SUPREME COURT, STATE OF COLORADO 2 East 14th Ave., Denver, Colorado 80203	
Original Proceeding Pursuant to C.A.R. 21 El Paso County Dist. Court, Case No. 2015CR5795 Honorable Gilbert Martinez, Chief Judge	DATE FILED: February 16, 2016 4:49 PM
In re: People v. Robert Lewis Dear, Jr. **PETITIONERS**: ABC, Inc; The Associated Press; Cable News Network, Inc. ("CNN"); CBS News, a division of CBS Broadcasting Inc., and KCNC-TV, owned and operated by CBS Television Stations Inc.; Colorado Broadcasters Association; Colorado Freedom of Information Coalition; Colorado Press Association; Colorado Springs Independent; The Denver Post; Dow Jones & Company; First Look Media, Inc.; Fox News Network, LLC; Gannett Co., Inc.; The Gazette; KDVR-TV, Channel 21; KKTV-TV, Channel 11; KMGH-TV, Channel 7; KRDO-TV, Channel 13; KUSA-TV, Channel 9; KWGN-TV, Channel 2; NBCUniversal Media, LLC; The New York Times Company; The Reporters Committee for Freedom of the Press; Rocky Mountain PBS; The E.W. Scripps Company; TEGNA, Inc.; Tribune Media Company, and the Washington Post Company, and **RESPONDENTS**: District Court for the Fourth Judicial District of Colorado (the Hon. Gilbert Martinez, Chief Judge, presiding).	▲**COURT USE ONLY**▲
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THE HONORABLE GILBERT MARTINEZ'S ANSWER TO ORDER AND RULE TO SHOW CAUSE

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains 7,944 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

> In response to each issue raised, the appellee must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1 and C.A.R. 32.

/s/ Grant T. Sullivan

GRANT T. SULLIVAN, 40151*
Assistant Solicitor General

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Respondents, the District Court for the Fourth Judicial District of Colorado and the Honorable Gilbert Martinez ("Chief Judge Martinez"), hereby submit this Answer to Order and Rule to Show Cause as follows:

INTRODUCTION

Robert Lewis Dear, Jr. was arrested for killing three people and wounding nine others at a Planned Parenthood clinic in Colorado Springs. Two dozen media entities ("Petitioners") moved to unseal the affidavits of probable cause supporting the warrant application, despite that the criminal investigation remained ongoing and no preliminary hearing had occurred. Petitioners here have abandoned the most straightforward means of obtaining the warrant records—claims under the Colorado Criminal Justice Records Act ("CCJRA") and common law. They seek instead to establish broad federal and state constitutional rights to inspect sealed court records.

Petitioners' requested relief is unprecedented in Colorado, is contrary to the great weight of the case law, and would undermine the CCJRA and Chief Justice Directive 05-01, as well as the important supervisory powers of the trial courts to protect ongoing criminal investigations and the privacy rights of victims and witnesses. This

Court need only decide the narrow issue of whether a constitutional right protects Petitioners where a criminal investigation remains ongoing, no preliminary hearing has occurred, and disclosure would violate the privacy rights of victims and witnesses. Because no such right exists, the rule should be discharged. As other trial courts have done in other high-profile murder cases, Chief Judge Martinez will continue to revisit the issue of access as the case progresses, and he may release the records to the press at a more appropriate time.

STATEMENT OF ISSUES

1. Should a new First Amendment right be recognized to guarantee members of the media a right to inspect sensitive judicial records?

2. Does the First Amendment's "experience and logic" test include a right to inspect affidavits of probable cause when a criminal investigation is ongoing?

3. Should a new right be recognized under article II, section 10 of the Colorado Constitution guaranteeing members of the media a right to inspect sensitive judicial records?

STATEMENT OF THE CASE

I. Nature of the Case, Course of Proceedings, and Disposition Below

The Motion to Unseal the Search Warrant Records. In late November, at the request of the People, El Paso County Court Judge Stephen J. Sletta entered orders sealing the search warrant, arrest warrant, and the supporting affidavits in this matter. Ex. A. The People's request to seal stated that "[i]f the information supporting this Search Warrant were to be released, it could jeopardize the continuing investigation, apprehension of suspect(s), and subsequent prosecution of same." *Id.*

Petitioners filed a forthwith motion with the trial court on December 17, 2015 to unseal the affidavits of probable cause. Pet'n Ex. 5. Their motion sought access to the affidavits on four grounds: (1) the federal constitution's First Amendment; (2) article II, section 10 of the Colorado Constitution; (3) the common law; and (4) the CCJRA, section 24-72-301, *et seq*., C.R.S. Pet'n Ex. 5, pp. 4-5. Petitioners have abandoned their common law and CCJRA arguments in this Court, and now rely only upon the federal and state constitutions as bases for inspecting the affidavits of probable cause. *See* Pet'n.

The defendant, Mr. Dear, filed a response through the public defenders' office objecting to the public release of the affidavits of probable cause. Pet'n Ex. 6. The response argued that the media and public have no First Amendment right to access court records; rather, the right to inspect court records is governed by the common law and the CCJRA. Pet'n Ex. 6, p. 2 (citing *Nixon v. Warner Comm'ncs, Inc.*, 435 U.S. 589, 597 (1978)). Applying those laws, Mr. Dear's counsel argued that the risks of prejudicial pretrial publicity outweighed the media's right to inspect the affidavits. Pet'n Ex. 6, p. 3.

The Order by Chief Judge Martinez. Chief Judge Martinez held a hearing on Petitioners' motion on December 23, 2015.[1] *See* Ex. B (hearing transcript). After extensive argument by Petitioners' counsel, Chief Judge Martinez inquired of the People whether a criminal investigation remained ongoing. *Id.*, p. 36, ll.7-8. The People responded, "There is still ongoing investigation. We are gonna leave this to the discretion of the Court and defense counsel." *Id.*, p. 36, ll.9-11. The

[1] At the same hearing, Mr. Dear requested that he be allowed to represent himself. Chief Judge Martinez ordered that Mr. Dear undergo a competency evaluation to determine whether his waiver of counsel is voluntary, knowing and intelligent. Ex. B, p. 14, ll.8-22. The results of the competency evaluation are expected on or about February 24, 2016.

People requested, however, that three topic areas remain sealed "[i]f the Court does grant the motion to unseal[.]" *Id.*, p. 36, l.12. Specifically, the People asked that unreleased victim names not be disclosed; that details of victim wounds not be released due to "HIPAA rights or doctor-patient rights"; and that details of the ongoing investigation not be disclosed. *Id.*, p. 36, l.24 – p. 37, l.18.

On December 30, 2015, Chief Judge Martinez issued a written order denying Petitioners' motion to unseal the affidavits of probable cause. Pet'n Ex. 7. Conducting a statutory analysis under the CCJRA, Chief Judge Martinez balanced the competing interests of the public's right to inspect the affidavits against the danger of compromising the ongoing criminal investigation. *Id.*, p. 2. He also weighed the privacy interests of the witnesses and victims whose names had not yet been publically released, and the fact that the one-month-old case was in its earliest stages. *Id.* He also considered the past practice of other trial courts, concluding that motions to unseal of this type are normally granted "after the preliminary hearing or waiver of the preliminary hearing and only after the investigation has been completed." *Id.*, p. 3; *see also* Ex. B, p. 31, l.20 – p.32, l.2 (Petitioners' counsel acknowledging

in open court that affidavits were released in *Holmes* and *Cox* cases after preliminary hearing occurred or was waived); Pet'n Ex. 6, p. 4 (public defender's response in opposition detailing how affidavits in the *Holmes* and *Cox* cases were released after the preliminary hearings occurred or were waived). Chief Judge Martinez emphasized, however, that he would "revisit the issue as the case progresses." Pet'n Ex. 7, p. 3.

Media Access to Information about this Case. Although he denied access to the affidavits for the time being, Chief Judge Martinez has accommodated other media requests in this high-profile case. He granted expanded media coverage for certain court hearings, Ex. C, and he permitted two cameras in the courthouse's public hallways as a matter of course. Ex. D, p. 2. He also facilitated the creation of a designated media camera area at the entrance to the El Paso County Judicial Complex. *Id*., p. 3.

After the hearing on December 23, 2015, Mr. Dear telephoned from the jail one of the Petitioners, KCNC-TV. *See* Ex. E. He discussed with a reporter both his competency and events from the day of the shooting, November 23, 2015. KCNC-TV published and televised the details of its interview with Mr. Dear. *Id.*

II. Statement of Facts

The factual background section contained in the Petition for Rule to Show Cause, pages 9 to 11, adequately summarizes the underlying factual allegations.

SUMMARY OF ARGUMENT

The rule should be discharged.

I. Petitioners first assert that the First Amendment to the United States Constitution grants a right to inspect sensitive judicial records in criminal cases. But no precedent from this Court supports Petitioners' claimed right of access to criminal court *records*; this Court's cases instead address the very different right of access to court *proceedings*.

The lack of support for Petitioners' claimed First Amendment right fits the jurisprudence of the United States Supreme Court, which has held that the press's right to access judicial records is rooted in the more limited common law, not the First Amendment. *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978). But Petitioners here do not rely on this common law right, and that alone is sufficient to discharge

the rule. *See People v. Czemerynski*, 786 P.2d 1100, 1107 (Colo. 1990) (stating arguments not raised in opening brief are deemed waived).

Even if Petitioners could rely on the common law right of access, that right is not absolute. *Nixon*, 435 U.S. at 598. It is subordinate to the trial court's inherent supervisory power over its own files. *Id*. This case, like other high-profile murder cases, demands deference to this inherent power, which will allow Chief Judge Martinez to revisit the request to unseal the warrant records after the criminal investigation has concluded and as this case proceeds.

II. Petitioners' second argument—that the affidavits of probable cause should be released under the First Amendment's "experience and logic" test—also fails. As the great majority of courts recognize, neither prong of that two-pronged test is met for affidavits of probable cause.

First, affidavits of probable cause have not historically been open to the press or general public; for obvious reasons, *ex parte* search warrant proceedings necessarily require confidentiality so as to not tip off the targets of the warrants. The need for confidentiality after the search warrant is executed is also critical where, as here, a larger criminal investigation remains ongoing.

Second, recognizing a First Amendment right of public access would harm the functioning of the search warrant process for three reasons. One, it would compromise the integrity of ongoing investigations. Two, mandating public access would have the deleterious effect of causing the government to become selective in deciding what information it inserts in affidavits of probable cause. This would limit the flow of information to duty judges, impeding their ability to accurately assess probable cause. Three, public access would harm the legitimate privacy interests of witnesses, victims, and suspected persons who are ultimately shown to be uninvolved in criminal activity. These persons all risk embarrassment and damage to their reputations by the media attention that comes with public access to the affidavits.

III. As a final matter, Petitioners seek to use the Colorado Constitution's article II, section 10 to create a new constitutional right for the media to inspect sensitive court records. This Court, however, has never recognized such a constitutional right. And doing so now would upset the comprehensive statutory and administrative

frameworks that currently exist for releasing judicial records to the public under the CCJRA and Chief Justice Directive 05-01.

IV. If this Court rules in favor of Petitioners and recognizes constitutional rights of access to sealed criminal court records, it should remand this case for further findings, allowing the trial court to consider the new guidance contained in this Court's opinion.

ARGUMENT

I. Petitioners' attempt to create a new constitutional right under the First Amendment should be rejected.

Petitioners first contend that members of the media possess a broad First Amendment right to access court records in cases involving matters of public concern. They assert this Court has recognized such a right for more than fifty years. Pet'n, pp. 17-22. Petitioners' argument should be rejected because it misconstrues this Court's precedents and is contrary to the case law from the U.S. Supreme Court and other jurisdictions.

A. Standard of Review and Preservation.

Whether particular conduct or expression is subject to the protection of the First Amendment presents a question of law that is

reviewed de novo. *Cotter v. Bd. of Trustees of Univ. of N. Colo.*, 971 P.2d 687, 690 (Colo. App. 1998) (citing *Kemp v. State Bd. of Agric.*, 803 P.2d 498 (Colo. 1990)). Petitioners preserved their First Amendment argument in their motion to unseal the affidavit of probable cause. Pet'n Ex. 5, p. 5.

B. This Court has never recognized a First Amendment right to inspect sealed court records.

Petitioners cite decisions of this Court, suggesting that it has already recognized their claimed First Amendment right of access to court records. But those decisions are inapposite—they involve either claims under irrelevant *statutes* rather than the First Amendment or they involve the very different setting of public access to court *proceedings* rather than court *records*.

The Court in *Times-Call Publishing Co. v. Wingfield*, 159 Colo. 172, 410 P.2d 511 (1966), addressed a question of *statutory* interpretation involving access to court records under the section delineating county officers' duties (now codified at § 30-10-101(1)(a), C.R.S.). Petitioners make no claim under this statute and nowhere did

Wingfield determine that the media enjoys a constitutional right to inspect court records.

Petitioners' other cases all concern open access to court *proceedings*, not records. *See People v. Sigg*, No. 2013SA21 (Colo. Feb. 21, 2013) (unpublished order addressing closure of preliminary hearing); *P.R. v. District Court*, 637 P.2d 346, 353 (Colo. 1981) (addressing First Amendment right "in the context of trials"); *Star Journal Publishing Corp. v. Cnty. Court*, 197 Colo. 234, 238, 591 P.2d 1028, 1030 (1979) (determining when trial court may close pretrial hearing). A different analytical framework applies in cases involving access to court proceedings. *See United States v. Hickey*, 767 F.2d 705, 709 (10th Cir. 1985). While the First, Sixth and Fourteenth Amendments guarantee that criminal proceedings with be conducted in the open, *see, e.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980), these constitutional rights do not extend to sealed court records.

