SUPREME COURT, STATE OF COLORADO

Court Address: 2 East 14th Avenue
Denver, Colorado 80203

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 31; 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

Proposed Respondents:
District Court for the Fourth Judicial District of Colorado (the Hon. Gilbert Martinez, Chief Judge, presiding);

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▲ COURT USE ONLY ▲

Case No.: ___SA____

Related Case Below:
2015-CR-5795 (*People v. Robert Lewis Dear, Jr.*) – El Paso County District Ct.

PETITION FOR RULE TO SHOW CAUSE PURSUANT TO C.A.R. 21

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 21, and C.A.R. 32, including all formatting requirements set forth in these rules.

Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g):

- It contains **9,198** words in those portions subject to the Rule.

The brief complies with C.A.R. 21(e):

- It contains the following: (A) The identity of the petitioner and of the proposed respondent, together with their party status in the proceeding below (e.g., plaintiff, defendant, etc.); (B) The identity of the court or other tribunal below, the case name and case number or other identification of the proceeding below, if any, and identification of any other related proceeding; (C) The identity of the persons or entities against whom relief is sought; (D) The ruling, action, or failure to act complained of and the relief being sought; (E) The reasons why no other adequate remedy is available; (F) The issues presented; (G) The facts necessary to understand the issues presented; (H) Argument and points of authority explaining why a rule to show cause should be issued and why relief requested should be granted; and (I) A list of supporting documents, or an explanation of why supporting documents are not available.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 21, and C.A.R. 32.

By *s/ Steven D. Zansberg*
Steven D. Zansberg, #26634

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Page(s)

Page(s)

Page(s)

Page(s)

Statutes

Other Authorities

Page(s)

INTRODUCTION

Robert Lewis Dear has been charged with 179 felony counts, including eight counts of first degree murder, stemming from his 5½-hour standoff with law enforcement on "Black Friday," November 27, 2015, at a Planned Parenthood clinic in Colorado Springs. Dear is alleged to have shot and killed three individuals and wounded nine others. After the People had completed enough of their investigation to file the 179 felony counts, Media Petitioners—including several local and national newspapers, television and radio stations, broadcast networks, and cable news channels—moved the District Court to unseal the affidavits of probable cause supporting the Defendant's arrest and the search of his residence. **Applying the incorrect legal standard** governing such determinations,[1] on December 30, 2015—a full month after the crimes charged were committed—the trial court judge denied that request *in toto*. Because the Defendant has been ordered to undergo a psychiatric competency evaluation which may take up to nine months to complete, the District Court's sealing Order will deprive the public of knowing the factual basis for government action -- arresting

[1] A misapplication of the law constitutes an abuse of discretion. *Freedom Colo. Info., Inc. v. El Paso Cty. Sheriff's Dep't* (*Freedom Colo.*), 196 P.3d 892, 899 (Colo. 2008).

Dear, searching his residence, and filing 179 separate felony counts, for more than one year.

Notably, at the December 23 hearing, the District Attorney stated that **the People did not oppose the Media Petitioners' request to unseal the affidavits**, but only asked for the opportunity to urge the Court to redact the names of victims and witnesses, as well as certain other discrete pieces of information that may implicate the then-ongoing investigation. Nevertheless, the District Court refused to disclose *any* portions of the probable cause affidavits in redacted form, and instead ordered that the *entirety* of those judicial records be kept under seal indefinitely.

Although this Court has previously recognized that judicial records on file in cases of significant public interest are subject to a right of public access guaranteed by both federal and state constitutions, and although courts around the country have specifically held that judicial records like the ones at issue here are subject to a *constitutional* right of access, the District Court below explicitly ***rejected*** the view that there is a constitutional right of access applicable here. Instead, the District Court—parting company with Chief Judge Carlos Samour's ruling in *People v. Holmes*, Chief Judge Paul A. King's ruling in *People v. Cox*, and former

Denver County Court Judge Larry Bohning's ruling in *People v. King*[2]—continued the sealing based on a simple "balance of interests" and without giving any consideration to less restrictive alternatives to blanket sealing.

This Petition for extraordinary relief urges the Court to correct immediately the trial court's errors and to restore the public's right to monitor the operations of its courts. This Petition urges the Court to clarify for trial judges throughout Colorado that **under both State and Federal constitutions, the public enjoys a presumed right of access to documents on file in Colorado criminal cases after the defendant has been formally charged**, and to hold, accordingly, that such judicial records may not be sealed from public view in the absence of detailed and specific findings, on the record, that (a) such continued sealing is necessary to protect a governmental interest of the highest order, for example to preserve the fair trial rights of the defendant, *and* (b) each of the myriad alternative means to protect that interest is either not available or not adequate to do so.

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[2] *See People v. Holmes* (*Holmes*), No. 12-CR-1522, 41 Media L. Rep. (BNA) 1686, 1689 (Colo. Dist. Ct. Arapahoe Cnty. Apr. 4, 2013); *People v. Cox* (*Cox*), No. 10CR661, 39 Media L. Rep. (BNA) 2148 (Colo. Dist. Ct. Douglas Cty. June 22, 2011); and *People v. King* (*King*), No. 356315-12, 19 Media L. Rep. (BNA) 1247, 1248 (Colo. Cty. Ct. Denver Cty. July 29, 1991), all of which held that the First Amendment provides a presumptive right of public access to probable cause affidavits in the court file after charges have been filed. *See infra* 21-22.

Petitioners, through their undersigned attorneys, pursuant to Rule 21 of the Colorado Rules of Appellate Procedure, respectfully petition this Honorable Court to enter a Rule to Show Cause why the District Court's Order—sealing in their entirety the probable cause affidavits in the court file below—should not be immediately vacated and the affidavits unsuppressed unless and until the requisite judicial findings have been entered.

IDENTITIES OF PARTIES AND THEIR PARTY STATUS IN THE PROCEEDING BELOW

Petitioners are news media organizations who, through their newspapers, press wire service, television, cable and radio broadcasts, and internet websites, prepare and distribute to the public newsworthy information, including reports on the proceedings of this state's courts, and in particular, the proceedings underway in that court in *People v. Dear*, No. 2015-CR-5795.[3] Petitioners moved the District Court, as non-parties, to unsuppress the affidavits of probable cause that had been

[3] The following Petitioners herein did not appear on the Motion to Unseal filed below, but nevertheless share the same interest in gaining access to the judicial records at issue, and to ensuring that sealing orders such as the one entered below are made, both here and *in all future cases* in this State, through application of the proper legal standard: Colorado Broadcasters Association, Colorado Freedom of Information Coalition, Colorado Press Association, Gannett Co., Inc., and the Reporters Committee for Freedom of the Press.

sealed by the County Court in the immediate aftermath of the "Black Friday Massacre."

