DISTRICT COURT, EL PASO COUNTY, COLORADO Court Address: 270 South Tejon Colorado Springs, CO 80903 **Plaintiff:** PEOPLE OF THE STATE OF COLORADO **vs.** **Defendant:** LETECIA STAUCH and, **Non-Party Movants:** The Associated Press; Colorado Freedom of Information Coalition; Colorado Press Association; Colorado Public Radio; *Colorado Springs Gazette*; *Colorado Springs Independent*; *The Colorado Sun*; *The Denver Post*; KCNC-TV, Channel 4; KDVR-TV, Channel 31; KMGH-TV, Channel 7; KOAA-TV, Channel 5; KTTV-TV, Channel 11; and KUSA-TV, Channel 9	▲ COURT USE ONLY ▲
Attorneys for Movants: Steven D. Zansberg, #26634 BALLARD SPAHR, LLP 1225 17th St., #2300 Denver, Colorado 80202 Phone: (303) 292-2400 FAX: (303) 296-3956 zansbergs@ballardspahr.com	Case No. 20-CR-1358 Division: 5

MOTION TO UNSEAL FORTHWITH THE AFFIDAVIT OF PROBABLE CAUSE IN SUPPORT OF ARREST

(With request for expedited hearing)

Movants, The Associated Press; Colorado Freedom of Information Coalition; Colorado Press Association; Colorado Public Radio; *Colorado Springs Gazette*; *Colorado Springs Independent*; *The Colorado Sun*; *The Denver Post*; KCNC-TV, Channel 4; KDVR-TV, Channel 31; KMGH-TV, Channel 7; KOAA-TV, Channel 5; KTTV-TV, Channel 11; and KUSA-TV, Channel 9 (collectively "Media Petitioners"), by their undersigned counsel, respectfully move this honorable Court to unseal forthwith the affidavit of probable cause in support of arrest warrant, which has been fully executed and returned to the court.

As grounds for this Motion, movants show to the Court as follows:

INTRODUCTION

The Defendant in this action stands accused of four felony counts, including First Degree Murder by a Person in a Position of Trust and Child Abuse Resulting in Death. As set forth in the official press release issued by the El Paso County Sheriff's Office on March 2, 2020, "[t]he investigation into the disappearance of [eleven-year-old] Gannon Stauch began on January 27, 2020, when Letecia Stauch[,] who is Gannon's stepmother[,] called 9-1-1 to report Gannon had not returned from a friend's house. . . . By January 30, 2020, the case was upgraded from runaway to missing/endangered." *See* https://www.epcsheriffsoffice.com/news-releases/arrest-made-in-gannon-stauch-case. Gannon Stauch's disappearance, the extended searches conducted to locate him, and the Defendant's arrest for his murder have understandably garnered significant media attention worldwide.

Defendant was arrested in South Carolina on Monday, March 2, 2020 and has been extradited to Colorado. She appeared for advisement on Wednesday, March 4, 2020. The People have now had sufficient time to complete the bulk of their investigation (following the filing of criminal charges), and therefore **the People *do not oppose* the unsealing of the probable cause affidavit** at this time.[1]

To date, the public has been denied access to the affidavit of probable cause that were filed in the County Court on February 28, 2020, which prompted County Court Judge Ann Maria Rotolo to issue the arrest warrant for the Defendant.

Although the sealing of a probable cause affidavit is routine practice prior to the execution of the warrant, for good and obvious reasons, it is the ordinary practice, even in high-profile felony cases, to unseal such affidavits once the warrant(s) have been executed and the People have completed their preliminary investigation and filed charges thereon. Because the trial in this case – if there is to be a trial– is months away, and there are multiple means to protect the defendant's fair trial rights, there is no basis for continued denial of the public's rights to access judicial records that are on file in this Court.

While the public's right of access to court records is a qualified one – not absolute – judicial records may properly be sealed from public inspection only where findings have been made, on the record, that continued sealing is necessary to protect an extremely weight governmental interest *and* that no less restrictive alternative means exist to adequately protect that interest. Such findings have not been made, nor can they be made, with respect to the affidavit of probable cause on file in this Court. Accordingly, the Media Petitioners respectfully seek the immediate unsealing of the affidavit of probable cause.