Petitioners' reliance on the *ABA Standards for Criminal Justice Relating to Fair Trial and Free Press* faces the same problem. Those standards have never been used in Colorado to provide access to court

records; they have been invoked only to provide access to court proceedings. *See Star Journal Publishing Corp.*, 197 Colo. at 237, 591 P.2d at 1030; *Stapleton v. District Court*, 179 Colo. 187, 191, 499 P.2d 310, 311 (1979). Petitioners cite no case where the ABA standard is invoked as the governing law for access to sealed court records. Chief Judge Martinez's research likewise reveals no case *anywhere* using the ABA standard to grant access to sealed court records.

C. The U.S. Supreme Court and other jurisdictions have rejected a First Amendment right for members of the media to access court records; any such right is governed by the more limited common law.

The reason this Court has not recognized a First Amendment right to inspect Court records is that the U.S. Supreme Court has declined to do so. Instead, the U.S. Supreme Court has held that members of the media, like the general public, possess a more limited *common law* right "to inspect and copy records and documents, including judicial records and documents." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978) (footnotes omitted); *see id.* at 608-09 (rejecting media's argument that First Amendment's guarantee of freedom of the press mandates release of Watergate tapes). Petitioners

do not make a claim under the common law; they have therefore waived any claim under the Supreme Court's jurisprudence in this area. *See Czemerynski*, 786 P.2d at 1107.

But even assuming Petitioners may rely on federal cases like *Nixon*, their right of public access under the common law "is not absolute." 435 U.S. at 598. "Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes." *Id.* For example, the *Nixon* court emphasized that the common law right of inspection is subordinate to the power of the court to prevent private spite or public scandal from being broadcast "through the publication of the painful and sometimes disgusting details of a divorce case." *Id.* (internal quotations omitted). Accordingly, because of its fact-bound nature, whether to permit access to court records is committed to the "sound discretion of the trial court." *Id.* at 599; *see* § IV.A, *infra* (discussing why trial court's decision was not an abuse of discretion).

The Tenth Circuit has confirmed the lack of a broad First Amendment right to inspect criminal court records. In *United States v. Hickey*, the Tenth Circuit rejected the same argument Petitioners make

now, refusing to equate open access to court *proceedings* with open access to court files. 767 F.2d 705, 709 (10th Cir. 1985). The court explained that *Nixon* "remains the only decision by the Supreme Court directly dealing with the more narrow issue of access to court files." *Id.* *See also United States v. McVeigh*, 119 F.3d 806, 811-12 (10th Cir. 1997) (stating, "Although we have held that there is at least a common law right of access to court documents, we have not previously decided, nor do we need to decide in this case, whether there is a First Amendment right to judicial documents.").

And in *Lanphere & Urbaniak v. Colorado*, the court declined a law firm's commercially motivated request for the names and telephone numbers of persons charged with misdemeanor driving offenses, stating "there is no general First Amendment right in the public access to criminal justice records." 21 F.3d 1508, 1512 (10th Cir. 1994).

Decisions from other federal courts and state supreme courts are in accord—they routinely recognize that there is no First Amendment right to inspect court records, and any such right is governed by the common law. *See, e.g., Fisher v. King*, 232 F.3d 391, 396 (4th Cir. 2000); *United States v. Webbe*, 791 F.2d 103, 105 (8th Cir. 1986); *United States*

v. Beckham, 789 F.2d 401, 408-09 (6th Cir. 1986); *Belo Broad. Corp. v. Clark*, 654 F.2d 423, 426-27 (5th Cir. 1981); *In re Four Search Warrants*, 945 F. Supp. 1563, 1566 (N.D. Ga. 1996); *United States v. DeLorean*, 561 F. Supp. 797, 801 (C.D. Cal. 1983); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 913 (E.D. Penn. 1981); *State v. Archuleta*, 857 P.2d 234, 242 & n.41 (Utah 1993); *Newspapers of New England, Inc. v. Clerk-Magistrate of Ware Div. of Dist. Court Dep't*, 531 N.E.2d 1261, 1266 (Mass. 1988).

Accordingly, because the First Amendment does not create a right for the media to inspect criminal court records, this Court should reject Petitioners' attempt to create such a right. The rule should be discharged.

II. Under the First Amendment's "experience and logic" test, there is no right of access for affidavits of probable cause.

Petitioners next contend that the "experience and logic" test under the First Amendment requires a finding that affidavits of probable cause are subject to a constitutional right of access. Pet'n, pp. 22-28. Petitioners' constitutional analysis is flawed and should be rejected

because the test is not satisfied for warrant-related documents, as the vast majority of courts recognize.

A. Standard of Review and Preservation.

Although this Court has not addressed the standard of review when reviewing a lower court's "experience and logic" analysis under the First Amendment, other courts have applied a de novo standard of review, *see State v. Sykes*, 339 P.3d 972, 975 (Wash. 2014), and Chief Justice Martinez agrees that the de novo standard should apply. Petitioners preserved this argument in their motion to unseal the affidavit of probable cause. Pet'n Ex. 5, pp. 7-8.

B. Affidavits of probable cause do not satisfy the "experience and logic" test.

Under the "experience and logic" analysis, the right to publically access a particular criminal proceeding or document is granted if it (1) has "historically been open to the press and the general public," and (2) "public access plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8-9 (1986) ("*Press Enterprise II*"); *see El Vocero de P.R. v. Puerto Rico*, 508 U.S. 147 (1993) (reaffirming "experience and logic" analysis from *Press Enterprise II*). If the particular proceeding or

document in question passes these tests, a *qualified* First Amendment right of public access attaches. *Press Enterprise II*, 478 U.S. at 9. Under the qualified right, sealing may be appropriate if it is "essential to preserve higher values" and is narrowly tailored to serve that interest. *Id.* (internal quotations omitted).

The overwhelming majority of courts that have analyzed affidavits of probable cause and related investigatory materials under the "experience and logic" test hold that the First Amendment does not grant access to those records.[2] Applying the experience and logic analysis here leads to the same conclusion: no qualified right of access attaches to affidavits of probable cause.

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[2] *See, e.g., United States v. Appelbaum*, 707 F.3d 283, 291-92 (4th Cir. 2013); *In re Search of Fair Finance*, 692 F.3d 424, 430-32 (6th Cir. 2012); *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 64-65 (4th Cir. 1989); *Times Mirror Co. v. United States*, 873 F.2d 1210, 1213-16 (9th Cir. 1989); *United States v. All Funds on Deposit at Wells Fargo Bank*, 643 F. Supp. 2d 577, 581-82 (S.D.N.Y. 2009); *In re Release of Court Records*, 526 F. Supp. 2d 484, 492-97 (FISA Ct. 2007); *United States v. Inzunza*, 303 F. Supp. 2d 1041, 1045-50 (S.D. Cal. 2004); *Crowe v. Cnty. of San Diego*, 210 F. Supp. 2d 1189, 1194-97 (S.D. Cal. 2002); *In re 1993 Jeep Grand Cherokee*, 1996 U.S. Dist. LEXIS 19821, 1996 WL 768293 (D. Del. 1996); *In re Search Warrant*, 1994 U.S. Dist. LEXIS 18360 (S.D. Ohio 1994); *In re 2 Sealed Search Warrants*, 710 A.2d 202, 206-10 (Del. Super. Ct. 1997); *Oziel*, 273 Cal. Rptr. at 203-08.

Prong One*: *History of Access to Warrant Records. First, affidavits of probable cause historically have not been open to the press or general public. Proceedings to obtain search warrants are "necessarily *ex parte,* since the subject of the search cannot be tipped off to the application for a warrant lest he destroy or remove evidence." *Franks v. Delaware,* 438 U.S. 154, 169 (1978); *see also United States v. United States Dist. Court*, 407 U.S. 297, 321 (1972) (noting warrant application "involves no public or adversary proceedings"). To preserve the interest in secrecy, documents filed in connection with this process, like affidavits of probable cause, are also necessarily submitted confidentially. *See In re Search of Fair Finance*, 692 F.3d 424, 430 (6th Cir. 2012).

Although search warrant materials are later filed with the clerk under COLO. R. CRIM. P. 41(f), the government is able to restrict access to warrant materials by requesting a sealing order. *Times Mirror Co. v. United States*, 873 F.2d 1210, 1214 (9th Cir. 1989). Such sealing orders are "granted freely" upon a showing that a given criminal investigation requires secrecy. *Id.* In short, no historical tradition supports a First Amendment right to openly access affidavits of probable cause.

Prong Two: Whether Public Access Plays a Positive Role.

Second, the right of public access does not play a significant positive role in the functioning of the search warrant process. To the contrary, public access *hurts* the process for three reasons.

One, public access in this context would harm criminal investigations "by enabling criminal suspects to learn of impending searches and by potentially leading them to remove or destroy evidence." *Search of Fair Finance*, 692 F.3d at 432. But the harm is not eliminated after the search is executed. Disclosure after the search warrant is executed may substantially impede ongoing criminal investigations. As the federal circuit courts recognize, continuous wire taps and undercover operations may be compromised; confidential witness' safety may be endangered; persons identified as under suspicion may destroy evidence, coordinate their stories, or flee the jurisdiction; and the government's preliminary theory of the crime may be revealed, prompting suspects to glean other locations that are likely to be searched. *See Search of Fair Finance*, 692 F.3d at 432; *Times Mirror Co.*, 873 F.2d at 1215.

Two, and perhaps more important, mandating post-execution disclosure will cause the government "to be more selective" with the information it inserts in affidavits of probable cause to preserve the integrity of its investigations. *Search of Fair Finance*, 692 F.3d at 432. This limitation on the flow of information to judges could impede their ability to accurately determine probable cause. *Id.*

In this context, warrant proceedings are "indistinguishable" from grand jury proceedings where secrecy is imperative. *Times Mirror Co.*, 873 F.2d at 1215; *see* COLO. R. CRIM. P. 6.2 & 6.3. Indeed, search warrant proceedings are "one step back" in the chain of events of a criminal investigation. *Times Mirror Co.*, 873 F.2d at 1215 (internal quotations omitted). The U.S. Supreme Court has recognized that, without grand jury secrecy, prospective witnesses would be "hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony." *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 219 (1979). Witnesses would be less likely to testify fully and frankly for fear of being "open to retribution as well as to inducements." *Id.* In short, grand jury secrecy is maintained "to avoid jeopardizing the criminal investigation of which the grand jury is an

integral part." *Times Mirror Co.*, 873 F.2d at 1215. Affidavits of probable cause are no less an integral part of the criminal investigation process.

Three, privacy considerations also demonstrate that public access may harm the functioning of the search warrant process. *See, e.g., Oziel v. Superior Court*, 273 Cal. Rptr. 196, 204-07 (Cal. Ct. App. 1990). Public access to affidavits of probable cause may reveal the names of witnesses or innocent persons who never become involved in an ensuing criminal prosecution, causing them "embarrassment or censure." *Search of Fair Finance*, 692 F.3d at 432. This concern is especially poignant here where the location of the alleged shooting is an abortion clinic—a place where immensely private, emotional and sometimes controversial decisions are made regarding women's healthcare and family planning.

The privacy interests of persons suspected of criminal activity, but ultimately not charged, also militate against public access. Persons once suspected of criminal activity may prove to be uninvolved in the criminal enterprise after additional investigation. Yet the public release of an affidavit of probable may cause "'grave'" and irreversible damage. *Times Mirror Co.*, 873 F.2d at 1216 (quoting *United States v. Smith*, 776

F.2d 1104, 1113 (3d Cir. 1985)). The affidavit of probable cause contains the government's reasons for believing that the named persons have engaged in criminal activity. Public awareness of the mere fact of being under government suspicion can constitute a "clearly predictable injur[y] to the reputations" of the named individuals. *Id.* And such persons named in the affidavit but ultimately not charged will have no forum in which to exonerate themselves if the warrant materials are made public. *Times Mirror Co.*, 873 F.2d at 1216; *Smith*, 776 F.2d at 1114. As such, the right of public access does not play a significant role in the functioning of the search warrant process. Rather, public access harms it.

Accordingly, under the "experience and logic" test, affidavits of probable cause are not subject to a First Amendment right of access.

C. Petitioners' cited authorities do involve ongoing criminal investigations.

Petitioners' cited cases are unhelpful. Pet'n, pp. 22-23. None of those decisions permitted public access where, as here, a criminal investigation is ongoing at the time the trial court denies public disclosure. In fact, the *absence* of an ongoing investigation is often

dispositive when public disclosure is permitted. *See United States v. Loughner*, 769 F. Supp. 2d 1188, 1193 (D. Ariz. 2011) (permitting public disclosure because "the investigation has concluded"); *In re New Times Co.*, 585 F. Supp. 2d 83, 88 (D.D.C. 2008) (applying experience and logic analysis solely to "post-investigation warrant materials"). These decisions are consistent with other court holdings denying public access while an investigation remains ongoing. *See Appelbaum*, 707 F.3d at 292; *Search of Fair Finance*, 692 F.3d at 432; *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 574 (8th Cir. 1988); *United States v. Dougherty*, 2014 U.S. Dist. LEXIS 104226 (E.D. Penn. 2014); *In re Search Warrants Issued on June 11, 1998*, 710 F. Supp. 701, 704 (D. Minn. 1989) (denying media's motion in part because "public disclosure . . . would significantly compromise [the government's] ongoing investigation."); *cf. In re Search of 1638 E. 2nd St.*, 993 F.2d 773, 775-76 & n.1 (10th Cir. 1993) (denying access to protect identity of informant).

This Court, too, has recognized the importance of the government pursuing its criminal investigations without being compromised by public disclosures under the CCJRA. *See Freedom Colo. Info., Inc. v. El*

Paso Cnty. Sheriff's Dep't, 196 P.3d 892, 899 (Colo. 2008); *Harris v. Denver Post Corp.*, 123 P.3d 1166, 1175 (Colo. 2005). Here, the fact of the ongoing investigation formed the crux of Chief Judge Martinez's order. Pet'n Ex. 7, p. 2 (order emphasizing "there is still an ongoing investigation that should not be compromised"); *Id.* (noting "the district attorney states that the investigation is ongoing."). It should be upheld.

