed, and evaluated. No arrests have been made and no criminal prosecution has yet been initiated. The owners of the property subject to these searches have not been eliminated from suspicion. This case has drawn unprecedented local, national, and even international media interest and attention. It is the position of the Chief of the Boulder Police Department, who is responsible for this investigation, and the District Attorney, who will be responsible for any prosecution, that there should be no public

disclosure of the documents associated with these search warrants. Such disclosure would adversely impact the ongoing investigation and prematurely impact the privacy of people involved, and could pose a risk to the trial itself. The issue here is not whether these documents should ever be released to the press; rather the issue is when they should be released, and, more particularly, whether they should be released at this early investigatory stage.

Faegre & Benson LLP, on behalf of Boulder Publishing Company, Inc. (publisher of The Boulder Daily Camera) and the Denver Post Corporation (publisher of The Denver Post), submitted a petition for access to these warrants. Their arguments and authorities in support of public access submitted to this Court in their petition will be answered in this brief.

The documents associated with these warrants deal with a law enforcement investigation of the most serious kind. A little girl was killed and an intensive effort has been underway since to find, arrest, prosecute, and convict the person or persons responsible. Because this crime occurred in Boulder, the Boulder Police Department is responsible for this investigation, and the Boulder District Attorney will be responsible for any prosecution.

This Court has been called upon to assist in that investigation by reviewing applications for search warrants. Judicial review to determine the adequacy of the grounds for search warrants is part of our criminal justice system and serves the public purpose of placing the independent magistrate between the police, who are responsible for ferreting out crime, and the privacy interests of those who might be sources of information relevant to crime. The fact that the Court serves that role and the fact that documents related to that role are returned to the Court do not change the investigatory posture of this case. The Court does not serve an adjudicatory role, comparable to presiding at trial, in reviewing the affidavit, approving the warrant, or receiving the return.

It is often the case that soon after a search warrant is executed, an arrest is forthcoming or the investigation is quickly terminated.[1] Also, it is rarely the case that there is intense

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[1] The two local district court orders unsealing such records, attached to the petition of the Daily Camera and the Post, are not on point here because neither involves an ongoing investigation. Smika was a case in which no charges were being considered and it was the suspect who sought to seal the records to protect his privacy, not the prosecution to protect an ongoing investigation. In King, the defendant had been charged and the investigation was for practical purposes complete. The Court acknowledged that the documents "may be sealed to protect ongoing investigations." King, 19 Media L. Rptr. at 1248. The concern after charges had been

media attention focused on the normal search warrant situation. As a result, there is usually no need to seal the documents associated with search warrants because there is usually little danger to an ongoing investigation resulting from filing with the Court the documents associated with warrants.[2] The fact that this case does not meet these normal experiences does not mean that there is no reason to seal the documents related to the searches involved here, nor does it mean that the burden for sealing such records is unduly great; it merely confirms the greater sensitivity and complexity of this case in comparison with less drawn out and less publicized investigations, and therefore the greater need to seal.

II. THE CRIMINAL JUSTICE RECORDS ACT

The right to access public criminal justice records has been codified in Colorado. §24-72-301, *et seq.* In particular, §24-72-305 (1) & (5), C.R.S. expressly provide that the custodian of criminal justice records may decline access to such records

> "[o]n the ground that disclosure would be contrary to the public interest, and unless otherwise provided by law, the custodian may deny access to records of investigations conducted by or of intelligence information or security procedures of any sheriff, district attorney, or police department or any criminal justice investigatory files compiled for any other law enforcement purpose."

"Criminal justice records" are defined to mean "all books, papers, cards, photographs, tapes, recordings, or other documentary materials, regardless of form or characteristics, which are made, maintained, or kept by any criminal justice agency in the state for use in the exercise of functions required or authorized by law or administrative rule." §24-72-302(4), C.R.S. The documents involved here are easily within this definition, and there is no provision of law which requires their disclosure.