[1] The Defendant's counsel has indicated to undersigned counsel that **the Defendant *opposes* the unsealing of the probable cause affidavit**.

THE INTEREST OF THE MEDIA PETITIONERS

1. Each of the Media Petitioners is engaged in gathering news and other information on matters of public concern, including these judicial proceedings, and disseminating it, on various platforms—print, broadcast, cable, internet and mobile devices—to the general public.

2. Media Petitioners appear before this Court on their own behalf, as members of the public, entitled to the rights afforded them by the Constitution of the United States, the Colorado Constitution, all applicable statutes, and the common law. In addition, they appear on behalf of the broader public that receives the news and information gathered and disseminated by these media outlets. *See, e.g.*, *Richmond Newspapers, Inc.*, 448 U.S. at 573-74 (the print and electronic media function "as surrogates for the public"); *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 863 (1974) (Powell, J., dissenting) (in seeking out the news the press "acts as an agent of the public at large").

ARGUMENT

I. THE MEDIA PETITIONERS HAVE STANDING TO ASSERT THE RIGHT OF PUBLIC ACCESS TO COURT RECORDS

3. The First Amendment to the United States Constitution, article II, section 10 of the Constitution of the State of Colorado, C.J.D. 05-01, the Colorado Criminal Justice Records Act, § 24-72-301, *et seq*., C.R.S. (2019), ("CCJRA") and the common law all protect the right of the public to receive information about the criminal justice system through the news media, including access to judicial records on file in this Court, and the right of the news media to gather and report that information.

4. Movants' standing to be heard to vindicate those rights is well established. *See Star Journal Publ'g Corp. v. Cty. Ct.*, 591 P.2d 1028 (Colo. 1979) (newspaper's successful challenge to closure of preliminary hearing); *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 609 n.25 (1982) (recognizing press' right to be heard prior to closure of criminal trial); *Times-Call Publ'g Co. v. Wingfield*, 410 P.2d 511 (Colo. 1966) (press permitted to be heard in asserting their rights to access documents on file in civil action, which are founded upon federal and state constitutions' provisions); s*ee also In re N.Y. Times Co.*, 878 F.2d 67 (2d Cir. 1989); *In re Dow Jones & Co.*, 842 F.2d 603, 606-08 (2d Cir. 1988).[2]

5. The press routinely has been permitted to be heard in criminal cases in Colorado for the limited purpose of challenging the sealing of court files, and have succeeded in such challenges before both trial courts and Colorado's Supreme Court. *See People v. Robert Lewis Dear*, 2016 SA 13 (Colo. Mar. 21, 2016) (following grant of C.A.R. 21 petition by media

[2] In addition, the Colorado Rules of Civil Procedure authorize a motion by "any person" to review an order limiting access to a court file. Colo. R. Civ. P. 121(c) § 1-5(4) (2019) (provision also cited as instructive in Colo. R. Crim. P. 57(b)).

entities, ordering District Court to reconsider its order denying public access to arrest warrant); *People v. Thompson*, 181 P.3d 1143, 1148 (Colo. 2008) (granting media petitioners' emergency petition under C.A.R. 21 and ordering trial court to unseal indictment in murder trial, prior to preliminary hearing); *People v. Holmes*, No. 12-CR-1522 (Arapahoe Cty. Dist. Ct. Apr. 4, 2013) (recognizing Media Petitioners' right to seek unsealing of court file and ordering affidavits of probable cause in support of arrest unsuppressed) (attached as **Ex. 1**); *People v. Cox*, No. 10-CR-861 (Douglas Cty. Dist. Ct. June 22, 2011) (district court's order granting media organizations' motion to unseal arrest warrant affidavit in sexual assault case, after defendant had waived preliminary hearing) (attached as **Ex. 2**); *People v. Lamberth*, No. 2006-CR-1048 (El Paso Cty. Dist. Ct. Mar. 27, 2006) (Schwartz, J.) (ordering unsealing of affidavit of probable cause in response to media petitioners' motion to unseal) (attached as **Ex. 3**).