The proposed respondent is the District Court for the Fourth Judicial District of Colorado (Hon. Gilbert Martinez, presiding), who ordered the affidavits of probable cause suppressed in their entirety for the indefinite future.

IDENTITY OF THE COURT BELOW AND RELEVANT CASE NAMES AND NUMBERS

People v. Robert Lewis Dear, Jr., No. 2015-CR-5795, District Court for the Fourth Judicial District of Colorado (El Paso County).

IDENTITY OF THE PERSONS OR ENTITIES AGAINST WHOM RELIEF IS SOUGHT, THE ACTION COMPLAINED OF AND THE RELIEF BEING SOUGHT

Petitioners ask the Court to declare that District Court's Order of December 30, 2015 (Ex. 7 hereto), suppressing the entirety of the probable cause affidavits is unconstitutional under both the federal and Colorado constitutions. Petitioners also ask this Court to issue a writ of mandamus directing the District Court to immediately make available to the Petitioners, and to the public, all *portions* of the affidavits of probable cause in the court file for which the requisite evidentiary findings have not been entered.

NO OTHER ADEQUATE REMEDY IS AVAILABLE

Proceedings under C.A.R. 21 are authorized to consider whether a district court acted without or in excess of its jurisdiction or has abused its discretion where an appellate remedy would not be adequate. *See Morgan v. Genesee Co.*, 86 P.3d 388, 391 (Colo. 2004); *see also Weaver Constr. Co. v. Dist. Ct.*, 545 P.2d 1042, 1044 (Colo. 1976) (original jurisdiction appropriate where an appeal after trial would not provide a "'plain, speedy, and adequate remedy'" (citation omitted)). Relief in the nature of prohibition or mandamus is particularly appropriate "in matters of great public importance." *See Smardo v. Huisenga*, 412 P.2d 431, 432 (Colo. 1966). It cannot be doubted that entry of a judicial order in violation of rights protected by the First Amendment to the United States Constitution and article II, section 10 of the Colorado Constitution is of great public importance.

Indeed, four times previously this Court has issued writs pursuant to C.A.R. 21 when members of the news media challenged orders closing judicial proceedings or criminal court records to the public. *Star Journal Publ'g Corp. v. Cty. Ct.* (*Star Journal*), 591 P.2d 1028 (Colo. 1979) (preliminary hearing); *Times-Call Publ'g Co. v. Wingfield*, 410 P.2d 511 (Colo. 1966) (judicial records in a civil case); *People v. Thompson*, 181 P.3d 1143 (Colo. 2008) (indictment); *People v.*

Sigg, No. 2013SA21 (Colo. Feb. 21, 2013) (preliminary hearing); *see also P.R. v. Dist. Ct.*, 637 P.2d 346 (Colo. 1981) (non-media petitioner, in a civil contempt hearing).

The relief sought herein cannot await appellate review of any ultimate verdict after a full trial. *See Pearson v. Dist. Ct.*, 924 P.2d 512, 515 (Colo. 1996) (original jurisdiction under C.A.R. 21 appropriate where "the damage [petitioner] hopes to avoid would already be done before appellate review occurs"). Petitioners are not parties to the criminal proceeding below and therefore have no mechanism for a direct appeal at any time; accordingly, this Petition is particularly appropriate for review under Rule 21. See *People v. C.V.*, 64 P.3d 272, 274 (Colo. 2003) ("[O]riginal jurisdiction may be necessary to review a serious abuse of discretion that could not adequately be remedied by appellate review."); *see also CBS v. U.S. Dist. Ct.*, 765 F.2d 823, 825 (9th Cir. 1985) ("*Mandamus* is the appropriate procedure for CBS to seek review of orders denying it access to the sealed documents." (emphasis added)); *cf. Press-Enter. Co. v. Super. Ct.* (*Press-Enterprise I*), 464 U.S. 501, 504-05 (1984) (reviewing a closure order on a *mandamus* petition).

Finally, ***immediate*** review under C.A.R. 21 is appropriate here because the Order below, until such time as it is vacated, continues to deny the public's rights

protected by the First Amendment. *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 126-27 (2d Cir. 2006) (noting, in context of news media's effort to access judicial records, that the "'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" (citations omitted)).[4] Although arising in the context of a prior restraint on publication of information already possessed by the press, the Supreme Court has recognized that "'each passing day [that an infringement of free speech liberties remains in place] may constitute a separate and cognizable infringement of the First Amendment.'" *CBS, Inc. v. Davis*, 510 U.S. 1315, 1317 (1979) (Blackmun, J., in chambers) (quoting *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1319, 1329 (1975) (Blackmun,

[4] Because the public's presumptive right to access judicial records attaches as soon as a document is filed with the Court, any delays in access are effectively denials of that right, even though they may be limited in time. *See, e.g.*, *Associated Press v. U.S. Dist. Ct.*, 705 F.2d 1143, 1147 (9th Cir. 1983) (even a 48-hour delay in access constituted "a total restraint on the public's first amendment right of access even though the restraint is limited in time"); *Globe Newspaper Co. v. Pokaski* (*Globe Newspaper*), 868 F.2d 497, 507 (1st Cir. 1989) ("even a one to two day delay impermissibly burdens the First Amendment"); *Courthouse News Serv. v. Jackson*, No. H-09-1844, 2009 WL 2163609, at *3-4 (S.D. Tex. July 20, 2009) (24 to 72 hour delay in access to civil case-initiating documents was "effectively an access denial and is, therefore, unconstitutional"). As the Supreme Court has observed, "[d]elays imposed by governmental authority" are inconsistent with the press' "traditional function of bringing news to the public promptly." *Nebraska Press Association v. Stuart*, 427 U.S. 539, 560-61 (1976).

J., in chambers)). In this case, the need for this Court's immediate review could not be more clear.

THE ISSUES PRESENTED

1. Does the First Amendment right of public access apply to affidavits of probable cause in the court file following execution of the warrants issued on the basis of those affidavits, and the filing of formal charges?

2. Does the Colorado Constitution create a constitutional right of public access to affidavits of probable cause in the court file following execution of the warrants issued on the basis of those affidavits and the filing of formal charges?

3. Did the District Court err by failing to apply the appropriate constitutional standards when it denied public access to the judicial records on file in the court below?