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filed was protecting the fairness of the trial, which the Court believed could be accomplished through other means besides sealing search warrant documents. King 19 Media L. Rptr. at 1250. Other means are not available to protect an ongoing investigation.

[2] The more common concern once charges are filed or the investigation is discontinued is the effect of public disclosure on the privacy of the people whose property is involved and of the people who are mentioned in the affidavits as targets or as witnesses and the effect of disclosure on the fairness of the trial. These interests are also present during the investigatory stage, but so too is the integrity of the investigation itself, which may no longer be so vulnerable at later stages after charges have been filed, when the major investigation is usually completed.

"Criminal justice agency" is defined to include "any court with criminal jurisdiction" in addition to any agencies which "perform any activity directly relating to the detection or investigation of crime; the apprehension, ... [or] prosecution" of "accused persons or criminal offenders." §24-72-302(3), C.R.S. This definition includes both the court and the police department.

It is important to bear in mind that this Court is within this definition in two capacities: as a criminal court, but also as an agency performing an activity directly relating to the detection or investigation of crime. This court's role to date has been in the review and approval of the warrants requested by the police in pursuit of its criminal investigation, not in any adjudicatory function.[3] In addition, it is important to bear in mind that all of the documents submitted to this Court were prepared by the police as part of its investigation. To the extent those documents or the records from which those documents were prepared are still in the control of the police department, neither the public nor the press has access to them.[4]

The Court of Appeals has said, "Section 24-72-305(5), C.R.S. [] expressly exempts disclosure of police intelligence information or police investigatory files." Based on that exemption, the Court upheld the district court finding that "the police had a legitimate interest in avoiding disclosure of investigations of potential criminal conduct not ripe for prosecution." Prestash v. City of Leadville, 715 P. 2d 1272, 1273 (Colo. App. 1985) (cert. denied)(upholding denial of portions of police records to the individual involved in the ongoing investigation).

Based on this explicit statutory exemption to the generally applicable right of public access, these criminal justice records should remain sealed because of the on-going investigation into this serious homicide, the decision of the Boulder Police Department and the District Attorney that the public interest in

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[3] This is not meant to denigrate the significance of the Court's role in warrant approval; it is merely meant to distinguish that role from the more formal and more public role normally played by the Court in adjudicating disputes based on testimony and documents submitted as evidence in open court.

[4] Once again, this is not meant to denigrate the importance of submitting a return along with the warrant and other associated documents to the court; it is merely meant to emphasize that when the source of information is keeping that information confidential for reasons deemed significant in the exercise of its professional expertise, the recipient of that information should at least give serious deference to that judgement when requested to preserve that confidentiality, especially when the investigation is not complete.

this investigation requires confidentiality, and the limited, albeit significant, role of the Court with these investigatory documents.

III. ACCESS TO COURT PROCEEDINGS AND RECORDS UNDER THE FIRST AMENDMENT AND THE COMMON LAW.

The United States Supreme Court has decided a number of cases addressing the right of the press and public to court proceedings and documents. It has not yet applied the principles from these cases to documents associated with search warrants, although many lower courts have.[5] A brief review of these Supreme Court cases is important for the proper application of the principles and to fully understand the cases dealing with search warrant documents. In addition, such a review is important because several of these cases were cited in a cursory way, suggesting broader holdings than were in fact handed down, in the petition filed by counsel for the Daily Camera and the Post.

In Nixon v. Warner Communications, Inc., 435 U.S. 589, 98 S.Ct. 1306 (1978) the Court recognized a qualified common law right to inspect and copy judicial records and documents in the context of a press request for audio tapes of conversations of President Nixon which had been introduced in criminal trials of his former advisers. The petitioners wanted to copy the tapes for broadcasting and sale to the public. The trial court denied the request, in part because of the risk of mass merchandising to the defendants' rights on appeal. The Supreme Court upheld that denial of access.