II. THE PUBLIC HAS A QUALIFIED RIGHT TO ACCESS JUDICIAL RECORDS

6. The public's right to inspect court records is enshrined in the common law. *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978) ("the courts of this country recognize a general right to inspect and copy . . . judicial records and documents"); *In re NBC, Inc.*, 653 F.2d 609, 612 (D.C. Cir. 1981) ("existence of the common law right to inspect and copy judicial records is indisputable"); *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 120 (2d Cir. 2006) (same).

7. The common law access right "is not some arcane relic of ancient English law," but rather "is fundamental to a democratic state." *United States v. Mitchell*, 551 F.2d 1252, 1258 (D.C. Cir. 1976), *rev'd on other grounds sub nom. Nixon*, 435 U.S. 589. The common law right of access to judicial records exists to ensure that courts "have a measure of accountability" and to promote "confidence in the administration of justice." *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995); *accord United States v. Hubbard*, 650 F.2d 293, 314-15 (D.C. Cir. 1981).

8. Second, court records in criminal cases are also subject to public access under the CCJRA;[3] *see Thompson*, 181 P.3d at 1145. Here, an order of the Court bars the custodian from releasing the criminal justice records at issue, *see* § 24-72-305(1)(b), C.R.S., so this Court, not the custodian, must determine whether the sealing order should be lifted. *See also* **Ex. 2** at 4 (recognizing that requiring a party seeking to lift an existing sealing order to file a separate legal action "is unnecessary, unduly burdensome and an inefficient use of court resources and time.").

III. NO PROPER BASIS EXISTS FOR THE CONTINUED SEALING OF THE AFFIDAVIT OF PROBABLE CAUSE

8. Regularly, and routinely, courts have held that arrest warrant affidavits must be made available to the public after a defendant's arrest and initial charging. *See, e.g.*, *Commonwealth v. Fenstermaker*, 530 A.2d 414, 418-19 (Pa. 1987); *Greenwood v. Wolchik*, 544

[3] CJD 05-01 declares that court records in criminal cases are to be provided to the public, in accordance with § 24-72-301, C.R.S.

A.2d 1156, 1158 (Vt. 1988) ("Public access to affidavits of probable cause is all the more important because the process of charging by information involves no citizen involvement, such as is present with juries and grand juries.").

9. "Public scrutiny of the . . . warrant process – even after the fact – can shed light on how and *why a warrant was obtained*, and thereby further the public's interest in understanding the justice system." *United States v. Loughner*, 769 F. Supp. 2d 1188, 1194 (D. Ariz. 2011) (emphasis added). And more importantly, "[p]ublic access to . . . warrants may also serve to deter unreasonable warrant practices, either by the police or the courts." *Id.* "Permitting inspection of . . . warrants [and] the accompanying affidavits . . . will further public understanding of the response of government officials . . . and allow the public to judge whether law enforcement functioned properly and effectively . . . ." *Id.*

10. Recognizing the compelling importance of public access to such probable cause affidavits, the U.S. District Court for the Western District of North Carolina rejected a criminal defendant's argument that the right of access should be abridged because a search warrant affidavit contained statements that would not be admissible at trial and publicity given to such statements could compromise his right to a fair trial. *See United States v. Blowers*, No. 3:05CR93-V, 2005 WL 3830634, 34 Media L. Rep. (BNA) 1235 (W.D.N.C. Oct. 17, 2005). Courts regularly have required warrant affidavits to be disclosed under the common law presumption of access. *See, e.g.*, *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 65 (4th Cir. 1989) (common law right of inspection attaches once a search warrant affidavit is filed with the clerk); *In re Eye Care Physicians of Am.*, 100 F.3d 514, 517 (7th Cir. 1996) (same); *In re Search of 1638 E. 2nd Street*, 993 F.2d 773, 775 (10th Cir. 1993) (same); *In re Search Warrant for Secretarial Area*, 855 F.2d 569, 573 (8th Cir. 1988) (same).