Accordingly, because the "experience and logic" test establishes that no First Amendment right of access exists for affidavits of probable cause, and because Petitioners' cited cases are inapposite, this Court should discharge the rule.

III. This Court has never recognized a right of public access to judicial records under the state constitution.

Petitioners also argue they are entitled to the affidavits of probable cause under article II, section 10 of the Colorado Constitution, asserting it affords them greater free speech rights than the federal constitution. Pet'n, pp. 28-30. Like their First Amendment arguments, Petitioners' attempt to create new, expansive media rights under the state constitution should be rejected. Those arguments lack support under this Court's case law and would undermine the policies in the

CCJRA and Chief Justice Directive 05-01, which have never been held to be unconstitutional.

A. Standard of Review and Preservation.

This Court reviews de novo alleged violations of article II, section of the Colorado Constitution. *See Robertson v. Westminster Mall Co*., 43 P.3d 622, 625 (Colo. App. 2001) (citing *Lewis v. Colo. Rockies Baseball Club*, 941 P.2d 266 (Colo. 1997)). Petitioners preserved this argument in their motion to unseal the affidavit of probable cause. Pet'n Ex. 5, p. 5.

B. Petitioners' attempt to create a new, expansive right under the Colorado Constitution should be refused.

Although the Colorado Constitution provides greater free speech rights than the federal constitution, never before has this Court held that the right is so broad as to guarantee the media unfettered access to publically inspect confidential court documents. To the contrary, the state constitution does not secure the press any "right of special access" to information that is not generally available to the public. *People v. Bergen*, 83 P.2d 532, 544 (Colo. App. 1994).

Again, Petitioners' cited cases are off base. They deal with a person's right to purchase books anonymously without government interference, *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044

(Colo. 2002), a person's access to the public areas of an enclosed shopping mall, *Bock v. Westminster Mall Co.*, 819 P.2d 55 (Colo. 1991), and the adoption of a judicial canon excluding press photography, radio and television instruments from the courtroom, *In re Hearings Concerning Canon 35*, 132 Colo. 591, 296 P.2d 465 (1956). None involves media access to sealed judicial records. If anything, the latter case supports Chief Judge Martinez's decision because it recognizes the trial court should be imbued with considerable discretion on matters of access. *See Hearings Concerning Canon 35*, 296 P.2d at 472 (stating "the entire matter should be left to the discretion of the trial judge").

In addition to lacking legal support, Petitioners' request for a new right of access under the state constitution would undermine the existing CCJRA and Chief Justice Directive 05-01. These comprehensive statutory and administrative frameworks—which have never been invalidated as unconstitutional—are designed to empower trial courts with the discretionary authority to control the public release of their sensitive materials.

The CCJRA, for example, provides that criminal justice records, "at the discretion of the official custodian, *may* be open for inspection . .

. ." § 24-72-304(1), C.R.S. (emphasis added). Recognizing and codifying trial courts' discretionary power to control the release of their records is fundamentally at odds with Petitioners' suggested constitutional right. Compare *Freedom Colo. Info., Inc. v. El Paso Cnty. Sheriff's Dep't*, 196 P.3d 892, 900 (Colo. 2008) (custodian's decision under CCJRA is reviewed for abuse of discretion), with *Lewis v. Colo. Rockies Baseball Club, Ltd.*, 941 P.2d 266, 271 (Colo. 1997) (applying *de novo* standard of review in First Amendment case).

Likewise, adopting Petitioners' urged First Amendment right would frustrate Chief Justice Directive 05-01. That directive creates a "comprehensive framework" for public access to court records. CJD 05-01 § 1.00(a). It vests trial courts with authority to permit "reasonable access to court records while simultaneously protecting the confidentiality interests of the people whose information may be subject to disclosure." CJD 05-01, preamble. The directive thus contemplates that a court may deny public inspection of a particular court record.

Both the CCJRA and Chief Justice Directive 05-01 recognize that the "judiciary has inherent authority to use all powers reasonably required to protect the efficient function, dignity, independence, and

integrity of the court and judicial process." *People v. Aleem*, 149 P.3d 765, 774 (Colo. 2007). Without the ability to exercise this "considerable discretion," trial courts will be inhibited from assuring criminal defendants a fair trial by an impartial jury—a duty that "is paramount" and may require "limitations upon the exercise of the right of free speech and of the press." *Stapleton*, 179 Colo. at 192-93, 499 P.2d at 312.

Accordingly, because article II, section 10 of the Colorado Constitution does not recognize a right for the media to inspect confidential court records, the rule should be discharged.

IV. Remand for further findings is appropriate if this Court elects to recognize a new constitutional right.

A. The decision below was properly supported based on existing law.

With no constitutional right protecting Petitioners' request, Chief Judge Martinez's ruling on the motion to unseal was properly based on a statutory analysis under the CCJRA, section 24-72-301, *et seq*. Pet'n Ex. 7. Because affidavits of probable cause are not "official actions," *see* § 24-72-303(7), C.R.S., they constitute "other criminal justice records"

for which disclosure is left to the custodian's discretion. *People v. Thompson*, 181 P.3d 1143, 1145-46 (Colo. 2008).

In exercising that discretion, Chief Judge Martinez correctly balanced the competing interests of the ongoing criminal investigation, the privacy concerns of victims and witnesses whose names had not yet been released, and the public's interest in public access. *See Freedom Colo. Info.*, 196 P.3d at 899 (emphasis added); *see also Madrigal v. City of Aurora*, 349 P.3d 297, 301 (Colo. App. 2014) (holding custodian's determination that disclosure would compromise an ongoing investigation "represents an appropriate and reasonable basis for denying release of the records during the investigation."). Indeed, Petitioners here do not even challenge Chief Judge Martinez's CCJRA analysis. It should be upheld and the rule discharged.

Further, because no constitutional right protects Petitioners, no further inquiry into the adequacy of Chief Judge Martinez's factual findings is necessary. As Petitioners recognize, reviewing the adequacy of the trial court's findings becomes necessary only after "this Court determines that a particular category of court record is subject to a constitutional right of access." Pet'n, p. 31 (citing *Press Enterprise Co. v.*

Superior Court of Cal., 464 U.S. 501, 510 (1984)). Similarly, determining whether less restrictive measures (*e.g.* redaction) are adequate to protect the defendant's fair trial rights becomes necessary only if a constitutional right protects Petitioners' public access to the affidavits. *See* Pet'n Ex. 6, p. 4. Because no such right attaches here, the inquiry is over. The rule should be discharged and the case remanded so the case may continue.

B. If the Court articulates new constitutional rights in favor of media access to sealed court documents, it should remand for further findings.

If this Court recognizes a constitutional right for Petitioners to inspect sealed criminal court documents, remand is appropriate to permit Chief Judge Martinez to supplement his findings under the new constitutional guidance provided by this Court. *See In re Petition of R.A.*, 66 P.3d 146, 151 (Colo. App. 2002) ("Because the magistrate did not have the benefit of *C.M.* and therefore made no findings concerning that standard, . . . a remand is appropriate.").

Remand for further findings would also be appropriate if a new right is recognized because of the changed circumstances in this case. When Chief Judge Martinez initially denied Petitioners' access to the

affidavits the case was "just over one month old" and the criminal investigation was ongoing. Pet'n Ex. 7. But now the case is nearing its three-month mark. The criminal investigation is now likely concluded, significantly diminishing the trial court's concern that public disclosure would harm the process.

Moreover, Mr. Dear has recently made unsolicited statements in open court concerning the shooting events of November 27, 2015. He also recently telephoned one of the petitioning news media outlets from jail, making public statements concerning the shootings and his competency. *See* Ex. E. Thus, information that might have been previously sealed or redacted is now in the public domain. *See* Pet'n, pp. 33-34. Although the majority of the shooting victims' names have not been released and would be appropriately redacted, these changed circumstances may render it appropriate to release the affidavits of probable cause in redacted form. *See* Pet'n Ex. 7, p. 3 (order stating trial court "will revisit the issue as the case progresses."). In any event, should this Court recognize a new constitutional right for Petitioners, remand will be necessary for factual findings under the new constitutional standard.

SUPPORTING DOCUMENTS

A. Orders and Requests to Seal Search and Arrest Warrants;

B. Hearing Transcript, December 23, 2015;

C. Order Regarding Request for Expanded Media Coverage;

D. Decorum Order; and

E. CBS Channel 4 News Story – *Planned Parenthood Suspected Gunman: 'They Wanted To Start a War,'* January 13, 2016.

CONCLUSION

This Court should uphold Chief Judge Martinez's decision denying Petitioners access to the sealed affidavits of probable cause. The rule should be discharged.

Respectfully submitted this 16th day of February, 2014.

CYNTHIA H. COFFMAN
Attorney General

/s/ Grant T. Sullivan

FREDERICK R. YARGER, 34269*
Solicitor General
GRANT T. SULLIVAN, 40151*
Assistant Solicitor General
MATTHEW D. GROVE, 34269*
Assistant Solicitor General
State Services Section
Public Officials Unit
Attorney for Respondents
* Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **THE HONORABLE GILBERT MARTINEZ'S ANSWER TO ORDER AND RULE TO SHOW CAUSE** upon the following parties or their counsel electronically via ICCES and/or via U.S. first class mail at Denver, Colorado this 16th day of February, 2016 addressed as follows:

Steven D. Zansberg
Thomas B. Kelley
Christopher P. Beall
LEVINE SULLIVAN KOCH & SCHULZ, LLP
1888 Sherman Street, Suite 370
Denver, CO 80203

Kristen Nelson
Daniel King
Rosalie Roy
Office of the State Public Defender
1300 Broadway, Suite 400
Denver, CO 80203

Daniel May
Jeffrey Lindsey
Donna Billek
Doyle Baker
Fourth Judicial District Attorney's Office
105 E. Vermijo Ave., Suite 500
Colorado Springs, CO 80903

/s/ Terri Connell
Terri Connell

DATE FILED: February 16, 2016 4:49 PM

EXHIBIT A

TO THE HONORABLE GILBERT MARTINEZ'S ANSWER TO ORDER AND RULE TO SHOW CAUSE

Case No. 2016SA13

DISTRICT COURT, EL PASO COUNTY, STATE OF COLORADO Address: 270 South Tejon Street PO Box 2980 Colorado Springs, Colorado 80903	
State of Colorado in the matter of: Search Warrant	▲ COURT USE ONLY ▲
	Case/File Number:
Agency: Colorado Springs Police Department Agency Case Number: 15-47334	Division: Courtroom:

ORDER TO SEAL SEARCH WARRANT

THE COURT, having reviewed the the documents submitted in support of this Search Warrant, hereby enters an ORDER that the Search Warrant and Application for Search Warrant, to include the Affidavit, Attachment "A" and any other Attachments incorporated by reference, be sealed until the termination of the case, or until further order by the Court.

DONE THIS DAY November 27, 2015 at the hour of 10:36 ~~AM~~ PM

Stephen J. Sletta

Judge / Magistrate / Judicial Officer
Colorado 4th Judicial District / El Paso County Court

Printed Name: _____

DISTRICT COURT, EL PASO COUNTY, STATE OF COLORADO Address: 270 South Tejon Street PO Box 2980 Colorado Springs, Colorado 80903	
State of Colorado in the matter of: Search Warrant	▲ COURT USE ONLY ▲
	Case/File Number:
Agency: Colorado Springs Police Department Agency Case Number: 15-47334	Division: Courtroom:

REQUEST FOR SEALING OF SEARCH WARRANT

COMES NOW, the People of the State of Colorado, by and through Dan May | 11379, District Attorney for the Colorado 4th Judicial District, and his Deputy District Attorney, Donna Billek | 30721, respectfully request this Court enter an Order, sealing the Search Warrant and Application, to include the Affidavit, Attachment "A" and any other Attachments as so incorporated by reference, as grounds, therefore states the following:

1. The Offense Case Report, 15-47334 supporting this Search Warrant was initiated by the Colorado Springs Police Department, El Paso County, Colorado, is an ongoing investigation.
2. If the information supporting this Search Warrant were to be released, it could jeopardize the continuing investigation, apprehension of suspect(s), and subsequent prosecution of same.
3. We are requesting the sealing of this document indefinitely, or until the completion or termination of the investigation.

WHEREFORE, the People of the State of Colorado respectfully request the Court enter an ORDER, sealing the Search Warrant and Application for Search Warrant, to include the Affidavit, Attachment "A" and any other Attachments as so incorporated by reference, as grounds, therefore states the following:

Respectfully Submitted,

Donna Billek | 30721
Deputy District Attorney
Colorado 4th Judicial District

DISTRICT COURT, EL PASO COUNTY, STATE OF COLORADO Address: 270 South Tejon Street PO Box 2980 Colorado Springs, Colorado 80903	
State of Colorado in the matter of: Arrest Warrant	▲ COURT USE ONLY ▲
	Case/File Number:
Agency: Colorado Springs Police Department Agency Case Number: 15-47334	Division: Courtroom:

ORDER TO SEAL ARREST WARRANT

THE COURT, having reviewed the the documents submitted in support of this Arrest Warrant, hereby enters an ORDER that the Arrest Warrant and Application for Arrest Warrant, to include the Affidavit, Attachment "A" and any other Attachments incorporated by reference, be sealed until the termination of the case, or until further order by the Court.