FACTUAL BACKGROUND

On November 27, 2015, the Defendant, Robert Lewis Dear, Jr., was arrested following a 5-plus hour standoff with law enforcement at the Planned Parenthood clinic in Colorado Springs. During the time Dear was inside the clinic, national and international news outlets provided live, ongoing coverage of the standoff. *See* Ex. 1 (representative sampling of news coverage of November 27, 2015).[5] Later

[5] The factual background presented here is supported by the collection of news reports attached as Exhibits 1, 2 and 4. These self-authenticating news reports, *see* C.R.E. 902(6), are offered as evidence of the extent of information

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that day, authorities announced that Dear had killed three individuals, and wounded nine others.

In the days following the massacre, authorities announced that the three individuals killed were Officer Garrett Swasey, a University of Colorado at Colorado Springs police officer, Jennifer Markovsky, and Ke'Arre Stewart. Also, the nine wounded were identified as five law enforcement officers and four civilians. *See* Ex. 2 (sampling news reports in the days following the assault).

The fatal mass shooting at the Planned Parenthood clinic dominated the national and international news throughout the weekend following Thanksgiving and was the nation's "top story" until it was displaced by another mass shooting in San Bernardino, California the following Wednesday. During the immediate aftermath of the shooting in Colorado Springs, the Attorney General of the United States, Loretta Lynch, described Dear's assault on the clinic as "a crime against women," and Colorado's Governor, John Hickenlooper, said that it was "a tragedy that is beyond speech." *See* Ex. 2 at 38.

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about this case that is in the public domain. *See Prestige Homes, Inc. v. Legouffe*, 658 P.2d 850, 853 (Colo. 1983).

Although authorities did not state or confirm what weaponry Dear had used in perpetrating the alleged crimes, in his Saturday morning address, President Barack Obama expressed his dismay at yet another mass shooting incident and declared that "we have to do something about the easy accessibility of *weapons of war* on our streets to people who have no business wielding them." *Id.* at 41-42 (emphasis added).

On Monday, November 30, 2015, Robert Dear made his first appearance in court through a video link from the El Paso County jail, at which he was advised of a single count of murder in the first degree. Prior to the filing of formal charges, news reports disclosed certain additional facts based on statements provided by unnamed law enforcement sources, including that Dear had said something to the effect of "no more baby parts" to law enforcement officers who took him into custody. *Id.* at 43. Law enforcement officials also told the press that on the day of the shooting Dear had stopped and asked for directions to the Planned Parenthood clinic, and that propane-based bombs were also found at the clinic. Authorities also publicly disclosed that the FBI had conducted searches of two North Carolina homes in which Dear had previously resided. *See id.*

On December 9, 2015, twelve days after the shooting at the Planned Parenthood clinic, the People filed a Complaint and Information charging Dear

with 179 separate felony counts. *See* Ex. 3. The Complaint merely recites the statutory legal elements of the crimes charged, but provides no factual basis or explanation for those charges. That same day, in the course of a hearing addressing various motions, Dear blurted out comments on eighteen separate occasions, including one in which he stated, "Let it all come out. The truth!" Dear also stated, in open court, "There'll be no trial. I'm guilty" and made several references to the alleged killing of fetuses he had observed inside the clinic. *See* Ex. 4 (sampling of news reports covering the Dec. 9, 2015 hearing).

On December 17, 2015, the Petitioners herein filed a Motion to Unseal the Affidavits of Probable Cause in the Court File. *See* Ex. 5. That motion asserted four alternative grounds for the public's presumptive right of access to the sealed affidavits of probable cause, but noted that "most importantly, the public's right to inspect and obtain copies of certain court records is also protected by the First Amendment to the Constitution of the United States." *Id.* at 5 ¶ 8. The motion noted that in the recent case of *People v. Holmes*, Chief Judge Carlos Samour had found that the First Amendment right of access applies to affidavits of probable cause in the court file after charges have been filed.

On December 22, 2015, Dear, through counsel, filed a Response in Opposition to the Media Petitioners' Motion to Unseal Affidavits of Probable

Cause. *See* Ex. 6. Dear argued that there is no presumptive right to inspect and copy judicial records provided by the First Amendment or by article II, section 10 of the Colorado Constitution: "rather, to determine whether unsealing the arrest and search warrants and supporting affidavits is warranted . . . this Court must apply *a simple balancing test* to evaluate whether 'the public's right of access is outweighed by competing interests.'" *Id.* at 2-3 ¶ 8 (emphasis added) (citation omitted).

On December 23, 2015, the District Court heard oral argument on the Petitioners' Motion to Unseal. During that hearing, at which no evidence was proffered by any party, the District Attorney stated that the People took no position (*i.e.*, they **did not oppose**) the unsealing of the affidavits. Instead, the People asked only to have the opportunity to urge the Court, if unsealing were to occur, to redact only the names of the victims, certain witnesses, and other discrete pieces of information that may implicate the then-ongoing investigation.

On December 30, 2015, the District Court entered an Order Regarding the Media Motion to Unseal Forthwith Affidavits of Probable Cause in the Court File (C-006). *See* Ex. 7. In it, the Court first set out the parties' positions, and noted, several times, that the District Attorney had stated in court that there is an ongoing investigation. *Id.* at 1-2. The District Court adopted the position propounded by

the Defendant, that the standards applicable to the Court's decision are those "outlined in the Colorado Criminal Justice Records Act [("CCJRA")], C.R.S. 24-72-301, *et seq.*" *Id.* at 2. Weighing the various public and private factors, and again noting "the fact that there is still an ongoing investigation that should not be compromised," the Court denied the Motion to Unseal in its entirety, concluding that "a release [of any portion of the affidavits of probable cause] at this point would be contrary to the 'public interest.'" *Id.*[6] Notably, the District Court did not

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[6] The trial court also stated that search and arrest warrant affidavits are "normally" unsealed only "after the preliminary hearing or waiver of the preliminary hearing and only after the [entire] investigation has been completed." Ex. 7 at 3. To the contrary, and as this Court may take judicial notice of common experience, affidavits of probable cause supporting arrest are routinely—indeed, on a daily basis—released to the public, even in high-profile homicide cases, and are the subject of news reports throughout the state. *See, e.g.*, Sara Kuta, *Broomfield Police: Suspect Riddled Dealer with Bullets, 'Wanted to Make Sure He Was Dead'*, Denver Post (Sept. 21, 2015, 6:51 PM), http://www.denverpost.com/breakingnews/ci_28854526/; Google Search of denverpost.com, "according to the affidavit," https://www.google.com/?gws_rd=ssl#q=site:denverpost.com+%22according+to+the+affidavit%22; Google Search of gazette.com, "according to the affidavit," https://www.google.com/?gws_rd=ssl#q=site.gazette.com+%22according+to+the+affidavit%22. *See King*, 19 Media L. Rep. (BNA) at 1248 (Judge Bohning noting, based on his 11-½ years on the bench, "that not more than one percent of search warrants and arrest warrants in the City and County of Denver are ordered sealed" after "the time of arrest or possibly . . . the time charges are filed."); *Id*. at 1250 (applying the standard articulated by this Court in *Star Journal* and ordering the unsealing of affidavits while acknowledging "there has not been a preliminary hearing conducted yet"); *see also Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 64 (4th Cir. 1989) ("Frequently—probably most frequently—

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even mention the possibility of releasing a redacted version of the probable cause affidavits.