The Court recognized a common law right of access to judicial records based on the public interest in the workings of public agencies and the operation of government. The Court also recognized, however, that the right of access is not absolute and access could be denied when court files might become a vehicle for improper purposes. Nixon, 98 S.Ct. at 1312. The decision on access was "best left to the sound discretion of the trial court, a discretion to be exercised in the light of the relevant facts and

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[5] In reviewing this background material, the Court might keep in mind the recent comment of a federal district court in its decision denying the petition of the New York Times, NBC, and the Denver Post to unseal search warrant documents in the Unabomber case. Despite the legal firepower of these great representatives of the news media, the Court said, "It is instructive to note that in every case relied upon by the Petitioners, the ultimate result of the case was that the search warrant materials remained sealed during the early stage of criminal investigations." In Re Documents Relating to Kaczynski, 24 Media L. Rptr. 1700 (U.S. Dist. Ct. Montana, April 10 1996) ("Kaczynski") (attached to Court's copy at tab 1).

circumstances of the particular case." Id. The Court also concluded that neither the First Amendment nor the Sixth Amendment required access to the tapes themselves, as opposed to requiring access to the trial. Nixon, 98 S.Ct. at 1317-18.

In Gannett Co, Inc. v. DePasquale, 443 U.S. 368, 99 S.Ct. 2898 (1979), the Court upheld a trial court ruling closing the hearing on a motion to suppress. The Court emphasized the risk to a fair trial posed by adverse publicity. "To safeguard the due process rights of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity." Gannett, 99 S.Ct. at 2904, citing Sheppard v. Maxwell, 384 U.S. 333 86 S.Ct. 1507 (1966). The Court also said that "because of the Constitution's pervasive concern for these due process rights, a trial judge may surely take protective measures even when they are not strictly and inescapably necessary." Id.

The Court noted the "special risks of unfairness" presented by pretrial suppression hearings. The whole purpose of such hearings is "to screen out unreliable or illegally obtained evidence and insure that this evidence does not become known to the jury" and [p]ublicity concerning the proceedings at a pretrial hearing, however, could influence public opinion against a defendant and inform potential jurors of inculpatory information wholly inadmissible at the actual trial." Gannett, 99 S.Ct. at 2905. The Court said the danger of publicity at such a pretrial stage "is particularly acute, because it may be difficult to measure with any degree of certainty the effects of such publicity on the fairness of the trial." Id. This was because steps which are possible to protect fairness during the trial itself, such as sequestration, are not available or effective at a pretrial setting.[6] "Closure of pretrial proceedings is often one of the most effective methods that a trial judge can employ to attempt to insure that the fairness of a trial will not be jeopardized by the dissemination of such information throughout the community before the trial itself has even begun." Id.

The Court held that the Sixth Amendment right to a public trial only protected the defendant, not the public or the press. Despite the public interests served by open court procedures, other public interests also were important: "The pubic, for example, has a definite and concrete interest in seeing that justice is swiftly and fairly administered." Id. The Court said that any First Amendment right of the press and public to attend the proceeding were satisfied because the trial court considered their interests and based denial of access on competing societal interests and because the closure to access was only temporary in that a transcript was made available once the danger to a fair trial had

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[6] Such measures are even less available during the investigatory phase, before charges have even been filed.

dissipated. Gannett, 99 S.Ct. at 2911-12.

In contrast, in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 100 S.Ct. 2814 (1980), the Court held in a series of concurrences that absent overriding interests articulated in findings, the First Amendment protected the right of the public and the press to attend criminal trials. The plurality opinion only addressed "overriding interests" to point out that the trial court had not considered the availability of alternative means of protecting the fairness of the trial, such as sequestering witnesses or the jury, or the right of the public to attend. Richmond, 100 S.Ct. at 2829.