DONE THIS DAY November 27, 2015 at the hour of 10:28 ~~AM~~ / PM

Stephen J. Sletta
Judge / Magistrate / Judicial Officer
Colorado 4th Judicial District / El Paso County Court

Printed Name: _____

DISTRICT COURT, EL PASO COUNTY, STATE OF COLORADO Address: 270 South Tejon Street PO Box 2980 Colorado Springs, Colorado 80903	
State of Colorado in the matter of: Arrest Warrant	▲ COURT USE ONLY ▲
	Case/File Number:
Agency: Colorado Springs Police Department Agency Case Number: 15-47334	Division: Courtroom:

REQUEST FOR SEALING OF ARREST WARRANT

COMES NOW, the People of the State of Colorado, by and through Dan May | 11379, District Attorney for the Colorado 4th Judicial District, and his Deputy District Attorney, Donna Billek | 30721, respectfully request this Court enter an Order, sealing the Arrest Warrant and Application, to include the Affidavit, Attachment "A" and any other Attachments as so incorporated by reference, as grounds, therefore states the following:

1. The Offense Case Report, 15-47334 supporting this Arrest Warrant was initiated by the Colorado Springs Police Department, El Paso County, Colorado, is an ongoing investigation.
2. If the information supporting this Arrest Warrant were to be released, it could jeopardize the continuing investigation, apprehension of suspect(s), and subsequent prosecution of same.
3. We are requesting the sealing of this document indefinitely, or until the completion or termination of the investigation.

WHEREFORE, the People of the State of Colorado respectfully request the Court enter an ORDER, sealing the Arrest Warrant and Application for Arrest Warrant, to include the Affidavit, Attachment "A" and any other Attachments as so incorporated by reference, as grounds, therefore states the following:

Respectfully Submitted,

Donna Billek | 30721
Deputy District Attorney
Colorado 4th Judicial District

DATE FILED: February 16, 2016 4:49 PM

EXHIBIT B

TO THE HONORABLE GILBERT MARTINEZ'S ANSWER TO ORDER AND RULE TO SHOW CAUSE

Case No. 2016SA13

DISTRICT COURT, EL PASO COUNTY, STATE OF COLORADO 270 South Tejon Street Colorado Springs, CO 80903 _____ THE PEOPLE OF THE STATE OF COLORADO, Plaintiff, vs. ROBERT LEWIS DEAR, Defendant.	COURT USE ONLY
For the Plaintiff: Daniel H. May, #11379 Jeffrey D. Lindsey, #24664 Donna Billek, #30721 Doyle Baker, #22277 Daniel Edwards, #7938 Office of the District Attorney 105 East Vermijo Avenue, Suite 500 Colorado Springs, CO 80903 For the Defendant: Daniel King, #26129 Rosalie Roy, #26861 Kristen Nelson, #44247 Office of Colorado Public Defender 19 North Tejon Street, Suite 105 Colorado Springs, CO 80903	Case No. 15CR5795 Division 10
REPORTER'S TRANSCRIPT	

The above-entitled matter came on for hearing on Wednesday, December 23, 2015, before the HONORABLE GILBERT A. MARTINEZ, District Court Judge.

P R O C E E D I N G S

(Wednesday, December 23, 2015 - 1:30 p.m.)

*****

THE COURT: The Court will call 15CR5795, People vs. Robert Dear.

If counsel will identify themselves for the record, please.

MR. MAY: Dan May, Jeff Lindsey, Donna Billek on behalf of the People. And then today I know the Court swore in Dan Edwards as far as the prosecution team.

THE COURT: Okay.

MR. MAY: And Doyle Baker's here also.

MR. KING: Good afternoon, Your Honor.

Daniel King, Rosalie Roy, and Kristen Nelson appearing with Mr. Dear, who does appear in custody.

THE COURT: All right.

THE DEFENDANT: But I do not want them as my lawyers.

THE COURT: Okay.

THE DEFENDANT: I invoke my constitutional right to defend myself.

THE COURT: Okay. We'll get there in just a moment, okay?

THE DEFENDANT: (Nodding.)

THE COURT: All right. The first order of business is I have a request or got a request from Fox News to have video as well

as live tweeting.

Is there anybody here from Fox News? Any attorneys here from Fox News?

MR. ZANSBERG: I haven't been formally retained by them, but I have -- I'm representing Fox News as part of the motion to unseal as well.

THE COURT: Okay. I'll get to the unseal in a moment.

MR. ZANSBERG: Thank you. I wasn't aware of that request.

THE COURT: I don't know, did counsel get a request?

MR. MAY: I did. I can show counsel the...

THE COURT: Okay. In that regard the Court has reviewed the file. And I'm going to deny the request for expanded media coverage for today's hearing. And I'll sign that as the order C-0004, but I'm denying that.

And in that regard, I'll give copies to my clerk. And she can go ahead and give you all copies 'cause I have my stamp.

All right. The next order of business is we have the motion to unseal, which I do have the motion as well as the response.

Any additional argument in regard to the motion?

MR. ZANSBERG: Having not seen the response, Your Honor, I can't really say. So I don't know what was said in response to the motion. It's the first I've heard that one was been -- one has been filed. It wasn't served upon me or my office. And so if I

could have a minute to review it, I might add further argument in support of the motion.

THE COURT: Okay.

MS. NELSON: Your Honor, our understanding was that it was emailed to Mr. Zansberg yesterday. So if signals got crossed --

THE COURT REPORTER: I'm sorry, can you speak up. I can't hear you.

MS. NELSON: If signals got crossed, we apologize, but our administrative assistant -- I'm sure she could email it to Mr. Zansberg, so...

THE COURT: Do you have a hard copy so I can look at that now?

MS. NELSON: I believe so.

MR. MAY: We did not file a response.

THE COURT: Right. And I have the response as D-14. If not, I can make you a copy or get you a copy.

MS. NELSON: We do have a copy, Your Honor; however, it is an unredacted copy.

THE COURT: Okay.

MR. MAY: Judge, I could provide them my copy to look at it, but I don't -- ours doesn't show any redactions on it.

MS. NELSON: There is a redaction.

THE COURT: All right. If you'll go ahead and show them your copy.

MR. MAY: No, I think mine is -- I don't have any redactions on mine.

THE COURT: Okay.

MR. MAY: If they redacted something -- she's, I think, in the process of redacting that --

THE COURT: Okay.

MR. MAY: -- on her copy. I will not show them mine.

THE COURT: Okay.

MR. MAY: It would be just the three words on page 3, then?

MS. NELSON: (Nodding.)

MR. MAY: Okay.

THE COURT: Paragraph 13 is what we're talking about?

MR. MAY: Actually 5.

THE COURT: Okay. And if you want to go ahead and take a moment to review that, you can, and then we'll get back to you.

MR. ZANSBERG: That'd be great. Thank you, Your Honor.

THE COURT: Okay. You're welcome.

The other motion we have is the D-6, which is confidential defense experts present for the testing.

Any additional argument in regard to that motion? I believe that was --

MR. MAY: Mr. Lindsey will be handling that one.

THE COURT: Okay.

MR. LINDSEY: Judge, I did file a supplemental response.

I don't know if the Court got that, hopefully, yesterday.

And just so the Court's aware, we've gotten, I think, in the practice of emailing opposing counsel just because of wanting to make sure they've gotten that response. So my hope is that they did get that.

Judge, what -- I think what I'd rely on is in original responses, defense just throws these bold propositions out there without any real authority.

And I think the authority's clear, 16-3-309, that talks about when the Court is to intervene or when there is to be additional safeguards or procedural safeguards in place; and that's only in the case when there is destructive or consumptive testing. We don't know if any of this is going to be, but certainly we are aware of our requirements under 16-3-309. And if that is the case, as I indicated in my pleading, we will notify the Court and counsel.

But just to grant this broad-based request without any real legislative or statutory authority is really an encumbrance on any lab or any facility that's doing these testings.

I spoke directly to some of the attorneys for the FBI, who also were familiar with some of the ATF. We believe both of those labs could do testing. We also have some evidence that Colorado Bureau of Investigations and then we have Metro Crime Lab here in Colorado Springs, which is both sheriff's office and police department. None of those labs allow people to observe, and that

means even our office or any detective; it's all lab personnel.

Judge, really what -- what I think the defense is asking the Court to do, which is strictly overruled by *Wartena* -- a little bit different factually, but *Wartena*, the judge in that case, 156 P.3d 469, stepped in and started making some requirements both on the prosecution and the Colorado Bureau of Investigations. In that case the judge wanted them to videotape or the DA's office pay the costs of the expert. And the court -- Supreme Court in a Rule 21 proceeding said that was beyond the court's authority to do so.

So, Judge, I would say, again, no legislative or statutory authority. And then as noted in the *Wartena* dissent from Justice Coats, which he agreed basically with the holding but said it in the reasoning is that's a -- that's an investigative prosecutorial executive power function where the court really doesn't have the ability to do that; that's up to the legislature.

So we'd ask the Court to deny the motion.

THE COURT: Okay. Any response from the defense?

MS. ROY: Your Honor, I would like to respond; however, Mr. Dear would like to address his issue first and has indicated that he would like to respond to this motion.

THE COURT: Okay.

MS. ROY: So I'd like it if we could sort of stop and get back to Mr. Dear's issue and then figure out how to proceed after that.

THE COURT: Okay. Mr. Dear, I'm gonna certainly let you

talk and tell me what you want to tell me, but I want you to understand that what you say here is being recorded, and what you say here can be used against you at a trial, at a hearing, all of those kind of things, and you need to be aware of that. You say something, it can be used against you at trial. If you take the witness stand, it can be used to impeach you, things of that nature.

And I would suggest that you talk to your attorneys before you talk to me, if you haven't already. I think you need the opportunity to talk to them and make sure and follow their advice, 'cause you have some attorneys that you should be following their advice.

You make the call on a lot of things. You make the call on how you want to plead; you make the call on plea bargains; you make the call on whether you testify, things of that nature, but you should listen to your attorneys.

THE DEFENDANT: Well, how can I trust my attorney, Your Honor, when he says in a newspaper I'm incompetent? And -- and he's supposed to be working for my best interests. And they kept me in a medical unit --

THE COURT: Okay.

MR. KING: Judge --

THE COURT: That's -- that's gonna be the problem. If you keep talking, you're gonna say stuff that's gonna hurt you. I'm not trying to be mean here; I'm trying to help you.

THE DEFENDANT: I was just answering your question why --
THE COURT: I understand that.
THE DEFENDANT: -- why I want to be my own attorney.
THE COURT: Okay. Mr. King.
MR. KING: Judge, if I may, I think pursuant to *People vs. Bergerud*, 223 P.3d 686, a 2010 case, and the case of *People vs. Gonyea*, G-o-n-y-e-a, 195 P.3d 1171, the procedure, with all due respect, that the Court should follow in this type of a situation will be to conduct an ex parte hearing where you could then engage in a colloquy with Mr. Dear about his desires and we could address whether or not there was any partial waiver of attorney-client privilege, if you had questions of us and things of that nature.
I think that's the way that the Colorado Supreme Court has suggested that courts proceed when this type of issue arises. And that would be my suggestion and request.
THE COURT: And by ex parte hearing, what are you suggesting we do?
MR. KING: I'm suggesting that we clear the courtroom, Your Honor, other than the court staff and the court reporter and the sheriff's deputies and Mr. Dear and the defense counsel, and the Court engage in a hearing and inquire of Mr. Dear, rather than doing so in open court in front of the prosecution, which was a problem -- which is a problem which has been prescribed against by the cases I've cited.
THE COURT: All right. The prosecution's position?

MR. MAY: We would object to an ex parte procedure, Your Honor. Quite frankly, if this is appealed, we're the ones that have to defend it on appeal. We're not in the courtroom. We can't have any input on whether it's being done appropriately or not.

THE COURT: Isn't that what *Bergerud* tells us to do, though?

MR. MAY: Well, it may depend on what information is being provided at the time. A general disclosure that "I'm unsatisfied with my attorney" doesn't exactly put anything out there that's attorney-client privilege or general exclamation that "I want to represent myself; it's my constitution right."

Well, that is his constitutional right once -- if the Court advises him appropriately and feels he's competent in doing that, but those type things can be done.

I'm not hearing there's a conflict, that issues are gonna be discussed that would be confidential in nature. If we get into some issue that is confidential in nature, our position may change, but to say, "I want to represent myself and I have a constitutional right," I don't see where those are confidential in nature.

THE COURT: Well, the problem with that, once the cat's out of the bag, the cat's out of the bag. Once he blurts something out that is of a confidential nature, it's too late to bring it back.

MR. MAY: Again, you might inquire of defense counsel, but he put certain matters in the record last time, Mr. Dear did.

I don't know if we're going beyond that. I don't know if they've had even meetings with him to discuss anything confidential. And that's something that might be inquired of defense counsel, if they have had any meetings that there can be anything that's confidential or not.

THE COURT: Mr. King, any response to that?

MR. KING: Judge, my response is that the entire attorney-client relationship is, by its very nature, confidential. And that's why the United -- the Colorado, excuse me, Supreme Court in the *Bergerud* case said, as I quote, on page 21:

"At the outset --" at the outset, not when something comes up in court, but at the outset -- "the inquiries into the nature of the dispute should take place without the presence of the prosecution, as the trial court properly did here. Of course, the prosecuting attorneys may need to be informed about a proposed resolution of the dispute to the extent that it impacts their preparedness or the ability to proceed to trial. However, sharing anything more than necessary to resolve these matters with the prosecuting attorneys could seriously prejudice the accused's defense. These concerns were artfully managed by the trial court in this case." Talking about an ex parte hearing.

MR. MAY: Again, I guess, where I'm splitting the line is if there's a dispute, if they have met with him and there's some dispute that's gonna be going on the record, I would -- I would confess that. If we're going through a request and an advisement

of whether he should have counsel or not, whether he wants to represent himself, what things he should be laying in doing that, that all should be done in open court, and we should be parties to that to make sure the record's correct.

THE COURT: All right.

MR. MAY: Again, I'm asking the question: "Is there a dispute and have they even met with him to arise with the dispute?"

THE COURT: I don't think it's a question there's a dispute. He's already told us that.

I'm gonna follow the *Bergerud* procedure and ask that the courtroom be cleared, with the exception of defense counsel and staff.

MR. MAY: And I believe even defense counsel stated the sheriff's deputies should be here.

THE COURT: Well, somebody -- the sheriff's office will be here as well or at least one.

MR. ZANSBERG: Your Honor, if I may be heard for just one second?

THE COURT: You may not, not on this motion.