ARGUMENT AND POINTS OF AUTHORITY

I. Introduction and Summary of Argument.

The central issues presented by this Petition are (1) whether a ***constitutional*** right of public access applies to probable cause affidavits in the court file after the warrants have been executed and formal charges have been filed, and (2) did the District Court err when it refused to apply the appropriate constitutional standard necessary to justify the continued sealing of judicial records in a criminal case. As discussed more fully below, the answers to both of these questions are resoundingly, "Yes."

In arriving at these conclusions, this Petition first lays out the Colorado case law that has previously recognized and established that there is a fundamental, constitutionally-based (but qualified) right of access to documents filed in a court

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the warrant papers including supporting affidavits are open for inspection by the press and public in the clerk's office after the warrant has been executed."); *In re Search Warrant for Secretarial Area Outside Office of Gunn* (*Gunn*), 855 F.2d 569, 573 (8th Cir. 1988) (noting that search warrant affidavits "are routinely filed with the clerk without seal.").

proceeding which involves a matter of public concern. Next, in the event the Court chooses to engage anew in the "experience and logic" analysis dictated by the U.S. Supreme Court for determining whether a particular court filing is subject to a First Amendment right of access, this Petition canvasses both the history and the structural importance of public access to probable cause affidavits after the warrants have been executed and formal charges have been filed. This survey demonstrates that under these considerations, the First Amendment extends a constitutional presumption of access to probable cause affidavits following execution of the warrant(s) and the filing of charges. This Petition next demonstrates that under the even broader free speech protections of the Colorado Constitution, there is a separate state-constitutional right of access to the probable cause affidavits at issue.

Finally, this Petition demonstrates that the District Court failed to satisfy the requirements of either the First Amendment or the Colorado Constitution when it ordered the continued and indefinite suppression of the affidavits, in their entirety, without first entering the requisite detailed and specific evidentiary findings.

II. This Court Has Already Recognized That the Public Enjoys a Constitutional Right of Access to Court Records on File in Cases Involving Matters of Public Concern.

Some fifty years ago, this Court recognized that the public enjoys a presumptive constitutional right of access to judicial records in cases involving matters of public interest. *See Wingfield*, 410 P.2d at 513-14. In *Wingfield*, a newspaper challenged the constitutionality of a state statute that declares "no person, except parties in interest, or their attorneys, shall have the right to examine pleadings or other papers filed in any cause pending in such court." 410 P.2d at 512 (quoting § 35-1-1, C.R.S. (1963)). The pleadings were on file in a *civil* case in which several local residents had challenged election results in a local school bond referendum. The newspaper had sought to inspect the papers that revealed the basis for the plaintiffs' claims that the bond approved by voters was invalid. The defendants, two county court judges and the county court clerk, insisted that the statute cited above was absolute on its face and that the court therefore lacked any discretion to allow members of the public or the press to view the case's pleadings. *See id.*

This Court resolved the case by noting that the statutory interpretation adopted and advanced by the defendants "would raise serious questions of ***constitutional*** law involving ***freedom of the press*** and the separation of

governmental power." *Id.* at 513 (emphasis added). Although the Court gave no citation for its proposition, it is apparent that the "serious questions of constitutional law" envisioned by the Court was the unfounded abridgement of a constitutional right of access under the First Amendment, a point raised by the *Longmont Times-Call* in its briefing in that case. By adopting a saving construction of the statute, this Court recognized that reading the statute literally as barring all public access to filed pleadings in a case involving matters of significant public concern would be unconstitutional under the First Amendment. *See id.*; *see also State Ct. Admin'r v. Background Info. Servs., Inc.*, 994 P.2d 420, 428 (Colo. 1999) (reaffirming the constitutional ramifications of the Court's holding in *Wingfield* and noting its holding therein that in light of the constitutional issues "it would be an abuse of discretion for the court to deny a publishing company access to the court file" in a case adjudicating "a matter of public interest").[7]

[7] In *Background Information Services*, this Court held that the CCJRA declares that "courts of law" sitting in criminal cases are "custodians" of "criminal justice records" subject to that Act. The Court was not asked therein, and did not address, whether a First Amendment right of access applied to such court records (as it did in *Wingfield*). 994 P.2d at 428. Subsequently, in *People v. Thompson*, 181 P.3d 1143 (Colo. 2008), the Court determined that "records of official action," including an indictment, must be made available to the public under the CCJRA, notwithstanding the trial court's sealing order premised, in part, on concerns for the defendant's Sixth Amendment right to a fair trial. As a result, the court did not

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In 1979, this Court directly and explicitly recognized a constitutional right of public access to judicial ***proceedings*** in Colorado. *See Star Journal*, 591 P.2d at 1029-30.[8] In that case, the trial court had excluded the press, but not the public, from a preliminary hearing on the strength of the trial court's conclusion that the preliminary hearing might reveal potentially prejudicial information. *See id.* at 1029. This Court found the exclusion of the press from the preliminary hearing was unconstitutional under both the First Amendment and the Sixth Amendment: "An accommodation of these constitutional provisions and underlying policies compels the conclusion that criminal trials and pretrial proceedings should not be closed to media representatives unless an overriding and compelling state interest in closing the proceedings is demonstrated." *Id.* at 1030. Thus, the Court held, "[a] judge may close a pretrial hearing [in a criminal case] only if (1) the dissemination of information would create a clear and present danger to the

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therein address whether the First Amendment provides a presumptive right of public access to judicial records in criminal cases.

[8] Notably, this Court's recognition of this right preceded by one year the U.S. Supreme Court's ruling in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), in which that Court recognized a fundamental right of public access to criminal trials under the First Amendment.

fairness of the trial; and (2) the prejudicial effect of such information on trial fairness cannot be avoided by any reasonable alternative means." *Id*.