For like reasons, in Globe Newspaper Company v. Superior Court, 457 U.S. 596, 102 S.Ct. 2613 (1982), the Court held that a statute which provided for the exclusion of the public from the trial during the testimony of child victims of sexual assault violated the First Amendment. This right of access to the trial was based on the history of open trials and based on the particularly significant role in the functioning of the judicial process and the government as a whole played by access to the trial. Globe, 102 S.Ct. at 2619. However, the Court said that the right of access even to the trial is not absolute. Access to the trial itself can still be barred, despite the First Amendment interests involved, when necessitated by a compelling governmental interest and when narrowly tailored to serve that interest. Globe, 102 S.Ct. at 2620. The Court found the state interest in protecting the minor victim from further trauma and embarrassment to be compelling, but held that a mandatory closure for such testimony in all trials was not justified. Globe, 102 S.Ct. at 2620-21. As the issue presented by Justice Brennan for the Court, Globe, 102 S.Ct. at 2615, and the concurrence of Justice O'Conner, Globe, 102 S.Ct. at 2622, both demonstrate, the holding effected only access to the criminal trial itself. *See, also*, Press-Enterprise Company v. Superior Court, 464 U.S. 501, 104 S.Ct. 819, 824 (1984) ("Press-Enterprise I") (treating voir dire as the beginning of the trial so "the presumption of openness can only be overcome by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.")

Finally, in Press-Enterprise Company v. Superior Court, 478 U.S. 1, 106 S.Ct. 2735 (1986) ("Press-Enterprise II"), the Court reversed the order denying press access to transcripts of the preliminary hearing in a criminal prosecution. The 41 day proceeding had been closed at defendant's request as necessary to protect his right to a fair and impartial trial. The Court concluded from its prior cases on the right of access to criminal proceedings that two considerations were necessary to deciding whether the qualified First Amendment right attached to a particular part of the criminal process: (1) "whether the place and process have historically been open to the press and general

public" and (2) "whether public access plays a significant positive role in the functioning of the particular process in question." Press-Enterprise II, 106 S.Ct. at 2740. These considerations led the Court to conclude that the qualified First Amendment right of access applied to the preliminary hearing.

These cases demonstrate two very distinct lines of analysis with regard to judicial records and procedures. In those circumstances subject to the common law approach of Nixon, the trial court has discretion to deny access through balancing the competing interests.[7] In those circumstances subject to the First Amendment right of access, openness is presumed, but access can be denied under the compelling interest\narrowly tailored analysis. The determination of which approach applies is made through the two considerations from Press-Enterprise II.

IV. APPLICATION OF THESE PRINCIPLES TO SEARCH WARRANTS AND ASSOCIATED DOCUMENTS IN THE PRE-INDICTMENT, INVESTIGATORY STAGE

Most courts which have applied the Press-Enterprise II test, including one circuit court and three state Supreme Courts, have concluded that there is no First Amendment right of access to such documents at the investigatory stage because, historically, search warrants have been handled in secret and because the investigation would be hindered, not assisted, by public access to the information associated with the warrant, but that there is a common law right of access. *E.g.*, Baltimore Sun Company v. Goetz, 886 F2d 60 (4th Cir. 1989) (tab 2); Seattle Times v. Eberharter, 713 P. 2d 710 (Wash. 1986)[8] (tab 3); Newspapers of New England v. Clerk-Magistrate, 531 N.E. 2d 1261 (Mass. 1988)[9] (tab 4); State v.

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[7] In Colorado, the "common law" has been superseded by the Criminal Justice Records Act. The common law and statutory approaches may often be the same; however, the Act expressly exempts disclosure of police intelligence information or police investigatory files because of the legitimate interest in avoiding disclosure of investigations of potential criminal conduct not ripe for prosecution. §24-72-305(5); Prestash, 715 P. 2d at 1273. This exemption at least shows a strong legislative recognition in favor of denying access of records which have their source in a criminal investigation which is not yet completed, especially when the responsible law enforcement agency objects to disclosure.

[8] Seattle Times predates Press-Enterprise II but applies the same test by deriving it from Justice Brennan's concurrence in Richmond Newspapers. Seattle Times, 713 P. 2d at 713.