MR. ZANSBERG: Thank you, Your Honor.

THE COURT: You're welcome.

So if everybody would be so kind as to wait outside in the hall, please. Thank you.

MR. LINDSEY: Judge, if I could just ask real quickly, we have an area that we're meeting. Can we just take all our people

down there to that area and then bring them up in a reasonable amount of time?

THE COURT: Sure. That's fine.

MR. LINDSEY: Thank you.

*****

(Ex parte hearing held.)

MR. MAY: While we're waiting, may I bring up a matter about cellphones?

THE COURT: About...

MR. MAY: Cellphones or electronic devices.

THE COURT: Sure.

MR. MAY: Currently, I think, the court order only allows the attorneys to have them as we're at the table. Actually on my team the people that need them are the witness coordinators or the victim advocates or the investigators.

Can we expand to allow them to have electronic devices in order to coordinate witnesses and things like that in the future?

MR. KING: I would join in that request, Judge, especially if we get to a proceeding where we're talking about motions hearing or trial. It's those folks that run the show and not the people sitting at the table necessarily, so...

THE COURT: Okay.

MR. KING: I would willingly give up my cellphone if my staff could have theirs.

THE COURT: All right. That's fine. Why don't you

prepare me a stipulation and order expanding that, and I'll go ahead and do that, grant it.

(Short pause.)

MR. MAY: We're all set, Your Honor. Everybody's gone through the metal detector.

THE COURT: All right. The record should reflect that we are still in open court with everyone present.

I had given to defense counsel and to the district attorney the case of *People vs. Davis*, which is 352 P.3d 950, 2015, a Colorado Supreme Court case, which gives the Court guidance as to what to do in a situation like this.

The defendant, Mr. Dear, has indicated that he wishes to represent himself. As part of the due diligence that I have to do, I need to follow the case of *People vs. Davis*, which indicates that, as part of the totality of the circumstances, I can order a mental health -- a competency evaluation, excuse me, for Mr. Dear. Once I get that evaluation, I can then make some findings in regard to whether or not the waiver of counsel is voluntary, whether it's knowing, and whether it's intelligent; but I need to get -- and I am ordering a competency exam to be able to, in the future, make the determination whether Mr. Dear is competent to waive counsel, and that's the procedure that I intend to follow.

In that regard I've prepared an advisement regarding competency evaluation order, and I've labeled that C-005. And I've given a copy to the district attorney.

And, Mr. Dear, you have a copy of that right in front of you.

THE DEFENDANT: Yes, Your Honor.

And the question is: Do I have a constitutional right to be my own attorney? And if I do, then your forced psychiatric evaluation is -- that's not a constitutional right, then. At your whim you can take that away from somebody and say, "Oh, he's not competent. I'm taking away his constitutional right."

THE COURT: Okay. I'm not doing it by whim. What I'm doing is following Colorado case law. And once I follow that Colorado case law, then I will make a determination whether or not you have made a knowing, voluntary, and intelligent waiver.

THE DEFENDANT: Well, I'm not gonna say anything at that psychiatric hearing.

THE COURT: And that's fine.

THE DEFENDANT: So you're not gonna know any more than you do now, 'cause I'm not going to say one word to them.

THE COURT: Okay. That's fine.

Give me a moment. Follow along as I read this to you. And that discusses exactly what you're talking about.

"Advisement regarding competency evaluation order:

"Paragraph 1. In order to determine whether you are competent to proceed, the Court must first determine whether you have a mental disability or a developmental disability. You are incompetent to proceed if, as a result of a mental disability or a

developmental disability, you either: (1) do not have sufficient present ability to consult with your lawyer with a reasonable degree of rational understanding in order to assist in your defense, or (2) you do not have a rational and factual understanding of these criminal proceedings.

"Paragraph 2. A mental disability is a substantial disorder of thought, mood, perception, or cognitive ability that results in marked functional disability, significantly interfering with adaptive behavior. A mental disability does not include acute intoxication from alcohol or other substances, or any condition manifested only by antisocial behavior, or any substance abuse impairment resulting from recent use or withdrawal. However, substance abuse that results in a long-term, substantial disorder of thought, mood, or cognitive ability may constitute a mental disability."

Bear with me. We're going to get to the paragraph that you want.

"Paragraph 3. A developmental disability is a disability that has manifested before the person reaches 22 years of age, that constitutes a substantial disability to the affected individual, and is attributable to mental retardation or other neurological conditions when such conditions result in impairment of general intellectual functioning or adaptive behavior similar to that of a person with mental retardation.

"Paragraph 4. The Court may make a preliminary finding

regarding your competency to proceed, which shall be a final determination, unless either party objects within 14 days after the preliminary finding.

"No. 5. If either party objects to the Court's preliminary finding, or if the Court determines that it has insufficient information to make a preliminary finding, the Court shall order that you be evaluated for competency by the Department of Human Services. The Department of Human Services shall prepare a report, a copy of which shall be provided to the Court, the prosecution, and your counsel. The record shall include, but not be limited to: (1) the name of each physician, psychologist, or other expert who examined you; (2) a description of the nature, content, extent, and result of the evaluation and any tests conducted; (3) a diagnosis and prognosis of your mental disability or your developmental disability; (4) an opinion as to whether you suffer from a mental disability or a developmental disability; and (5) an opinion as to whether you are competent to proceed. The competency examiner may question you regarding confessions and admissions you may have made and any other evidence of the circumstances surrounding the commission of the offenses charged, as well as your medical and social history, when conducting the examination.

"6. Either party may request a hearing or a second evaluation within 14 days of receiving the court-ordered report. If neither party requests a hearing or a second evaluation, the

Court shall enter a final determination regarding your competency based on the information available to the Court at that time.

"7. If either party makes a timely request for a hearing, the hearing shall be held within 35 days after the request for the hearing or, if applicable -- or, if applicable, within 35 days after the filing of the second evaluation report. The time for the hearing may be extended by the Court after a finding of good cause. At such hearing, you and the prosecution are entitled to: (1) be present in person; (2) examine any reports of the evaluation or other matter to be considered by the Court as bearing upon the determination of competency; (3) introduce evidence, summon witnesses, cross-examine opposing witnesses or witnesses called by the Court; and (4) make opening statements and closing arguments. The Court may cross-examine any witness called by you or the prosecution and may summon and examine its own witnesses.

"8. You have the right to confer with counsel prior to submitting to a competency examination. If you are indigent and without funds to employ counsel, the Court will appoint counsel for you at state expense. Indeed, in this case, the Court has already appointed counsel free of cost to you and the Court's found you to be in custody and indigent.

"9. The location of any competency evaluation shall be determined by the Court. In determining the place where the evaluation is to be conducted, the Court shall give priority to the place where you are in custody (in this case, the El Paso County

Jail), unless the nature and circumstances of the evaluation require designation of a different facility.

"No. 10. By statute, you are required to cooperate with the competency evaluator and other personnel conducting the competency examination. You have the right --" and this is what you were asking about. "You have the right not to answer any questions or make any statements during the competency examination. However, such refusal may be considered noncooperation. Any statements you do make during the course of the evaluation shall be protected as described in paragraphs 11, 12 and 13 of this advisement.

"Paragraph 11. If you do not cooperate with the competency evaluator or other personnel, and your lack of cooperation is not the result of mental disability or developmental disability, the fact of your noncooperation may be admissible at a hearing to determine your competency or any hearing to determine whether, after being found incompetent, you have been restored to competency. However, the fact of your noncooperation may only be introduced at such hearings to rebut any evidence you may offer with regard to your competency.

"12. If you do not cooperate with the competency evaluator or other personnel, the competency evaluator may also offer an opinion regarding your competency based upon confessions, admissions, and any other evidence of the circumstances surrounding the commission of the offense charged, as well as your known

medical and social history, and that opinion may be admissible into evidence at any competency hearing or competency restoration hearing.

"No. 13. Evidence acquired directly or indirectly for the first time from a communication derived from your mental processes during the course of a competency evaluation is not admissible against you on the issues raised by a plea of not guilty, except to rebut any evidence you offered regarding your mental condition to show incapacity to form a culpable mental state.

"Paragraph 14. Evidence acquired directly or indirectly for the first time from a communication derived from your mental processes during the course of a competency evaluation proceeding is admissible at any capital sentencing hearing held pursuant to section 18-1.3-1201 of the Colorado Revised Statutes only to prove the existence or absence of any mitigating factor.

"No. 15."

We're almost done, Mr. Dear, so bear with me.

"No. 15. If you testify on your own behalf at trial or at any capital sentencing hearing held pursuant to section 18-1.3-1201 of the Colorado Revised Statutes, evidence acquired directly or indirectly for the first time from a communication derived from your mental processes during the course of a competency evaluation may be used to impeach or rebut your testimony.

"No. 16. If, after the competency evaluation ordered by the Court has been completed, you wish to be examined by a competency evaluator of your own choosing, the Court, upon timely motion, shall order the competency evaluator chosen by you be given a reasonable opportunity to conduct a second evaluation. If you are indigent and without funds to employ a competency evaluator, the Court will appoint an evaluator at state's expense.

"No. 17. If you have raised the issue of your competency to proceed, or if the Court has determined that you are incompetent to proceed and has ordered you -- ordered -- and has ordered you to undergo competency restoration treatment, any claim by you to confidentiality or privilege is deemed waived, and the prosecutors, your attorneys, and the Court are granted access, without your written consent or further order of the Court, to: (1) reports of competency evaluations, including second competency evaluations; (2) information and documents relating to the competency evaluation created by, obtained by, reviewed by, or relied on by an evaluator performing a Court-Ordered evaluation; and (3) the evaluator, for purposes of discussing the competency evaluation.

"18. If the Court makes a final determination that you are not competent to proceed, the Court will suspend the proceedings, other than preliminary matters, and the Court may either release you on bond and order restoration proceedings and/or mental health treatment at a community-based program, or the Court may commit you to the Department of Human Services for treatment.

If committed to the Department of Human Services, you will be committed for so long as you remain incompetent to proceed, not to exceed the maximum sentence for the crime for which you are charged --" and I'm adding that's not in the final order here -- "less any earned time to which you will be entitled under Colorado law. If you are found incompetent to proceed, and the Court orders competency restoration proceedings, any claim of privilege or confidentiality shall be deemed waived, as outlined in paragraph 15 of this advisement."

The record should reflect that this order, C-005, was read in open court to Mr. Dear; and Mr. Dear had that in front of him as I was reading the order.

THE DEFENDANT: And, like I said, your competency people, when I don't answer their questions, they're gonna say, "He's not cooperating; we've got to deem him incompetent." So then you can do your drug treatment to make me a zombie like they did the Batman, and that's the whole plan, I guess. There's no constitutional right to have -- be my own attorney.

So everybody listening to me, do I sound like I'm a zombie? Do I sound like I have no intelligence? And then when you see me in here next month, when I'm sitting here like this, then just remember that.

THE COURT: All right. Thank you, Mr. Dear.

MS. BILLEK: Your Honor, if I may, I have some questions with regard to this advisement and the Court's finding.

THE COURT: You may.

MS. BILLEK: Your Honor, I --

THE COURT: I haven't made any finding yet.

MS. BILLEK: That's what I'm -- one of my questions that I was going to ask the Court is whether or not the Court has made a finding --

THE COURT: I have not.

MS. BILLEK: -- because I think under the statute the Court is required to make a preliminary finding before we do the advisement aspect of it.

THE COURT: Well, if I don't have enough information to make that finding, I can order an evaluation.

MS. BILLEK: And that is essentially, then, what the Court is ordering, if you don't have enough information. So that's what the finding of the Court is right now?

THE COURT: Correct.

MS. BILLEK: I would ask the Court to provide some information as to what the basis of that is. We were obviously not present for the ex parte hearing, so I don't know what came out in that, so I can't respond to that.

But I can tell the Court that if the Court has considered what happened at the last court hearing, Mr. Dear does have an understanding of the nature of these proceedings. He understands the possible punishments. He's understanded even defenses. And while he has disagreed with the strategy of his attorneys, that, in

and of itself, does not raise this to the level of incompetency.

He has indicated to the Court several times that he disagrees with the strategy of his attorneys. He's indicated even today that he understands his constitutional rights. At the last hearing he indicated he knew he had a constitutional right to go to trial.

So when we look at the very basic level that we need to determine competency, Mr. Dear meets those. I don't know what happened in that ex parte hearing; part of the reason why we objected, because we can't respond to any of that.

So I'm asking the Court to make findings on the record as to what the Court is relying on to even arrive at its preliminary determination such to the point that the Court would have to give him an advisement.

I also think that because Mr. Dear has raised the issue that he wants to represent himself, I think the Court is duty-bound to advise him of *Arguello*. That may have been done while we were outside the courtroom, but I do think this Court has to advise him of that.

THE COURT: I'm relying on *People vs. Davis.* And *People vs. Davis* says the defendant's competency is one factor that I can look at as a totality of the circumstance in making a determination as to whether or not his waiver of counsel is voluntary, knowing, and intelligent.

MS. BILLEK: And I would --

THE COURT: And --

MS. BILLEK: I'm sorry, Your Honor.

THE COURT: That's okay.

And I'm also looking at the case of *People vs. Seigler*, which is 832 P.2d 980, which says: "The court may take into account its observations of the defendant in the courtroom in making its determination."

So I'm relying on that as well. That's my record.

MS. BILLEK: And I understand that the Court may be relying on its observations, but those observations are in direct contradiction to somebody who would appear to be incompetent.

In fact, the record actually supports that Mr. Dear is competent, understands the nature of these proceedings, even as outlined in the case that the Court provided to us, which was *People v. Davis*, where under the totality of the circumstances, it has to demonstrate that the defendant understands the nature of the charges, which he has indicated to the Court that he does; that he understands the statutory offenses and the defenses that are allowable and punishment, he's already indicated that he does, and the defenses to the charges and circumstances of mitigation. He indicated last time that he understands what's going on with that and any other factors.