In recognizing a constitutional right of public access to criminal proceedings, in *Star Journal*, this Court adopted Section 8-3.2 of the ABA Standards for Criminal Justice Relating to Fair Trial and Free Press (herein, "ABA Standards: Fair Trial/Free Press"). *See Star Journal*, 591 P.2d at 1030 (citing the 1978 second edition of the ABA Standards).[9] Importantly, although the *Star Journal* case involved access to a court ***proceeding***, the ABA's fair trial/free press standards adopted in that case apply equally to court ***records***, including "all writings, reports and objects, to which both sides have access, relevant to any judicial proceeding in the case which are made a matter of record in the proceeding." *See* ABA Standards: Fair Trial/Free Press, § 8-3.2.

In the wake of *Star Journal* and the U.S. Supreme Court's *Richmond Newspapers* decision, this Court reaffirmed the *Star Journal* constitutional test for closure in a criminal case, explaining that

> Public confidence cannot long be maintained where important judicial decisions are made behind closed doors and then announced in

[9] In 2013, this Court adopted the "substantial probability of harm" standard in *People v. Sigg*, No. 2013SA21 (Colo. Feb. 21, 2013).

> conclusive terms to the public, with ***the record supporting the court's decision*** sealed from public view.

P.R., 637 P.2d at 353 (emphasis added) (quoting *United States v. Cianfrani*, 573 F.2d 835, 851 (3d Cir. 1978)). Here again, although the *P.R.* case involved access to a court ***hearing***, the Court's analysis fully supports the proposition that court ***records***, and especially those court records that serve as the basis for judicial decisions (e.g., issuance of a warrant), are equally subject to the constitutional right of access. *See id.*; *see also Associated Press v. U.S. Dist. Ct.*, 705 F.2d 1143, 1145 (9th Cir. 1983) (holding that the First Amendment right of public access applies to pretrial documents as equally as it does to pretrial proceedings: "There is no reason to distinguish between pretrial proceedings and the documents filed in regard to them. Indeed, the two principal justifications for the first amendment right of access to criminal proceedings apply, in general, to pretrial documents.").

Thus, in light of the interrelationship and logic of *Wingfield*, *Star Journal*, and *P.R.*, this Court has already established that court records in cases of substantial public interest are subject to a First Amendment-based presumptive right of public access. *Cf. Holmes*, 41 Media L. Rep. (BNA) at 1689 (applying *Star Journal* test, requiring a "showing of an overriding and compelling state interest" to continue the suppression of affidavits of probable cause); *Cox*, 39 Media L. Rep. (BNA) 2148 (ordering unsealing of probable cause affidavit, in

redacted form, applying the First Amendment standard set forth in *Star Journal*); *King*, 19 Media L. Rep. (BNA) at 1249-50 (recognizing that this Court's decision in *Star Journal* established a constitutional right of access to search warrant affidavits on file with the court, even before a preliminary hearing has been held).

III. The First Amendment "Experience and Logic" Analysis Requires a Finding that Affidavits of Probable Cause in the Court File Following Official Charging Are Subject to a Constitutional Right of Access.

Even if this Court were to conclude that there is no controlling case law in Colorado on the question of a ***constitutional*** right of access to judicial records in cases of public interest, (which it should not), the District Court's ruling that no such constitutional right of access exists cannot stand. Persuasive authorities from across the nation demonstrate that the First Amendment provides a presumptive right of access to filed warrant affidavits once a defendant has been taken into custody and formally charged. *See, e.g.*, *Greenwood v. Wolchik*, 544 A.2d 1156, 1158 (Vt. 1988) (recognizing a constitutional right of access to affidavits of probable cause in support of an arrest); *Journal Newspapers, Inc. v. State*, 456 A.2d 963, 969-71 (Md. Ct. Spec. App. 1983) (recognizing a First Amendment right of access and reversing a trial court's order sealing a probable cause statement in a high-profile rape case), *aff'd sub nom. Buzbee v. Journal Newspapers, Inc.*, 465 A.2d 426 (Md. 1983); *United States v. Loughner*, 769 F. Supp. 2d 1188, 1194

(D. Ariz. 2011) (recognizing First Amendment right of access to affidavit probable cause in support of arrest after investigation leading to the filing of charges has been completed); *In re Application of N.Y. Times Co. for Access to Certain Sealed Ct. Records*, 585 F. Supp. 2d 83 (D.D.C. 2008) (same, with respect to search warrant affidavits); *In re Search Warrants Issued on June 11, 1988 for the Premises of Three Buildings at Unisys Inc*. (*Three Buildings*), 710 F. Supp. 701 (D. Minn. 1989) (same).

As the U.S. Court of Appeals for the Eighth Circuit concluded after conducting the historical and structural analysis mandated by *Richmond Newspapers*, *Globe Newspaper*, and *Press-Enterprise [I]*:

> [T]he **first amendment right of public access *does* extend to the documents filed in support of search warrant applications**. First, although the process of issuing search warrants has traditionally not been conducted in an open fashion, search warrant applications and receipts are routinely filed with the clerk of court without seal. Under the common law[,] judicial records and documents have been historically considered to be open to inspection by the public. Second, public access to documents filed in support of search warrants is important to the public's understanding of the function and operation of the judicial process and the criminal justice system and may operate as a curb on prosecutorial or judicial misconduct.

Gunn, 855 F.2d at 573 (emphasis added) (citations omitted).

Under the "experience and logic" analysis dictated by the United States Supreme Court in *Press-Enterprise Co. v. Superior Court* (*Press-Enterprise II*),

478 U.S. 1, 8-9 (1986), there can be no dispute that affidavits of probable cause on file in the court, following execution of the warrant(s) and filing of charges, are subject to the constitutional right of access. The "experience and logic" analysis requires the Court to determine (1) whether there is a historical experience demonstrating that the public generally has had access to the particular court record, and (2) whether logic dictates that "public access [to the court record] plays a significant positive role in the functioning of the particular process in question." *See id.*[10] In this case, both of the *Press-Enterprise II* criteria are plainly satisfied.