[9] The Massachusetts Court held that good cause existed for impounding the affidavit prior to any suppression hearing as well as prior to indictment.

Cummings, 546 N.W.2d 406 (Wis. (1996) (tab 5); In the matter of the Search of Flower Aviation of Kansas, Inc., 789 F.Supp. 366 (D.Kan. 1992) (tab 6); In re The Macom Telegraph Publishing Co., 900 F.Supp. 489 (M.D. Ga. 1995) (tab 7); In the Matter of the Search of Eyecare Physicians of America, 910 F.Supp. 414 (N.D. Ill. 1996) (tab 8), aff'd. 100 F.3d 514 (7th Cir. 1996); In the Matter of the Search of Office Suites for World and Islam Studies Enterprise, 925 F.Supp. 738 (M.D. Fla 1996) (tab 9). One circuit court has concluded that there is neither a First Amendment right nor a common law right of access. Times Mirror Company v. United States, 873 F.2d 1210 (9th Cir. 1989) (tab 10). Finally, one circuit court concluded that there is a First Amendment right of access, but the compelling interest of the investigation justified sealing. In Re Search Warrant for Secretarial Area Outside Office of Gunn, 855 F.2d 569 (8th Cir. 1988) ("Gunn") (tab 11)

Regardless of the approach adopted,[10] however, the published decisions which have considered the right to access to search warrant documents returned to the court while the investigation is continuing and where the prosecution objects have uniformly denied access.[11] *See, e.g.*, Kaczynski, (in which the Court noted the

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[10] It is instructive that the Denver Post and the Boulder Camera only cited one of these three influential circuit court opinions -- Gunn -- and then only for the holding that the First Amendment applied and they do not mention the more significant holding that sealing was proper despite the application of the First Amendment because of the compelling state interest in the integrity of the ongoing investigation, which could not be met by any other means than keeping the documents confidential. Gunn, 855 F.2d at 574.

[11] The Daily Camera and the Post cited several cases in their string cite on page 3 of their petition in support of the lengthy quotation from Gunn concerning the First Amendment right of access. None of these cases supports release of these records. Gunn resulted in sealing the records and will be discussed below. In Re New York Times was post arrest, and therefore not in the investigatory stage, and the defendant, not the prosecutor, wanted the documents sealed. In Re Search Warrants Issued on June 11, 1988, the Court ordered those portions of the documents sealed which the prosecution requested be sealed based on compelling interests in the ongoing investigation and privacy rights of individuals. In Re Search Warrant for Second Floor Bedroom was a 1980 case which predated, and therefore did not apply the analysis required by, Press-Enterprise II. Fenstermaker involved a request for arrest warrant affidavits after charges had been filed, so the investigatory phase was over; nonetheless the Court recognized the discretion of the trial court to seal in order to protect the fairness of the trial. Schaefer also involved a request for arrest warrants after the defendant had been arrested and arraigned, so

uniformity with which the ultimate result was sealing such documents prior to indictment.) The case law is consistent with the legislative determination in the Criminal Justice Records Act in exempting these records of ongoing law enforcement investigations from public access. This conclusion is also consistent with the admonition of the Supreme Court in another context that "[t]he right to speak and publish does not carry with it the unrestrained right to gather information." Zemel v. Rusk, 381 U.S. 1, 17, 85 S.Ct. 1271, 1281 (1965) quoted in Eberharter, 713 P. 2d at 712.

In Gunn, the Eighth Circuit linked the search warrant process to trial because returns are filed with the court, because of the importance of public understanding of the judicial process and the criminal justice system, and because search warrant are integral to the trial because suppression issues are often crucial.[12] Nonetheless, the court held that sealing such records met the compelling state interest/least restrictive means test of the First Amendment. It stated:

> The government has demonstrated that restricting public access to these documents is necessitated by a compelling government interest -- the ongoing investigation. These documents describe in considerable detail the nature, scope and direction of the government's investigation and the individuals and specific projects involved. ... There is a substantial probability that the government's on-going investigation would be severely compromised if the sealed documents were released.