So I don't believe that the record is sufficient right now to support the Court's ruling, even with regard to the case that the Court is citing itself.

THE COURT: Okay. The Court disagrees with you.

And I'm looking also at 16-8.5-103(2). If the Court has insufficient information to make preliminary findings of competency, the Court can order a competency evaluation of the defendant.

MS. BILLEK: And I understand that, Your Honor. I'm asking the Court to explain what the Court is relying on to indicate incompetency.

THE COURT: I just did.

MS. BILLEK: I would ask, Your Honor, with regard to the findings that the Court has made, which obviously the Court knows we disagree with, I would ask that that ex parte hearing that we just had be unsealed so that it can be considered. I assume that those observations that the Court is relying on occurred during that hearing, which then, I think, becomes information needed by the evaluator and the parties to be able to respond to.

THE COURT: Your assumption is incorrect. The part that I'm relying on, in regard to my observations, have not only been today's hearing but previous hearings that we've had, including the advisement hearing.

MS. BILLEK: And if that is it, Your Honor, I'm asking that that hearing be unsealed, since some of those observations and/or statements made by the defendant could be at issue.

THE COURT: Okay. Any response from the defense counsel?

MR. KING: About unsealing --

THE COURT: Yes.

MR. KING: -- the ex parte hearing? No.

THE DEFENDANT: Unseal it.

MR. KING: I think would be prohibited by law, Judge.

THE COURT: I agree. So that motion will be denied.

That being done, I believe that doesn't prevent us from also looking at some other preliminary motions that are still out there. I think we can still do those.

And in that regard I'll look at defendant's D-12, which is the videotape. Is there any objection to proceeding on those as a preliminary matter?

MR. KING: Judge, now that the issue of competency has been raised, I don't think we can address any further issues before the Court until that issue is resolved. The issue of competency is fundamental and foremost in the proceedings. And I don't think that we can address whether or not -- any other issues until that issue has been investigated and resolved.

THE COURT: One of the problems with that, if we don't address that issue, some of the evidence might be destroyed.

MR. KING: I'm not aware of how any of the evidence would be destroyed.

THE COURT: Weren't they going to only keep it for 30 days or something along those lines is my understanding? If I'm wrong, I'm wrong. I'll stand corrected.

MR. LINDSEY: You're referring to D-006, Judge?

THE COURT: Yes. No, no, D-0012.

MR. KING: Oh, on the issue of videotape.

THE COURT: Yeah, videotape.

MR. MAY: I thought we resolved that last time.

MR. KING: I thought we did, too.

MR. MAY: We put them on notice. Actually the county attorney's here on that issue also.

THE COURT: That's why we haven't resolved it, because the county attorney wants to be here is my understanding.

MR. MAY: I will say this, Judge. Here's my --

Are you done? I don't mean to --

MR. KING: Yeah. Go ahead.

MR. MAY: Under 16-8.5-102, you are correct. On a competency issue, in terms of what the Court's done, that the Court can consider and decide matters, including preliminary hearing and motions, that are susceptible to fair determination prior to trial without the personal participation of the defendant.

So if we were strictly on a competency issue, I would agree that we can do other motions. But the Court has raised this not as a strict competency issue, as I just understood the exchange; the Court is raising this as an *Arguello* issue, that you are determining whether he -- who should be the attorney for the defendant in the courtroom. Should it be the defendant himself or should it be the attorneys seated next to him?

So our concern now is because this issue is who can argue

these motions for the defense side of this, I'm not sure you can raise preliminary matters because it's not just a pure competency issue anymore.

THE COURT: That's fine. If you don't want me to get into preliminary matters, I'm fine with that as well. I don't have any heartache one way or the other.

MR. KING: I think I agree with Mr. May. I hesitate to say that, but that certainly may be the case in the future as well.

THE COURT: Okay. That being said, I'm sure the gentleman who's standing up wants to tell us something.

Yes, sir.

MR. ZANSBERG: Your Honor, unless the defendant wishes to take a different position from that represented by his counsel in opposing our motion to unseal the court file, I think that position has already been set forth, and I'm prepared to respond to that.

But if the -- if there's a disagreement between the defendant and his counsel and he wishes to withdraw the -- or if the -- I don't know if he's had a chance to review the position set forth by his counsel and our position, but we do have a First Amendment right, the people do, to attend these proceedings.

THE COURT: And you're here. Nobody's prevented you from attending any proceeding.

MR. ZANSBERG: I understand.

And, Your Honor, to echo what was said earlier, the reason I got up before the Court emptied the courtroom is because,

as the prosecutor's pointed out, certain findings need to be made on the record.

Under the case law cited in our motion papers regarding the sealed pleadings, even the defense counsel, who opposes that, acknowledges that it is unquestionably the law of the land from the United States Supreme Court that prior to being excluded from a courtroom in a pretrial proceeding, including the one that went on earlier, the Court must make findings on the record that the First Amendment right of the public to attend judicial proceedings has been overcome. I have no doubt that those findings could have easily been made. The prosecution -- it was an ex parte proceeding. If the press were and the public were privy to the proceeding, the prosecutor would have access to the information. There's no less restrictive means and appropriately the courtroom was closed and emptied.

I was merely standing up, Your Honor, to say under the Constitution of the United States, from the *Press-Enterprise* case of the United States Supreme Court, and the *Star Journal* case from the Colorado Supreme Court, and the *Sigg* case from the Colorado Supreme Court, the Court must enter findings on the record before closing any proceeding in this case to the public.

I have no doubt, as I said, that such findings easily could have been made, but that itself is a constitutional requirement. And I believe the same -- as our motion indicates, the same constitutional requirement must be made. There must be

findings on the record by the Court to justify continued sealing of the court file or any portion thereof once a member of the public, and my clients are appearing as members of the public, no -- with no greater rights, no lesser rights than any other member of the public as for access to the court file.

I'm prepared to address the arguments made in the defendant's motion on that, if the Court is willing to entertain that preliminary motion at this time.

THE COURT: I'll hear your argument.

MR. ZANSBERG: My argument is that the defense counsel says that the First Amendment does not apply to the court file. And we respectfully disagree and have cited to the Court -- as the defense counsel says, *Star Journal Publishing* and *In re P.R.* are courtroom proceedings, not records, but the standard adopted in that case, the 3.2 -- 3.8(2) *[sic]* of the ABA Standards of Criminal Justice apply equally to court records. And we cited numerous authorities in our motion, including numerous judges in this state, Judge Samour in the Holmes' proceeding, Judge King in the Cox proceeding --

THE COURT: Who didn't release stuff until after the prelim; is that right?

MR. ZANSBERG: Judge Samour did not; that's correct.

THE COURT: Okay.

MR. ZANSBERG: And Judge King released them even though there was no prelim.

THE COURT: And it was waived.

MR. ZANSBERG: Right. It was waived.

And Judge Schwartz in the -- another case, Lamberth, involving the murder of a Colorado Springs police officer, in which the unsealed arrest affidavit, months before a preliminary hearing, contained the confession of the defendant. And as I pointed out in the motion, Judge Schwartz said: "If it's going to come out at a preliminary hearing, anyway, where the People do have to show probable cause, why delay?" And why delay is a very good question when there is a constitutional right to contemporary -- contemporaneous access to court files.

And the Court must also find, under those precedents, that there's no less restrictive means available to protect a defendant's fair trial rights. And as our motion points out, there are a myriad alternate means available to protect this defendant's fair trial rights should this defendant choose to go to trial, which in the last proceeding he announced his intention to waive. That may change, don't know where this is going, but if it goes to trial, there are abundant alternative resources to find 12 impartial jurors, whether they've been exposed to the information or not, who can decide the defendant's guilt or innocence.

And we have found that time and time again in the Perrish Cox case where Judge King did release the arrest warrant affidavit over the objections of defense counsel saying it would be impossible to seat a fair jury. After they were exposed to the

information and that warrant affidavit, he was acquitted.

So there -- and there are a myriad of other cases to indicate -- to substantiate that. Change of venue, admonition to the jury, extensive voir dire are all means that are available and need to be shown by a party seeking to maintain sealing to be either unavailable or inadequate. It's not my burden to show that they are. As any party wishing to deny the public's First Amendment rights to show, meaning through presentation of evidence, that's the holding of *In re P.R.* and *Star Journal*, there's to be an evidentiary hearing in which parties seeking to close this courtroom earlier or to deny the public's right of access to the court file show to the Court, through evidence, so that the Court can make the requisite findings on the record enabling judicial review.

And this may sound like, you know, very highfalutin and lofty discussion removed from reality, but I would commend to Your Honor the *Georgia vs. Presley* case from the United States Supreme Court, about three terms ago, in which the United States Supreme Court reversed a criminal trial after conviction, after criminal -- criminal trial, because the voir dire was closed to the public where neither party objected. And the United States Supreme Court said judges of --

THE COURT: Well, Counsel, I think that kind of argument, voir dire and an affidavit, those are completely different. One's apples and oranges. That's not even a fair comparison.

MR. ZANSBERG: My point, Your Honor, is that --

THE COURT: Well, my point is that's not a fair comparison at all. Voir dire, closing voir dire, that's a pretty drastic move. That's a lot different than affidavits.

MR. ZANSBERG: My point was not to --

THE COURT: Agreed? Do you agree that that's a lot different?

MR. ZANSBERG: I agree that they're different --

THE COURT: Thank you.

MR. ZANSBERG: -- in nature.

THE COURT: In nature?

MR. ZANSBERG: Yes.

THE COURT: Okay.

MR. ZANSBERG: What I'm saying is that when a First Amendment right of access applies, whether it be a proceeding, and the proceedings to which have been applied include the preliminary hearing, probable cause showing, that that's in the same nature. That's the *Press-Enterprise* case. A preliminary hearing in which the People make a showing of probable cause, inadmissible evidence that -- to believe that the defendant should be held over for trial, yes, the First Amendment right of access applies to those proceedings. It applies to suppression motion hearings, et cetera.

And when a First Amendment right of access applies, those findings that the Court must make, the Court must make them sua sponte, even if no party requests that the proceeding be open.

Even if I hadn't stood up and asked that the findings be made, the Court must do so. And failure to do so, the Supreme Court of the United States has said constitutes constitutional reversible error. I would commend that case to Your Honor's attention.

Even though probable cause affidavits are different in kind to voir dire, they are not different in kind than a preliminary hearing. And as a result, the current statement of probable cause to hold this defendant and deprive him of his liberty upon a judicial order authorizing his arrest and other judicial orders authorizing the search of his home under the Fourth Amendment, those are acts of judicial authority, and they are based upon records presented by other governmental authorities to a court of law. And the people in this country have a right to see what its government is doing. And until -- as a result of that First Amendment right, it is the burden, as I say, on the parties wishing to overcome that right.

I fully acknowledge that Mr. Dear has rights under the Sixth, Fourth, Fifth Amendments as a criminal defendant, but there are countervailing rights of the public in judicial proceedings. All of the case law we've cited involved the interplay of those Sixth and Seventh Amendment rights and the First Amendment rights of the public. And that balancing is what requires the Court to make the findings which, until these parties make their showing, the Court cannot make. They haven't made that showing, and the Court cannot make the findings and, therefore, we respectfully ask

that the Court unseal any portion of the court file for which there has not been a showing that warrants the Court's, excuse me, entry of such findings.

THE COURT: Thank you.

And it's my understanding the district attorney -- well, does the district attorney have a position on this? I have one question that needs to be asked. Is there still ongoing investigation?

MR. MAY: There is still ongoing investigation. We are gonna leave this to the discretion of the Court and defense counsel.

If the Court does grant the motion to unseal, then we would have a statement about things that we think we would ask to have redacted until the investigation is complete. Actually there are three areas that we would cover if the Court -- if the Court is going to grant the request to unseal, then we'll bring that up. If the Court's not, then there's no reason for us to speak. But whether it's gonna be unsealed in general, we'd leave it to the Court.

THE COURT: Just as educational, what three areas are we talking about if I was to grant it?

MR. MAY: The three areas that I see, as I looked at the search warrant and the arrest warrant, are:

One, we have filed charges in this case. We have named the law enforcement victims in the case. We have not named the

other parties who are victims in the case. We've used their initials. Some of those names are in the affidavits.

So we would want to redact the specific names of people who have privacy rights and doctor-patient privacy rights. So we'd want to redact that.

Second, in one of the affidavits it gets rather specific on what some of the wounds may be. And, again, those people may -- we have not had the opportunity to see if they are going to assert any HIPAA rights or doctor-patient rights on their particular wounds that occurred in this case. And so at least initially we'd like to be able to have time to contact them. That, I think, is an issue that will go away and will be released at some point would be my guess, but that's secondly.

Third, there are some -- some areas in there that may affect the ongoing investigation. It relates to the same line that the defense redacted in their motion before showing it to counsel. And so we would be asking to redact that until that portion of the investigation is done.

THE COURT: Okay.

MR. MAY: I've had discussions previously with counsel. And I think he understands the need for -- we had that sort of discussion in the past of -- that it may be until all the investigation's done, certain aspects may not be given out. And he was very generous in the first couple weeks of not addressing this knowing that we were -- there was ongoing investigation.

THE COURT: Okay. Thank you.

The Court's gonna take the matter under advisement, and I'll issue a written ruling.

With that, I assume we can set it for a further proceedings to get a report back. And I'm not sure how long it takes these days.

I'm sorry. Counsel.

MS. MAY: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MS. MAY: Diana May, senior assistant county attorney, appearing on behalf of the sheriff's office, the El Paso County Sheriff's Office.

We would like to be heard on defense's motion D-12. We did file a written response. It's our understanding at the last court proceeding the Court issued a temporary order but set the matter for a hearing today.

And at the present time the sheriff's office is preserving the recordings. There's two sets of recordings that are being preserved. And I think it's important, on behalf of the sheriff's office, that we address the continued preservation request.

First, there seems to be a presumption that there is relevant evidence on there or presumption argued by defense counsel that there's some sort of exculpatory information on it.