Perhaps the most cogent articulation of why both the "experience" and "logic" prongs of the *Press-Enterprise* test are met, with respect to affidavits of

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[10] *See also Associated Press*, 705 F.2d at 1145 (holding that the First Amendment right of access applies to all pretrial court filings); *In re Wash. Post*, 807 F.2d at 392 (applying *Press-Enterprise II* to find a First Amendment right of *access* applicable to documents filed in connection with plea and sentencing hearings); *United States v. Presser* (*In re Storer Commc'ns, Inc.*), 828 F.2d 330, 336 (6th Cir. 1987) (applying *Press-Enterprise II* to find a First Amendment right of access applicable to papers filed in connection with a motion to recuse a judge); *United States v. Biaggi* (*In re N.Y. Times Co.*), 828 F.2d 110, 114 (2d Cir. 1987) (applying *Press-Enterprise II* to find a First Amendment right of access applicable to documents filed in connection with a suppression hearing); *Seattle Times Co. v. U.S. Dist. Ct.*, 845 F.2d 1513, 1515-17 (9th Cir. 1988) (applying *Press-Enterprise II* to find a First Amendment right of access applicable to documents filed in connection with a pretrial release hearing); *Globe Newspaper*, 868 F.2d at 502-04 (applying *Press-Enterprise II* to find a First Amendment right of access applicable to sealed criminal court files).

probable cause after formal charges have been filed, was written by U.S. District Court Judge Larry Alan Burns in the Tucson, Arizona mass shooting case against Jared Lee Loughner:

> [T]he more recent authority recogniz[es] a right of access once the investigation has concluded and the indictment has issued. Given the critical importance of the public's right to be fully informed in high profile case like this one, as well as the need for robust protection of a free press, this Court opts to be guided by the more recent authority. **The Court is persuaded by the clear trend among the states during the past 30 years that experience supports finding a qualified First Amendment right of access to search warrant materials once the investigation has concluded and a final indictment has issued.**
>
> **Logic also supports openness and disclosure at this stage**. When there is no danger of corrupting the investigation or interfering with grand jury proceedings, opening search warrant materials to public inspection can play a significant positive role in the functioning of the criminal justice system. Search warrants are a ubiquitous part of the criminal investigatory process, and ordinary citizens are well aware of their prevalent use. The raw power implicated by the authority to conduct a search is enormous. Armed with a search warrant, an officer possesses the imprimatur of the law to forcibly enter homes, roust the occupants, and rummage through drawers and other private places. Even though search warrants are judicially authorized and the scope of the search is defined, as a practical matter, most citizens know the search can be as intense and intrusive as the officer chooses to make it.
>
> A person whose home or property is searched pursuant to a search warrant has an obvious interest in knowing that proper procedures have been followed. The general public shares that interest. **Public scrutiny of the search warrant process—even after the fact—can shed light on how and <u>why a warrant was obtained</u>, and thereby further the public's interest in understanding the**

> **justice system**. *Phoenix Newspapers [Inc. v. U.S. Dist. Ct.]*, 156 F.3d [940,] 949 [(9th Cir. 1998)]. **Public access to search warrants may also serve to deter unreasonable warrant practices, either by the police or the courts.** *Id.*; *[In re] Application of New York Times,* 585 F. Supp. 2d at 90 ("Public access to warrant materials serves as a check on the judiciary because the public can ensure that judges are not merely serving as a rubber stamp for the police.").
>
> [P]ublic inspection of the search warrants "will enable the public to evaluate for itself whether the government's searches went too far—or did not go far enough." . . . More broadly speaking, **society has a valid and understandable interest in the law enforcement system and how well it works. Permitting inspection of the search warrants, the accompanying affidavits, and the property inventory will further public understanding of the response of government officials** to the Tucson shootings, **and allow the public to judge whether law enforcement functioned properly and effectively** under the hectic circumstances of that day. *See Press–Enterprise I,* 464 U.S. at 508, 104 S. Ct. 819 (opening the judicial process and allowing public access to court documents "gives assurances that established procedures are being followed and that deviations will become known" and corrected).

Loughner, 769 F. Supp. 2d at 1193-94 (emphases added); *see also Greenwood*, 544 A.2d at 1158 ("[P]ublic access to the [affidavit] may help provide a check upon possible violations of the fundamental requirement that a warrant of arrest is not issued upon anything less than probable cause. Also, respect for the judicial process may not fully exist if the paper upon which many criminal proceedings commence is unconditionally barred from public scrutiny." (citation and internal quotation marks omitted).

Chief Justice Burger's explained how public access to information concerning criminal prosecutions, especially in "high-profile" cases such as this one, furthers several public functions:

> When a shocking crime occurs, a community reaction of outrage and public protest often follows. Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. . . . The accusation and conviction or acquittal, as much perhaps as the execution of punishment, operate to restore the imbalance which was created by the offense or public charge, to reaffirm the temporarily lost feeling of security and, perhaps, to satisfy that latent "urge to punish."
>
> . . . The crucial prophylactic aspects of the administration of justice cannot function in the dark; **no community catharsis can occur if justice is done in a corner or in any covert manner**. It is not enough to say that results alone will satiate the natural community desire for "satisfaction." . . . To work effectively, it is important that society's criminal process satisfy the appearance of justice, and the appearance of justice can best be provided by allowing people to observe it.

Richmond Newspapers, 448 U.S. at 571-72 (emphasis added) (citations and internal quotation marks omitted).

Because public access to affidavits of probable cause following execution of the warrants and the formal filing of charges satisfies both the "experience" and "logic" prongs of *Press Enterprise II* test, this Court should conclude that the First

Amendment extends a *presumptive* right of access to such judicial records in the court file.[11]

IV. The Colorado Constitution Establishes a Right of Public Access to Judicial Records that Is Broader than the Right Afforded by the First Amendment.

Even if this Court were to conclude that there is no *federal* constitutional right of public access to affidavits of probable cause in the court's file, which it should not, a state constitutional right of access nevertheless must be recognized under the Colorado Constitution's stronger protections for free speech rights in article II, section 10.

This Court has repeatedly held that "the Colorado Constitution provides broader free speech protections than the Federal Constitution." *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1054 (Colo. 2002), *as modified on denial of*

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[11] Of course, that the *presumptive* right of access under the First Amendment applies does not mean that the entirety of such records *must* be open to the public. Upon the entry of proper judicial findings, a court may still, constitutionally, seal some or all of the affidavits. *See, e.g.*, *Gunn*, 855 F.2d at 574 (sealing of affidavits affirmed as justified because of "substantial probability" that disclosure would compromise ongoing government investigation and identify confidential informants); *In the Matter of Search Warrants Issued on June 11, 1988 for the Premises of Three Buildings at Unisys Inc.*, 710 F. Supp. 701, 705-06 (D. Minn. 1989) (affirming redaction of 25 words to protect privacy interests); *Cox*, 39 Media L. Rep. (BNA) at 2151 (redacting certain information about the victim and her friend from probable cause affidavit to protect their privacy).

reh'g (Apr. 29, 2002); *see also Bock v. Westminster Mall Co.*, 819 P.2d 55, 59-60 (Colo. 1991) ("Colorado's tradition of ensuring a broader liberty of speech is long. For more than a century, this Court has held that Article II, Section 10 provides greater protection of free speech than does the First Amendment.") (collecting cases).