11. Though Colorado's Supreme Court has declined to recognize a First Amendment-based right of public access to documents on file in criminal cases, other courts have concluded that the First Amendment independently protects public access to warrant affidavits on file in a court. As the U.S. Court of Appeals for the Eighth Circuit held: "[T]he **first amendment right of public access *does* extend to the documents filed in support of . . . warrant applications**." *In re Search Warrant for Secretarial Area*, 855 F.2d at 573 (emphasis added) (citations omitted). *See also, In re N.Y. Times Co.*, 585 F. Supp. 2d at 89.[4]

12. While not expressly addressing warrant affidavits, the Colorado Supreme Court has also recognized that "Public confidence cannot long be maintained where important judicial decisions [e.g. authorizing an arrest warrant] are made behind closed doors and then announced in conclusive terms to the public, *with the record supporting the court's decision sealed from*

[4] In some instances, courts have declined to apply the constitutional access right to search warrant affidavits before charges have been brought, to avoid interference with an on-going investigation. *See Baltimore Sun Co. v. Goetz.*, 886 F.2d 60, 62-65 (4th Cir. 1989); *Times Mirror Co. v. United States*, 873 F.2d 1210, 1221 (9th Cir. 1989).

public view." *P.R. v. Dist. Ct.*, 637 P.2d 346, 353 (Colo. 1981) (emphasis added) (quoting *United States v. Cianfrani*, 573 F.2d 835, 851 (3d Cir. 1978)).

13. Absent disclosure of the factual bases for the issuance a warrant, the public cannot properly assess the propriety of the government's conduct. As Chief Justice Burger observed:

> When a shocking crime occurs, a community reaction of outrage and public protest often follows, and thereafter, the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. . . .
>
> **The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is done in a corner or in any covert manner.** It is not enough to say that results alone will satiate the natural community desire for "satisfaction." A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted. To work effectively, **it is important that society's criminal process satisfy the appearance of justice, and the appearance of justice can best be provided by allowing people to observe it.**

Richmond Newspapers, Inc., 448 U.S. at 571-572 (emphasis added) (citations, quotation marks, and minor alterations omitted).

A. THE DEFENDANT'S FAIR TRIAL RIGHTS ARE ADEQUATELY PROTECTED WITHOUT DEPRIVING THE PUBLIC OF INFORMATION CONCERNING THE CONDUCT OF PUBLIC INSTITUTIONS

14. At this early stage of these criminal proceedings, the Defendant cannot possibly meet her burden of demonstrating that unsealing the probable cause affidavit, will create a "substantial probability of prejudice" to her fair trial rights, which is the first of two prerequisites for continued sealing.

15. Courts have recognized that boilerplate concerns about "high-profile" criminal cases posing a difficulty to empanelling an impartial jury are frequently overstated. *See, e.g.*, *see Skilling v. United States*, 561 U.S. 358, 398 (2010) (finding no presumption of prejudice arising from pervasive negative pre-trial publicity and approving of trial court's *voir dire* to empanel an impartial jury); *CBS, Inc. v. U.S. Dist. Ct.*, 729 F.2d 1174, 1179 (9th Cir. 1984) ("even when exposed to heavy and widespread publicity many, if not most, potential jurors are untainted by press coverage"); *In re Charlotte Observer*, 882 F.2d 850, 855-56 (4th Cir. 1989) ("Cases such as those involving the Watergate defendants, the Abscam defendants, and more recently, John DeLorean, all characterized by massive pretrial media reportage and commentary, nevertheless proceeded to trial with juries which – remarkably in the eyes of many – were satisfactorily

disclosed to have been unaffected (indeed, in some instances, blissfully unaware of or untouched) by that publicity."); *see also United States v. McVeigh*, 153 F.3d 1166, 1180-81, 1184 n.6 (10th Cir. 1998) (noting that more than one half of potential jurors were unaware of Timothy McVeigh's purported *confession* to having bombed the Alfred P. Murrah building in Oklahoma City despite ubiquitous press coverage given to that confession on the eve of trial).

16. In highly publicized cases "'[t]he relevant question is not whether the community remembered the case, but whether the jurors . . . had such fixed opinions that they could not judge impartially the guilt of the defendant.'" *Mu'Min v. Virginia*, 500 U.S. 415, 430 (1991) (quoting *Patton v. Yount*, 467 U.S. 1025, 1035 (1984)).