The sheriff's office's video system is for two purposes.

It's for the safety and security of the guards and the deputies and the safety and security of the inmates. It does not have audio-recordings.

So, first of all, the presumption that there's some sort of audio-recording that is being preserved is helpful, I want to first dispel that -- that belief.

The second issue is the sheriff's office did temporarily agree to audio-record Mr. Dear for the first 30 days. The sheriff's office does intend, absent a court order to the contrary, which we would oppose, to stop audio-recording him on Monday, which is the 30th day. We are having to assign a deputy, who would normally be serving their duties at the jail of safety and security, to record him with a handheld audio-recording.

And so there are two issues. I understand the issue of -- as Mr. May put it, the *Arguello* competency issue, but this is -- this is an issue that the sheriff's office needs to address because of the time and the cost associated with continuing the Court's temporary order.

I would respectfully also indicate that it's also the sheriff's office position under 30-10-511 that the sheriff is the one who's in control and custody -- control of the jail and in charge of the county jail, as the statute states.

So I also would question the authority to be able to continue to order the sheriff's office to preserve video in and of itself or continuing to audio-record Mr. Dear.

THE DEFENDANT: May I say something, Your Honor?
THE COURT: What?
THE DEFENDANT: That -- that I said on one of those videos that you're forcing on me --
THE COURT: Okay. Let me stop you just a moment, okay? Let me stop you for just a moment.
Are you still video-recording at this point or...
MS. MAY: Yes. At this point both are taking place, the video-recording and the audio.
THE COURT: And you're going to stop that at the end of 30 days?
MS. MAY: Well, unless the Court orders otherwise.
THE COURT: And your intention is to stop at the end of 30 days?
MS. MAY: Yes, Your Honor.
THE COURT: Okay. The Court is going to -- I'm not gonna get in the business of telling the jail how to run their jail. It's their jail.
The audio and video that has been done for the last 30 days should be preserved. I'm not gonna order that you continue doing it. That's your -- that's your -- that's the jail's prerogative, the county's prerogative, as to what they want to do, but if they -- for the last 30 days the audio and video must be preserved.
MS. MAY: We will do that.

THE COURT: And whether or not it's relevant or not relevant, it may go towards competency, I don't know, but it should be preserved.

MS. MAY: It is. And it will continue until Monday.

Thank you, Your Honor.

THE COURT: You're welcome.

THE DEFENDANT: Well, I have evidence, Your Honor, my hair. They can take a sample of my hair. And they can get if there's any drugs that's been put in me while I'm in jail.

THE COURT: Okay.

THE DEFENDANT: So any time you want, take a hair sample.

THE COURT: Okay. How long -- I'm unaware as to how long we think the competency eval will take, the first one.

And the other issue being, do we want to do it at the jail or do we want to do it at -- in Pueblo? I mean, that's kind of a sore subject for people these days.

MS. BILLEK: Well, Your Honor, the last case where I had an issue -- is not similar to this, but when we had to contact the state hospital with regard to timing, they can do the evaluation quicker if it is done at the El Paso County Jail, which they estimate about 90 days. With regard to sending him to the state hospital in Pueblo, they are estimating it's anywhere from six to nine months because they are really backlogged by request of second evaluations.

THE COURT: Okay. Give me just a brief moment.

I believe the statute talks about the Court should give priority to the place where the person is in custody, which in this case would be the El Paso County Jail, unless the nature of the circumstance of the evaluation require designation of a different facility.

Any statement in that regard from either side?

MR. KING: Yes, Your Honor. I have a statement, unless counsel wants to finish.

MS. BILLEK: Mr. ...

MR. KING: Well, I think, unless the prosecutors are willing to concede that this will not be a case where the death penalty will be pursued, then this is such a case where we ought to consider having this done correctly and having it done with all of the resources that are required and not be cutting corners.

So if the authorities at the state hospital believe that it should take place at the state hospital, I think that's where it should take place. And we shouldn't be hamstringing those people in a case of this nature.

The other point that I would make, Judge, is that with regard to the time frames, those time frames may be the case with your average run-of-the-mill circumstance; but I would suspect that some special arrangements might be made by the state hospital in a case of this nature.

So I think if we were to give them the prerogative and the ability to do their jobs, that would be the appropriate way to

proceed.

MS. BILLEK: Your Honor, any contact with the state hospital would be inappropriate by either of the parties. That would obviously have to come from the Court about getting any increased dates or evaluations done sooner.

THE COURT: All right.

MS. BILLEK: 'Cause it's actually -- it's the Court's evaluation; it's not one of the parties' evaluations with regard to that.

May I have just a moment?

THE COURT: You may.

MR. KING: Well, Judge, I would disagree with the fact that I couldn't call the state hospital and ask them what the time frame is on the evaluation. That's certainly something that's frequently done. Any competency evaluator who would engage in a competency evaluation without speaking to the defense counsel would not be doing their job.

So I expect they'll be wanting to talk to us anyways. And I'm aware of no proscription of me speaking to the state hospital, other than my ethical and constitutional obligations to Mr. Dear.

MS. BILLEK: And, Your Honor, I think defense counsel's mixing up two different things.

It is not our responsibility to contact, nor would we be allowed to contact the state hospital and say, "Hey, could you get

this done in 32 days?" That is the Court's prerogative to do, regardless of whether or not an evaluator contacts us as they would normally with regard to evaluations.

So I think defense counsel's mixing up two different things.

THE COURT: All right. The Court notes that this is a case that is -- first degree murder's the highest charge. We have 179 separate counts. The Court feels that this is the type of case that does make it appropriate for the evaluation to take place at the hospital in Pueblo, as opposed to the El Paso County Jail, understanding that this is an issue that, quite frankly, is being brought up throughout the state as to where the evaluation should take place, should it be at the county jail or should it be at the state hospital in Pueblo?

Based upon the nature of the offense, based upon the potential penalty, the Court finds that the circumstances of this evaluation require the designation of the facility being at the hospital in Pueblo.

That being said, what's the time frame, roughly? I know that's what we just went through, but...

MS. BILLEK: In a prior case, Your Honor, it was six to nine months. But I suppose if the Court calls down and says, "I would like it done within 45 days," then the state hospital is gonna have to comply with the court order.

THE COURT: Well, I have tried that before and, quite

frankly, the state hospital does not comply with those court orders and then we get into a contempt issue. I wish they would, quite frankly, but --

MS. BILLEK: I would ask the Court to set it for a status within 60 days.

MR. KING: That was gonna be my suggestion.

THE COURT: All right.

MR. KING: Why don't we set it for a status in about 60 days and see where we're at.

THE COURT: That works for me. Let's set it for a further proceedings status in 60 days. And is that a status that we want the defendant brought back up for?

THE DEFENDANT: I'm not gonna cooperate with them.

THE COURT: That's fine. I understand that and that's why -- you don't have to. That's why I read you that whole piece of paper.

MS. BILLEK: I would say yes, Your Honor.

THE COURT: I would think so as well.

MS. BILLEK: There were some statements that were made.

I also would ask the Court if we receive information that the elevation is done sooner, may this --

THE COURT: Oh, certainly.

MS. BILLEK: -- issue be brought back --

THE COURT: If we get it done sooner, I'll bring it back sooner. I don't have any problem with that. And we'll give proper

notice to everyone.

MS. BILLEK: Thank you.

THE COURT: So let's set it for further proceedings in approximately 60 days. I'll have to have the district attorney prepare me a writ of habeas corpus as well --

MS. BILLEK: Yes, Your Honor.

THE COURT: -- once we get that date.

Let's do a Wednesday.

THE CLERK: February 24th at 1:30.

THE COURT: February 24th at 1:30.

MR. KING: That's fine with us.

THE COURT: Does that work for the district attorney?

MR. MAY: It does. 24, was it?

THE COURT: Yes.

MR. MAY: At 1:30?

THE COURT: All right. February 24, 1:30. And it will be in -- at this point this same courtroom.

MR. MAY: And I'm looking for direction on discovery at this point. We've provided defense counsel with over a thousand pages of discovery and a couple of videos. We have much more discovery to give out here in the next seven days, even much more the next couple of weeks. I'm assuming the Court would want us to continue giving that to defense counsel.

THE COURT: I do. And what defense counsel does with that discovery if -- once I make my determination as to the waiver

of counsel, that will take place at that time.

MR. MAY: We have some redaction issues we'd like to bring up --

THE COURT: Sure.

MR. MAY: -- on that.

MR. LINDSEY: Judge, in some of the videos personal information is provided of the officers. And what we'd indicated to the Court and counsel last time is that any officers that are sought for whatever purpose, we will just go through agency address. We were hoping to redact that out of reports.

THE COURT: As opposed to home addresses or...

MR. LINDSEY: Yes, sir.

THE COURT: Okay.

MR. LINDSEY: There are home addresses and personal cell numbers that are part of some of those interviews.

THE COURT: Well, let's do this: Let's don't have those redactions, but I'm gonna issue a protective order that defense counsel should not use those in any way other than defense team, with the understanding that we may have to revisit this issue if, in fact, the defendant represents himself, and we might have to do some separate redactions at that point. And put that on the back burner.

MR. LINDSEY: Yes, sir.

And if I could ask for additional points of clarifications. As we go through this, we're finding more and more

details where the investigations have given out personal information of staff or patients. We also would ask that same protective order. I think we got it last time, but it's in different areas that we didn't anticipate just because of the investigation covers videos; it covers photographs; it covers patient information.

We do have one photograph, I think our investigator indicated to us, of an actual file that's inside of the clinic has information that's pertinent to a patient. If we can redact anything, Judge, I'd like to redact that photograph or somehow blur the name out. I don't think the name of that person in that file is relevant to anything a part of this case.

THE COURT: I don't -- it's difficult to know what's there or what you're -- I have a general idea of what you're talking about, but let's leave it in there. Do not redact it. If, in fact -- well, let's say we have that same protective order with defense counsel. They're not supposed to use it or give it to anyone else.

Again, if we get to a point where Mr. Dear's representing himself, we'll take another look at the redaction at that point because that raises certainly different issues.

MR. LINDSEY: And so will that protective order apply to any video, any call screen printout, any audio --

THE COURT: Yes.

MR. LINDSEY: -- any photographs, any reports?

THE COURT: Any discovery, period.

MR. LINDSEY: Yes, sir. Thank you.

THE COURT: You're welcome.

MR. MAY: I have one other -- two other matters I need to make a record on.

THE COURT: Sure.

MR. MAY: One of them's sort of a continuation based on some things that happened at the last hearing that I was unaware of at the time.

Last time, just for context, I brought up the case of People vs. Nozolino where you, Your Honor, are a victim in that case. I mentioned that both of my co-prosecutors here were prosecutors in the case. Donna Billek, in particular, did the homicide trial. Joy Mitchell was the victim advocate in this case and on that case. I pointed out that you were a named victim, that Mr. Nozolino was convicted of attempted murder in your particular case and is on appeal.

What I did know, what happened last time, is that your wife came to the proceedings two weeks ago on December 9th. She met Joy Mitchell in the hallway and gave her a hug. She came into the courtroom and went up to Donna Billek and gave Donna Billek a hug. I'm assuming part of that is because she is also a named victim in the Nozolino case.

She also -- Mr. Nozolino had been charged also with the attempted first degree murder of your wife. He was convicted on

that. His case is on appeal. And so that I assume she knows Joy Mitchell and hugged her because Joy Mitchell even today is your wife's victim advocate and is your victim advocate. So I want to make sure that's clear on the record so that all people are aware of that.

Second, it's my understanding that -- I looked at the court's -- the courthouse here has -- I'll provide a copy, if I might approach the bench --

THE COURT: Sure.

MR. MAY: -- directives in the court. The last directive I've seen on appointment of judges in homicide cases is one signed by then Chief Judge Samelson.

I provided also a case to the Court, which is *People vs. Maser*, M-a-s-e-r. That particular case indicates that the chief judge director -- directives had the same standing as, quite frankly, statutes have. The particular one we have indicates that on all class 1 felony cases, that there is a random rotation that is done in who gets the particular case in the courthouse.

It has come to my attention that, in fact, you, Your Honor, were not the next judge on the rotation, that, in fact, it was Judge David Gilbert, I believe --

MR. LINDSEY: 7.

MR. MAY: -- who is -- or Division 7, whoever the judge is in 7, was -- my co-counsel corrected me -- was the next judge on the rotation. And in light of things that exposed or brought

out -- exposed is not the right term -- brought up on the record, I think it does raise a fair question of how is this Court appointed on this case and is that in violation of Chief Judge Directive 2008-6, signed June 30th, 2008?

I will note that it does allow -- you do have also a disqualification/recusal-of-a-judge directive. That actually, as I saw, goes back to 1988. So that if the Division 7 judge did disqualify themself, it does require that that be done in writing and communicated so that we all know why, the reason for disqualification or recusal for the next judge or judges in the rotation.

So, I guess, I am asking the question of how did this Court end up on this case?

THE COURT: Are you having -- are you moving to recuse me from the case or are you just asking?

MR. MAY: I've asked the question. I don't -- I don't know the answer to that, so I don't know what the next step is.

THE COURT: The answer to that --

MR. MAY: I do have concern.

THE COURT: The answer to that question is it's customary, and through the state court administrator's office, when you have a high-profile case, that the chief judge takes the high-profile case. The chief judge took the high-profile case in Kobe Bryant case. The two chief judges in the Holmes' case took those cases. It was -- Judge Samour was the last one, but the one

before that -- I can't remember his name, but it was a chief judge who's currently retired.

So it's customary, and with direction from the state court administrator's office, that the chief judge is to handle these cases. That's the answer.

MR. MAY: And may I inquire whether there is a written directive, if there was an oral directive, or how that directive came down --

THE COURT: It was oral.

MR. MAY: -- came down from state judicial?

THE COURT: Oral.

MR. MAY: And is it fair to state, then, that I am correct that you were not in next in the rotation based on Chief Judge Directive 2008-6?