This Court's precedents interpreting article II, section 10 dictate that the public enjoys a presumptive right under our State Constitution to access judicial records on file in a criminal case, to enable citizens meaningfully to exercise their role in the body politic. *See Bock*, 819 P.2d at 62-63 (holding that the protections of article II, section 10 are meant to protect public discourse in the "marketplace of ideas" and to enable citizens to engage each other on topics of any kind, "including the political").

Sixty years ago, Justice O. Otto Moore recognized this structural aspect to the protections of article II, section 10, especially when viewed in concert with the "public trial" guarantee of article II, section 16: "It has repeatedly been held that the right to a 'public trial' is abridged if the press is excluded. . . ." *In re Hearings Concerning Canon 35*, 296 P.2d 465, 467 (Colo. 1956) (*per curiam*, adopting Referee's report) (citation omitted); *see also People v. Vaughan*, 514 P.2d 1318, 1323 (Colo. 1973) ("First Amendment freedoms are the cornerstone of our

democracy and the source of the strength and vitality of our society. It is the unfettered and public discussion of ideas of every sort that keeps the institutions of government responsive to the people.").

Indeed, in extending the public's right to attend criminal proceedings to a hearing on contempt of a grand jury witness, this Court expressly premised its holding on ***both*** the federal and ***state*** constitutional provisions protecting free speech. *See P.R.*, 637 P.2d at 354; *cf. Tattered Cover, Inc.*, 44 P.3d at 1052 ("Without the right to receive information and ideas, the protection of speech under the United States *and Colorado Constitutions* would be meaningless." (emphasis added)); *Robert C. Ozer, P.C. v. Borquez*, 940 P.2d 371, 378 (Colo. 1997) ("The right of privacy may potentially clash with the rights of free speech and free press guaranteed by the United States and Colorado Constitutions. *See* U.S. Const. amend. I; Colo. Const., art. II, § 10. The rights of free speech and free press protect the public' s access to information on matters of legitimate public concern." (citing *Cox Broad. Corp. v. Cohn,* 420 U.S. 469, 491-92 (1975))).

In sum, Colorado's accentuated constitutional protection for free speech compels the recognition of a concomitant state constitutional right of public access to judicial records on file in cases addressing matters of legitimate public concern.

V. The Trial Court Failed to Apply the Correct Constitutional Standard in Its Refusal to Unseal Any Portion of the Probable Cause Affidavits.

Once this Court determines that a particular category of court record is subject to a constitutional right of access, that right may be overcome "only by an overriding interest *based on findings* that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[12] *Press-Enterprise I*, 464 U.S. at 510.[13]

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[12] *See NBC Subsidiary (KNBC-TV), Inc. v. Super. Ct.*, 980 P.2d 337, 365 (Cal. 1999); *see also Holmes*, 41 Media L. Rep. (BNA) at 1689 (referencing ABA Standard 8-3.2 "which provides that a court may properly suppress court documents [only] if [1] unrestricted access would pose a substantial probability of harm to the fairness of the trial, [2] if suppression would effectively prevent such harm, and [3] if there is no less restrictive alternative reasonably available to prevent the harm." (citing *Star Journal*)).)

[13] *See also Associated Press*, 705 F.2d at 1146 ("First, there must be 'a substantial probability that irreparable damage to [a defendant's] fair-trial right will result' if the documents are not sealed. . . . Second, there must be 'a substantial probability that alternatives to closure will not protect adequately [the] right to a fair trial.' . . . Third, there must be 'a substantial probability that closure will be effective in protecting against the perceived harm.'" (alterations in original) (quoting *United States v. Brooklier*, 685 F.2d 1162, 1167 (9th Cir. 1982))); *cf. In re State-Record Co.*, 917 F.2d 124, 128 (4th Cir. 1990) (holding that it was reversible error for a trial court to seal certain pretrial records on the basis of a finding of "reasonable likelihood of prejudice" as opposed to the constitutionally required standard of "substantial probability" of prejudice).

A. The District Court's Failure to Require an Evidentiary Showing of the Need for Closure and to Enter Findings on Both Prongs of the Constitutional Test Renders the Order Constitutionally Infirm

As noted above, the First Amendment, as interpreted and applied by the U.S. Supreme Court and this Court, requires that any order denying the public's right of access must be preceded by, and founded upon, *specific factual findings*, based on the *presentation of evidence*. *See Star Journal*, 591 P.2d at 1030 (recognizing, as part of the Court's holding, "the requirements that evidence be presented"). Here, **no evidence was presented** at the December 23, 2015 hearing, addressing either of the two independent prongs of the *Star Journal* and *Press-Enterprise* test. Accordingly, these is simply no evidence in the record (and none was cited in the District Court's Order) that would support either of the two constitutionally-required evidentiary findings. *See Press-Enterprise II*, 478 U.S. at 14 (holding that the First Amendment right of public access may be overcome "only if ***specific findings*** are made ***demonstrating*** that, first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure ***cannot*** adequately protect the defendant's fair trial rights" (emphasis added)). The constitutionally-required record findings justifying closure or sealing must be "'specific enough that a reviewing court can determine whether the closure order was properly

entered.'" *Id.* at 9-10 (quoting *Press-Enter Co. v. Super. Ct.*, 464 U.S. 501, 510 (1984) (*Press-Enterprise I*)). In this case, quite plainly, the trial court's blanket suppression order did not satisfy the applicable constitutional standard.

B. Because So Much Information About the Charged Crimes Has Already Entered the Public Domain, No Finding of "Substantial Probability of Harm" from Disclosure of Any Portion of The Judicial Records at Issue Could Be Factually Supported

Even if the Defendant *had* presented any evidence during the hearing (which he did not), there would still be no factual basis to support a judicial finding that the *entirety* of the probable cause affidavits must remain suppressed from public inspection. Given the amount of information that is already in the public domain, , it is simply impossible to conclude that the *entirety* of the probable cause affidavits must remain sealed from public view, because disclosure of *any portion* of them poses "a substantial probability of harm" either to the defendant's fair trial rights or to the government's continued investigation (after it had filed 179 felony charges). *See In re N.Y. Times Co.*, 828 F.2d at 116 (holding that sealing of court papers is not proper where much of the information contained in them "has already been publicized"); *CBS*, 765 F.2d at 825 (same, when "most of the information the government seeks to keep confidential concerns matters that might easily be surmised from what is already in the public record"); *Associated Press v. Bell*, 510

N.E.2d 313, 317 (N.Y. 1987) (same); *In re Herald Co.*, 734 F.2d 93, 101 (2d Cir. 1984) (holding that closure is not proper where "information sought to be kept confidential has already been given sufficient public exposure").