17. Any party who seeks to continue the sealing of a court record must *show*, ***in addition to*** a "substantial probability of prejudice" to fair trial rights necessarily flowing from disclosure of the sealed information, *that there are no less restrictive measures available* to protect the defendant's fair trial rights short of continued sealing. *Cf. P.R.*, 637 P.2d at 354 (holding that a finding of clear and present danger to the fair administration of justice, by itself, is not sufficient to warrant court closure; such a finding merely "triggers the next level of inquiry – that is, whether reasonable and less drastic alternatives *are available*" (emphasis added)); *Star Journal Publ'g*, 591 P.2d at 1030 (same); *Press-Enter. Co. v. Super. Ct.* (*Press-Enterprise II*), 478 U.S. 1, 14 (1986) (same); *Richmond Newspapers, Inc.*, 448 U.S. at 580-81(same).[5]

18. Myriad alternative measures exist to protect the Defendant's fair trial rights, *see Press-Enterprise II*, 478 U.S. at 15, that would properly balance the Defendant's fair trial rights with the news agencies' free press rights, such as:

> The trial judge may: (1) cause extensive voir dire examination of prospective jurors; (2) change the trial venue to a place less exposed to intense publicity; (3) postpone the trial to allow public attention to subside; (4) empanel veniremen from an area that has not been exposed to intense pretrial publicity; . . . or [(5)] use emphatic and clear instructions on the sworn duty of each juror to decide the issues only on the evidence presented in open court.

People v. Botham, 629 P.2d 589, 596 (Colo. 1981); *see also Associated Press*, 705 F.2d at 1146 ("[W]e believe that careful jury selection is an alternative that can adequately protect the right to a fair trial. In a large metropolitan area . . . it is unlikely that 'searching questioning of

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[5] Colorado's Supreme Court is currently considering a proposed new Rule of Criminal Procedure (55.1), that, once adopted, will require all District Court judges to enter written findings supporting the suppression of judicial records, *inter alia* "that no less restrictive means than making the record inaccessible . . . or allowing a redacted copy . . . accessible to the public exists to achieve or protected the identified interest(s)." *See* https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Committees/Criminal_Rules_Committee/ACCESS%20TO%20COURT%20RECORDS%20IN%20CRIMINAL%20CASES%20%20January%202020.pdf

prospective jurors . . . to screen out those with fixed opinions as to guilt or innocence' and 'the use of emphatic and clear instructions . . . to decide the issues only on evidence presented in open court' will fail to produce an unbiased jury, regardless of the nature of the pre-trial documents filed." (quoting *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 563-64 (1976)).

19. Under applicable law, therefore, the issue is not whether the Defendant or the Court would *prefer* not to resort to "cumbersome" measures such as change of venue, extensive jury *voir dire* or detailed jury instructions. Rather, before continued sealing may be ordered, the alternatives must be considered and expressly found by the Court to be *unavailable* or *inadequate*, based on specific reasons that the court must articulate on the record. *Press-Enterprise I*, 464 U.S. at 513; *ABC, Inc. v. Stewart*, 360 F.3d 90, 102 (2d Cir. 2004); *P.R.*, 637 P.2d at 354; *see also Rockdale Citizen Publ'g Co. v. State*, 463 S.E.2d 864, 866 (Ga. 1995) (holding that news media have a right of access to pretrial evidentiary hearings where the availability of a potential change of venue eliminates any basis for a claim of prejudice).

20. The argument that press reports might expose jurors to information in the probable cause affidavits that may not ultimately be admissible at a possible trial is <u>not</u> sufficient to pose a "substantial likelihood of prejudice" to Defendant's fair trial rights; nor does it mean that less restrictive measures than sealing the affidavit would not be available or adequate if there were to be a trial. As the Supreme Court noted more than thirty years ago, in any "important case,"

> Scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irwin v. Dowd, 366 U.S. 717, 722-23 (1961) (citations omitted). This same sentiment was echoed by the Colorado Supreme Court:

> [A]n important criminal case can be expected to generate much public interest and usually the best qualified jurors will have heard or read something about the case. **To hold that jurors can have no familiarity through the news media with the facts of the case is to establish an impossible standard in a nation that nurtures freedom of the press. It is therefore sufficient if jurors can lay aside the information and opinions they have received through pretrial publicity.**

People v. McCrary, 549 P.2d 1320, 1325 (Colo. 1976) (emphasis added).