Gunn, 855 P. 2d at 575. The decision in Gunn is that such documents may have to be released as they become relevant to filed charges and the trial, but they do not have to be released during the investigation because of the compelling state interest in the

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the interest for sealing was the fairness of the trial, not protecting the investigation. Cowles Publishing, a 1981 case, adopted procedures for application of the common law approach, recognizing that "indiscriminate disclosure of these records may unnecessarily embarrass the subject of an unfruitful search, may allow a suspect to escape or destroy evidence, and may discourage informants from providing information or for fear for their safety and well-being" and that "in some cases justice will not be served by public access." None of these cases is authority for the application of current doctrine for the sealing of search warrant documents during the ongoing investigation.

[12] This reasoning in Gunn has been rejected by the two circuits and the state high courts which have addressed the issue since. Most if not all published district court decisions also reject Gunn's approach.

investigation itself. As shown by subsequent decisions of other courts, the Eighth Circuit did not properly distinguish the investigatory phase from later trial proceedings for purposes of deciding whether the First Amendment right of access applied at all. It did, however, give proper weight to the significance of the public interest in confidentiality during the investigation.

The Fourth Circuit in Baltimore Sun and the Ninth Circuit in Times Mirror rejected the reasoning on the First Amendment in Gunn, and both held that "the press does not have a First Amendment right of access to an affidavit for a search warrant." Baltimore Sun, 886 F.2d at 64-65. Both courts relied on prior Supreme Court decisions recognizing "that proceedings for the issuance of search warrants are not open," but are rather "necessarily *ex parte*, since the subject of the search cannot be tipped off to the application for a warrant lest he destroy or remove the evidence" and a "warrant application involves no public or adversary proceeding." Id; Times Mirror, 873 F.2d at 1214.[13] The Court reasoned that such documents "may describe continuing investigations, disclose information gleaned from wiretaps that have not yet been terminated, or reveal the identity of informers whose lives would be endangered." Id.[14]

The Ninth Circuit also emphasized U.S. Supreme Court authority for the fact that "[t]he investigation of criminal activity has long involved imparting sensitive information to judicial officers who have respected the confidentialities involved." Times Mirror, 873 F.2d at 1214, quoting United States v. District Court, 407 U.S. 297, 320-321, 92 S.Ct. 2125, 2138 (1972). The Court said:

> The process of disclosing information to a neutral magistrate to obtain a search warrant, therefore, has always been considered an extension of the criminal investigation itself. It follows that the information disclosed to the magistrate in support of the warrant request is entitled to the same confidentiality accorded other aspects of the criminal investigation. Both the magistrate in granting the original sealing order and the

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[13] Both courts also acknowledged that the fact that in many cases warrant materials may not be sealed does not mean that this is demanded by the First Amendment or that they can never be sealed. Baltimore Sun, 886 F.2d at 64; Times Mirror, 873 P. 2d at 1214 & 1217 ("[T]he fact that search warrants and supporting affidavits are often filed with the district court without seal -- merely describes a practice in cases where the government presumably believes secrecy is unnecessary."

[14] The Fourth Circuit also acknowledged that "the need for sealing affidavits may remain after execution and in some instances even after indictment." Baltimore Sun, 886 F.2d at 64.

district court in reviewing such orders have necessarily been highly deferential to the government's determination that a given investigation requires secrecy and that warrant material be kept under seal.

Times Mirror, 873 F.2d at 1214. The Court also noted in this regard the trial court's finding "that the government's interest in completing its criminal investigation far outweighed the public's interest in obtaining the warrant materials while the investigation was ongoing." Id. at n.6.