C. The District Court's Order Is Also Constitutionally Infirm Because It Failed Even to Consider Whether Less Restrictive Alternatives Are Adequate, Much Less Include Factual Findings Explaining Why They Are Not

The trial court's order, resulting in the continued and indefinite suppression of *the entirety* of the probable cause affidavits, did not even *mention*, much less address, the availability of "less restrictive alternatives" to blanket sealing. Under the First Amendment standard, judicial proceedings or records may be closed to the public "*only* if specific findings are made ***demonstrating*** [not merely stating] that . . . reasonable alternatives to closure ***cannot*** adequately protect the defendant's fair trial rights [or other compelling interest]." *Press-Enterprise II*, 478 U.S. at 14; *see also In re Time, Inc.*, 182 F.3d 270, 271 (4th Cir. 1999) (holding that before a court may seal pleadings, it must enter findings explaining "*why* it rejected alternatives to sealing" (emphasis added)); *P.R.*, 637 P.2d at 354 ("A finding of clear and present danger, by itself, does not constitute a warrant for an order of closure. Such a finding merely triggers the next level of inquiry—that is, whether reasonable and less drastic alternatives ***are available*** to the order of closure." (emphasis added)).

The Supreme Court has held that a trial judge has a duty, under the First Amendment, to consider *sua sponte* less restrictive alternatives to blanket closure, even if neither party suggests such alternatives, and **a trial court's failure to do so constitutes reversible error**. *See Presley v. Georgia*, 558 U.S. 209, 213-14 (2010); *see also Press-Enterprise II*, 478 U.S. at 14 (holding that trial court committed constitutional error because it "failed to consider whether *alternatives short of complete closure* would have protected the interests of the accused." (emphasis added)); *cf. United States v. Pickard*, 733 F.3d 1297, 1303-05 (10th Cir. 2013) (under common law right of access to judicial records, a party seeking to maintain sealing must demonstrate that "redacting documents instead of completely sealing them would [not] adequately serve [the] government interest to be protected." (citation omitted)).

Accordingly, "it is the responsibility of the district court to ensure that sealing documents to which the public has a First Amendment right is no broader than necessary." *United States v. Aref*, 533 F.3d 72, 82 (2d Cir. 2008) (emphasis added); *see also Kasza v. Whitman*, 325 F.3d 1178, 1181 (9th Cir. 2003) (where release of court records poses risk to national security, "[p]ublic release of redacted material is an appropriate response"); *In re Providence Journal Co.*, 293 F.3d 1, 15 (1st Cir. 2002) ("[T]he First Amendment requires consideration of the feasibility of

redaction on a document-by-document basis"); *In re N.Y. Times Co.*, 834 F.2d 1152, 1154 (2d Cir. 1987) (approving of requirement "to minimize redaction in view of First Amendment considerations." (internal quotation marks omitted)). This body of law has been applied to warrants of probable cause supporting a search warrant. *Three Buildings,* 710 F. Supp. at 705 ("Where redaction is required to protect privacy interests, it must be narrowly tailored to allow as much disclosure as is feasible.")

Even courts that have applied the less stringent common-law right of public access to judicial records have recognized the duty of a court to consider release of redacted documents as a "less restrictive means" than blanket sealing. *See, e.g. Pickard*, 733 F.3d at 1304 (reversing trial court's blanket sealing order because "the district court did not consider whether selectively redacting just the still sensitive, and previously undisclosed, information from the [records] . . . would adequately serve the government's interest."); *In re Application of Newsday, Inc.*, 895 F.2d 74, 79 (2d Cir. 1990) (approving of trial court's release of redacted probable cause affidavit to protect privacy interest of innocent third parties whose names were redacted); *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 66 (4th Cir. 1989) ("[T]he judicial officer must consider alternatives to [blanket] sealing [of] the

documents. This ordinarily involves disclosing some of the documents or giving access to a redacted version." (citation omitted)).

Indeed, when applying the CCJRA to an internal affairs investigation file in the custody of a Sheriff, this Court held that a judge reviewing such a discretionary disclosure decision must "decide[] whether the custodian has properly determined to . . . *allow inspection of a redacted version of the record*," and further instructed that "[a] custodian should redact sparingly to promote the CCJRA's preference for public disclosure." *Freedom Colo.*, 196 P.3d at 900 & n.3 (Colo. 2008) (emphasis added), *cited with approval and applied in Cox*, 39 Media L. Rep. (BNA) 2148.

The trial court's order in this case makes no mention of the "less restrictive alternative" of releasing a redacted version of the probable cause affidavits. Whether under the First Amendment, the common law, or the CCJRA, such an overly broad order, denying the public's right to "observe" the sole basis for official judicial action—cannot stand.

SUPPORTING DOCUMENTS

1. Criminal Complaint in *People v. Dear* (Ex. 3);
2. Court's Order Denying Media Petitioners' Motion to Unseal (Ex. 7);
3. Media Petitioners' Motion to Unseal (Ex. 5);

4. Defendant's Response to Media Petitioners' Motion to Unseal (Ex. 6);

5. Compilations of Press Reports on the November 27, 2015 Mass Shooting in Colorado Springs and the Criminal Proceedings Flowing Therefrom (Exs. 1, 2 & 4);

6. Order Unsealing Probable Cause Affidavits in *People v. Holmes*;

7. Order Unsealing Probable Cause Affidavits in *People v. Cox*; and

8. Order Unsealing Probable Cause Affidavits in *People v. King*.

CONCLUSION

Under the standards enunciated by both the U.S. Supreme Court and by this Court, applying the First Amendment and article II section 10 of the Colorado Constitution, the trial court's order sealing indefinitely the entirety of the probable cause affidavits in this case cannot stand. The Petitioners, as any other members of the public, have a constitutionally-protected presumptive right of access to the Court's judicial records that served as the basis for entry of two warrants that have been executed and returned to the Court. The record below demonstrates that neither the People nor the Defendant have met their required burdens to justify the continued suppression of the *entirety* of those judicial records, and most importantly, the trial court did not enter the record findings necessary to justify its abridgement of the public's constitutional rights.

WHEREFORE, Petitioners respectfully request that this Court forthwith issue a Rule to Show Cause directing the Proposed Respondent to show cause, if any, why the relief sought by this Petition should not be granted.

Respectfully submitted this 15th day of January, 2015,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of January, 2016, a true and correct copy of the foregoing **PETITION FOR RULE TO SHOW CAUSE PURSUANT TO C.A.R. 21** was served on the following counsel through the ICCES electronic court filing system, pursuant to C.R.C.P. 121(c), § 1-26:

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