21. Moreover, empirical research confirms that jurors are able to set aside their conclusions, based on extensive and prejudicial pretrial publicity, and to base their verdict solely on the evidence admitted in the course or the trial. *Gentile v. State Bar of Nev.*, 501 U.S. 1030,

1054-55 (1991); *see Skilling*, 561 U.S. at 396-98 (holding that defendant had "failed to establish that a presumption of prejudice arose or that actual bias infected the jury" because "[i]t is sufficient if the juror[s] can lay aside [their] impression[s] or opinion[s] and render a verdict based on the evidence presented in court" where trial was held amidst massive press coverage concerning Enron's collapse and alleged crimes perpetrated by firm's management, including the defendant) (quotation omitted); *id.* at 391 n.28 (citing numerous cases where, despite extensive pretrial publicity, the court was able to seat an impartial jury).

22. Following the indictment of Jared Lee Loughner for the fatal shootings in Tucson, Arizona, the federal district court ruled that Loughner's fair trial rights would not be compromised by release of the warrant affidavits because the court, "with the assistance of counsel . . . intends to develop a comprehensive jury questionnaire, which will help identify the extent of exposure prospective jurors may have had to the news coverage about th[e] case and assist counsel in ferreting out people with fixed opinions." *See Loughner*, 769 F. Supp. 2d at 1196. Further, the court noted it would "permit counsel to personally and extensively voir dire prospective jurors" and would "consider granting additional peremptory challenges to each side, if voir dire establishes that is necessary." *Id.*

23. In 2006, in *People v. Lamberth*, No. 2006CR001048, the accused was charged with murdering Detective Jared Jensen of the Colorado Springs Police Department. This Court ordered the affidavits of probable cause supporting Lamberth's arrest unsealed, over the defendant's objections, four months before the preliminary hearing. *See* **Ex. 3**. Your Honor stated from the bench that evidence establishing probable cause to hold Lamberth over for trial would be presented in open court at the preliminary hearing, which would occur *closer in time* to the actual trial, so there was no logical basis to withhold that information from the public until the time of the preliminary hearing. And this Court ordered the unsealing of the probable cause affidavit notwithstanding the fact that it *included Lamberth's confession* to having murdered Officer Jensen. *See* **Ex. 4** (Dick Foster, *Arrest Affidavit: Suspect Admitted Killing Detective*, Rocky Mountain News, Mar. 28, 2006, at 13A).[6]

24. Lastly, in the high-profile multiple murder case (the "Aurora Theater Shooting" case) in Arapahoe County, *People v. Holmes*, the affidavits in support of arrest and search warrants were unsealed far in advance of trial, and the Court was able to seat a jury of impartial death-qualified jurors; following his conviction and sentencing, Holmes did not appeal the jury's verdict.

25. Because numerous prophylactic measures (*e.g.*, change of venue, extended *voir dire*, jury admonitions and instructions) remain available, and in the absence of any showing that such alternative measures would be ineffective in protecting the Defendant's right to a fair trial,

[6] Lamberth was subsequently convicted of second degree murder and sentenced to 96 years in prison for that crime.

the Court must conclude that the Defendant cannot meet her burden of showing the lack of any alternative measures short of continued sealing. *See Stewart*, 360 F.3d at 102; **Ex. 6** at 5, 7.

B. THE AFFIDAVITS SHOULD BE UNSEALED FORTHWITH, TO PROTECT THE PUBLIC'S RIGHT OF *CONTEMPORANEOUS* ACCESS TO JUDICIAL RECORDS

26. The Court should not countenance any contention that sealing now is appropriate because the public will be fully informed later, either at the preliminary hearing or at the time of trial. It is firmly established that the public's right of access to judicial records is a right of *contemporaneous* access. *See Lugosch*, 435 F.3d at 126-27 ("Our public access cases and those in other circuits emphasize the importance of *immediate* access where a right of access is found." (emphasis added) (citations omitted)); *Grove Fresh Distribs.*, 24 F.3d at 897 (noting that access to court documents "should be immediate and contemporaneous").