The Ninth Circuit also found the request for access to fail under the second prong of Press-Enterprise II. It said that any legitimate interests in public access "are more than outweighed by the damage to the criminal investigatory process that could result from open warrant proceedings. In our view, public access would hinder, rather than facilitate, the warrant process and the government's ability to conduct criminal investigations." Times Mirror, 873 F.2d at 1215. The Court concluded that secrecy is necessary to avoid jeopardizing the criminal investigation because if "the supporting affidavits were made public when the investigation was still ongoing, persons identified as being under suspicion of criminal activity might destroy evidence, coordinate their stories before testifying, or even flee the jurisdiction." Id. For like reasons, the Ninth Circuit held that "the ends of justice would be frustrated, not served, if the public were allowed access to warrant materials in the midst of a pre-indictment investigation into suspected criminal activity," thereby rejecting the claim of a common law right of access as well. Times Mirror 873 F.2d at 1219.[15]

Different courts have listed different ways in which premature release of the information associated with search warrants could negatively impact the effort to find and convict the perpetrator. The cases cited above have mentioned risks such as: (1) destruction of evidence; (2) tailoring statements based on the information revealed; (3) revealing witnesses and thereby placing them in danger or discouraging further cooperation; (4) identifying targets; (5) disclosing the scope, direction, or methods of investigation; (6) flight; (7) revealing evidence known by police; (8) revealing information which may be mistaken, untrue, irrelevant, or inadmissible; and (9) unnecessarily or prematurely embarrassing the subject of an unfruitful search. The courts have recognized that various combinations of such risks could compromise the investigation, undercut successful prosecution, and lead to

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[15] The Court also said that finding no qualified right of access "relieves the government of the considerable burden of responding on a case-by-case basis to actions such as these brought during the middle of an ongoing investigation." Time Mirror, 873 F.2d at 1217 n.8.

unfairness to either innocent people or to the trial itself.

The following lessons can be drawn from the published cases: (1) that the search warrant process is different from other court procedures more directly connected to the trial; (2) that that process has historically been secret, like the rest of the police investigation; (3) that the investigation could be negatively impacted in many ways if forced into the public eye; (4) that the preliminary nature of the probable cause determination raises risks to the fairness of the trial in that evidence appropriate to support a warrant or the evidence found as a result of the warrant may not be admissible at trial, but could improperly influence the fact-finder if published prematurely, and that such a risk should be avoided at least until a defendant is charged and can defend his/her interests; (5) that alternatives such as sequestration, voir dire, or change of venue may protect the fairness of the trial for disclosure during trial, but that such alternatives are not necessarily available or effective at earlier stages, particularly during the investigation itself; and (6) that sealing of search warrant documents, especially during the phase prior to charging and perhaps thereafter, is a temporary, not a permanent, step which is appropriate to protect the investigation itself, and that the public interest in having the information in order to oversee the criminal justice system does not require immediate access to such information but will be satisfied in due time.

V. CONCLUSION

The professional opinion of the Boulder Police and the District Attorney, the exception for records dealing with law enforcement investigations in the Criminal Justice Records Act, the court created doctrine on access to such records, the holdings of the relevant cases, and the unique circumstances of this serious investigation all support continuing to seal all the documents associated with the search warrants in this case.

It is respectfully requested that the Court seal all documents associated with the search warrants in this case for the pendency of the investigation or until the matter can be reviewed after charges are filed.

Dated: February 18, 1997

Respectfully Submitted,
ALEXANDER M. HUNTER, DISTRICT ATTORNEY
TWENTIETH JUDICIAL DISTRICT

By: William F. Nagel

William F. Nagel, No. 10,625
Appellate Chief Deputy District Attorney
P.O. Box 471
Boulder, CO 80306
(303) 441-4772

CERTIFICATE OF MAILING

I hereby certify that on February 18, 1997, a true and accurate copy of this BRIEF IN SUPPORT OF MOTION TO SEAL SEARCH WARRANT DOCUMENTS was placed in the U.S. Mail, postage prepaid, addressed to:

Thomas B. Kelly
FAEGRE & BENSON LLP
2500 Republic Plaza
370 Seventeenth Street
Denver, CO 80202-4004

William F. Nagel