THE COURT: I don't know. I didn't look at the rotation.

THE DEFENDANT: Then why do we have a rotation?

THE COURT: Anything else you want to say, Counsel?

THE DEFENDANT: All I just said, you weren't next on rotation, and so why even have a rotation?

THE COURT: So each judge gets a turn at a homicide case. And, in fact, I had directions and talked to the state court administrator's office, and that's why I took the case.

Anything else from defense counsel?

MR. KING: No, Judge.

It's a little concerning. It seems -- almost sounds like

Mr. May is trying to select the judicial officer that would hear this case. I don't have any position on what judicial officer hears this case. I have no problem with this Court or any other court that the judicial office -- the state judicial decides should hear this case.

THE COURT: All right. Well, it wasn't state judicial. I talked to state judicial with their advice, and I decided to take the case.

Anything else?

MR. KING: No, sir.

MR. LINDSEY: Judge, Ms. Roy had said something about responding to the expert being present. We have a lot of testing to be done and a lot of places to send evidence. We'd like to get moving on those and testing of the evidence.

THE COURT: Unfortunately, I don't think we can until I get to the competency evaluation.

MR. MAY: I don't think the Court entered an order in regard to the testing of evidence. You did state on the record that no consumptive testing should be done.

THE COURT: Right. If it's consumptive or destructive testing, it cannot be done.

MR. MAY: Otherwise you didn't enter an order.

THE COURT: That's the order right now.

MR. MAY: Yeah.

THE COURT: And from now on, the way we're gonna work

this is each attorney takes one area and one attorney talks to me, not three different attorneys talks to me about one specific issue.

Okay. Thank you. Anything else?

Thank you very much.

MR. KING: No, Your Honor.

THE COURT: The Court will be in recess.

(At 2:59 p.m. - hearing concluded.)

*****

REPORTER'S CERTIFICATE

This document is a true and complete transcription of my stenographic notes taken in my capacity as Official Reporter of the Fourth Judicial District, District Court, El Paso County, Colorado, at the time and place noted.

Dated at Colorado Springs, Colorado, January 21, 2016.

Cindy A. Pressprich

Cindy A. Pressprich, RPR, RMR, CRR

DATE FILED: February 16, 2016 4:49 PM

EXHIBIT C

TO THE HONORABLE GILBERT MARTINEZ'S ANSWER TO ORDER AND RULE TO SHOW CAUSE

Case No. 2016SA13

REDACTED

District Court, El Paso County, Colorado Court address: **270 South Tejon** **Colorado Springs, CO 80903** Phone Number: **(719) 452-5446**	FILED-DISTRICT & COUNTY COURTS-EL PASO CO., CO DEC 0 9 2015 DIVISION 10
People of the State of Colorado, Plaintiff, v ROBERT LEWIS DEAR, JR, Defendant.	
Attorney or Party wihout Attorney(Name and Address): Phone Number: Email: FAX Number: Atty.Reg#:	Case Number: 15CR5795 Division 10 Courtroom W570
ORDER REGARDING REQUEST FOR EXPANDED MEDIA COVERAGE (C-003)	

THIS MATTER comes before the Court on KUSA/9NEWS and Denver Post Request for Expanded Media Coverage. The Court, being fully advised in the premises, finds and orders as follows:

1. The Request for Expanded Media Coverage was timely filed pursuant to the Colorado Supreme Court Rules, Chapter 38, Rule 3, Media Coverage of Court Proceedings. A copy of the request was also provided to both the prosecution and defense in this matter.

2. The written requests are for video, audio recording and still photography of the Dec. 9, 2015 proceedings.

3. The Court has sought and received input from both the People and counsel for the Defendant regarding this request.

4. The Court has considered the positions of the parties involved, the factors contained within Rule 3 and the nature and length of the Dec. 9, 2015 hearing, and pursuant to said review the Court will allow expanded media coverage of the Dec. 9, 2015 hearing.

5. This Order applies only to the Dec. 9, 2015 hearing.

EC

WHEREFORE, the Court hereby **GRANTS** the Request for Expanded Media Coverage at the Dec. 9, 2015 hearing in the above referenced matter.

SO ORDERED THIS 9th day of December, 2015.

BY THE COURT:

District Court Judge

DATE FILED: February 16, 2016 4:49 PM

EXHIBIT D

TO THE HONORABLE GILBERT MARTINEZ'S ANSWER TO ORDER AND RULE TO SHOW CAUSE

Case No. 2016SA13

District Court, El Paso County, Colorado Court address: **270 South Tejon** **Colorado Springs, CO 80903** Phone Number: **(719) 452-5446**	
People of the State of Colorado, Plaintiff, v ROBERT LEWIS DEAR, JR., Defendant.	
	Case Number: 15CR5795 Division 10 Courtroom W570
DECORUM ORDER (C-002)	

Upon consideration of the intense public and media interest in the proceedings in this matter, the Court, in the exercise of its inherent power to provide for the orderly disposition of this case, hereby enters this Order pertaining to the conduct of proceedings in this matter.

It is the Court's intent to preserve the processes by which a fair trial may be conducted. Any violation of this Order, and any other conduct which the Court finds disruptive of the proceedings, may result in an order of temporary or permanent exclusion from the proceedings and/or other legal sanctions including but not limited to, proceedings for contempt of Court. Sanctions for contempt of Court may include a fine and/or a jail sentence.

The media, members of the public, parties and their legal representatives, and agents thereof, having gained access to the El Paso County Terry R. Harris Judicial Complex, (hereinafter "Judicial Complex") shall at all times be subject to this Decorum Order to the extent that it is not inconsistent with any other specific court order. This Order shall apply to all proceedings in this case until further order of this Court. "Proceedings" means any trial, hearing, or any other matter held in open court that the public is entitled to attend.

1. Specific requests for expanded media coverage, pursuant to P.A.I.R.R. 3 (Media Coverage of Court Proceedings) are required for each hearing or proceeding for which such coverage is being requested and shall be addressed by separate order.

2. The following restrictions shall apply to the public areas within the Courthouse, which for purposes of this section 2 includes the following: the area comprised of the courtrooms, clerks' offices, judges' chambers and hallways adjacent thereto:

    a. No interviews shall be conducted within the Courthouse. This provision does not restrict anyone from making inquiries of court personnel regarding the scheduling of proceedings or the filing of papers with the Court, or from requesting any other information in the public record concerning this case.

    b. Persons known or identified to be summoned or selected jurors shall not be approached, contacted, questioned, interviewed or harassed, whether on or off the premises of the Judicial Complex, about the prospective service, qualifications, opinions or any other matter concerning this case. This Order does not preclude the interview of a summoned or selected juror after discharge from service.

    c. The media and members of the public may not photograph or videotape persons known or identified to be summoned or selected jurors. Selected jurors will be given a juror badge and any such person displaying the badge shall not be photographed or videotaped. Any summoned juror who displays a jury summons upon entrance to the Courthouse shall not be photographed or videotaped. If an individual who is photographed or videotaped is subsequently determined to be a summoned or selected juror, the individual's image shall not be displayed or distributed, nor may the individual be identified as a juror in any other manner. The foregoing provisions pertaining to summoned and selected jurors shall also apply to the hallway cameras permitted in Paragraph 1(d) below. Additional provisions pertaining to photography or videotaping of the alleged victims, Defendant, their counsel, families, witnesses and jurors may be addressed by the Court as it becomes necessary.

    d. Notwithstanding the above provisions and subject to Paragraph 1(c), one still camera and one video camera with audio recording disabled will be permitted in the Courthouse's public hallway. The cameras shall be placed in locations acceptable to the Court and shall be positioned and operated so as to minimize any distraction in the public hallway. The Court reserves the right to vacate this provision if final arrangements are not acceptable to the Court. The pool camera operators are responsible for arranging an open and impartial distribution scheme for all participants of the media pool.

    e. Photographers and videographers may not harass or chase any persons entering or leaving the Courthouse.

    f. At all times there should be a clear passage and entry into the Courthouse for all persons who conduct business with the courts. There shall be no obstructions to clear passage through the public hallways in the Courthouse.

3. A designated media camera area will be established at the entrance to the Judicial Complex.

4. Notwithstanding the above provisions, all persons on the premises of the Judicial Complex shall at all times comply with any specific direction given by Court personnel and El Paso County Sheriff's personnel.

5. The following restrictions shall apply to all courtrooms. For purposes of this section 5 "courtrooms" shall include the primary courtroom in which proceedings in this case are held, as well as any spillover courtroom or other auxiliary listening facility, operated by the Court:

    a. No electronic devices, including but not limited to computers, cameras, cell phones, video phones or other recording or transmitting devices, shall be permitted in the courtrooms except pursuant to an expanded media coverage order. Cameras permitted pursuant to an expanded media coverage order shall be turned on and operating only while Court is in session.

    b. All members of the public and media must be seated before the Court is in session and must remain seated in the courtrooms (except for emergencies) until the next recess is called. No admittance to the courtrooms while Court is in session is permitted.

    c. While in the courtrooms, all members of the public and media must remain quiet, not comment on the proceedings and not engage in any disruptive behavior while Court is in session. Signs or symbols on clothing or otherwise indicating support for any party are considered prohibited comment.

3. A copy of this Order shall be posted at all entrances to the Judicial Complex and the courtrooms (as defined in section 2) in which proceedings take place.

DONE this 7th day of December, 2015

BY THE COURT:

Chief District Court Judge

DATE FILED: February 16, 2016 4:49 PM

EXHIBIT E

TO THE HONORABLE GILBERT MARTINEZ'S ANSWER TO ORDER AND RULE TO SHOW CAUSE

Case No. 2016SA13

Planned Parenthood Suspected Gunman: 'They Wanted To Start A War'

January 13, 2016 5:00 PM

Filed Under: Colorado Springs, El Paso County, El Paso County Jail, Garrett Swasey, Jennifer Markovsky, Ke'Arre Stewart, Planned Parenthood, Planned Parenthood Attack, Robert Dear, Robert Lewis Dear

COLORADO SPRINGS, Colo. (CBS4) – The suspected gunman in the Planned Parenthood attack in Colorado Springs believes the FBI was following him the day he allegedly opened fire at the clinic.

Prosecutors have charged Robert Lewis Dear with 179 counts of crimes including first-degree murder, attempted murder and assault in the Nov. 27, 2015 attack that left three people dead and nine others injured.

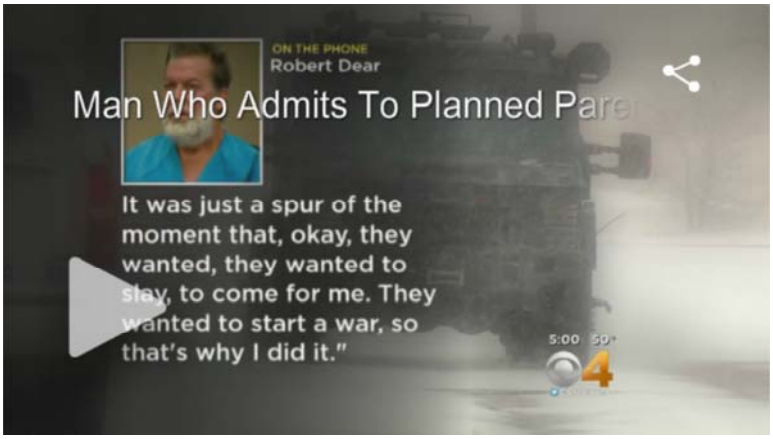
8

Robert Lewis Dear in court on Dec. 9, 2015 (credit: CBS)

Dear, 57, called CBS4 from the El Paso County Jail. CBS4 Investigator Rick Sallinger talked to Dear on the phone on Wednesday where he described that the attack wasn't calculated before that day.

"It wasn't planned, as far as that goes. It was just a spur of the moment that… okay. They wanted, they wanted to slay, to come for me, they wanted to start a war, and so that's why I did it," said Dear.

During a court appearance, Dear declared himself "a warrior for the babies" and said he was guilty.



He also claimed the truth was being hidden, "There's a lot more to this than to me to go silently into the grave."

Dear said his troubles began 22 years ago when he complained on the radio about the FBI at the siege in Waco, Texas. Since then, he claimed to have been followed and harassed by the FBI.

Dear told Sallinger that 10 FBI agents were following him from his trailer home in Hartsel that morning.

"I felt like they were going to get me and so I am going to pick where I want to make my last stand. And I picked Planned Parenthood because it's murdering little babies."

(credit: CBS)

Dear claimed the FBI tipped off the clinic that he was on his way.

"Well, when I got there of course, those guys knew I was armed, knew everything about me. They slither off like snakes and they get the local

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cops to do their dirty work, so that's why the shootout was there," said Dear.

Garrett Swasey, Ke'Arre Stewart and Jennifer Markovsky (credit: CBS)

The three people killed in the attack were Garrett Swasey, a University of Colorado-Colorado Springs police officer; Ke'Arre Stewart, an Iraq War veteran; and Jennifer Markovsky, a mother of two.

Dear has been ordered to undergo a competency hearing to determine if he can stand trial.

He told CBS4 that he is ready to stand trial.

"I'm just letting you know I am sane, I am coherent, I have a college degree."

The suspect being arrested (credit: CBS)

He said on Wednesday that he won't cooperate.

"If I am coherent and sane why would I want to open Pandora's Box?"

In court last month, Dear also stated he wouldn't cooperate with a psychiatric exam.

"I'm not going to agree to their mental health evaluations where they want to take me and put me on their psychotropic drugs."

Dear insists there will be no trial because he wants to represent himself and plead guilty.

"Well I'm just an honest man and I believe I'm guilty so I am just going to plead guilty," said Dear.

Dear told Sallinger he expected to die that day but after more than five hours, chose to give up.

“And now the rest of my life I will either be executed or in here.”

When asked if he was trying to be considered a martyr, Dear replied, “That’s for God to decide what I am but I am just letting you know I am sane.”

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