27. Since the public's presumptive right of access attaches as soon as a document is filed with the Court, any delays in access are, in effect, denials of access, even though they may be limited in time**.** *See, e.g., Associated Press*, 705 F.2d at 1147 (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*, 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, 38 Media L. Rep. (BNA) 1890, 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").

28. As the Supreme Court observed in *Nebraska Press Association v. Stuart*, "[d]elays imposed by governmental authority" are inconsistent with the press' "traditional function of bringing news to the public promptly." 427 U.S. 529, 560-61 (1976).

WHEREFORE, the Media Petitioners respectfully request that the Court forthwith enter an order unsealing the affidavit of probable cause in support of arrest.

In light of the asserted right of the public for *contemporaneous* access to judicial records on file in criminal cases, the Media Petitioners hereby respectfully further request that the Court provide them the opportunity to be heard on the issues presented herein <u>at the earliest practical time</u>.

Respectfully submitted this 9th day of March, 2020, by:

BALLARD SPAHR, LLP

In accord with C.R.C.P. 121 § 1-26(7) a printable copy of this document with electronic signatures is being maintained by the filing party and will be made available for inspection by other parties or the court upon request

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

Attorney for Media Petitioners

CERTIFICATE OF MAILING

I hereby certify that on this 9th day of March, 2020, a true and correct copy of this **MOTION TO UNSEAL FORTHWITH THE AFFIDAVIT OF PROBABLE CAUSE IN SUPPORT OF ARREST** was delivered via EMAIL to the attorneys below and was served via ICCES to the following:

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In accord with C.R.C.P. 121 § 1-26(7) a printable copy of this document with electronic signatures is being maintained by the filing party and will be made available for inspection by other parties or the court upon request

s/ Cynthia D. Henning
Legal Administrative Assistant

DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO 7325 S. Potomac St. Centennial, Colorado 80112	▲COURT USE ONLY▲
People of the State of Colorado **v.** **James Eagan Holmes,** **Defendant**	Case No. **12CR1522** Division: **26**

ORDER REGARDING MEDIA PETITIONERS' MOTION TO UNSEAL AFFIDAVITS OF PROBABLE CAUSE IN SUPPORT OF ARREST AND SEARCH WARRANTS AND REQUESTS FOR ORDERS FOR PRODUCTION OF DOCUMENTS (C- 24)

INTRODUCTION

This matter is before the Court on Media Petitioners' Motion to Unseal Affidavits of Probable Cause in Support of Arrest and Search Warrants and Requests for Orders for Production of Documents [C-24], which was filed on January 16, 2013 (hereafter "Motion").[1] Media Petitioners ask the Court to unseal and release: (1) the

[1] Media Petitioners are the following nonparties: ABC, Inc.; The Associated Press; Cable News Network, Inc.; CBS News, a division of CBS Broadcasting Inc.; CBS Television Stations, Inc., a subsidiary of CBS Corporation; *The Denver Post;* Dow Jones & Company; Fox News Network, LLC; Gannett; KCNC-TV, Channel 4; KDVR-TV, Channel 31; KMGH-TV, Channel 7; KUSA-TV, Channel 9; *Los Angeles Times*; The McClatchy Company; National Public Radio Company; and *The Washington Post.*

EXHIBIT 1

probable cause affidavits in support of all arrest and search warrants (hereafter "affidavits"); and (2) any requests seeking the production of records (hereafter "records warrants").[2] The parties filed responses opposing the Motion. The defendant objects to the Motion in its entirety and the People object to the Motion in part. For the reasons articulated in this Order, the objections are overruled and the Motion is granted.

PROCEDURAL HISTORY

This case involves an alleged shooting on July 20, 2012. On that same day, the Court entered an Order to Seal Search Warrants, Affidavits, Orders, and Case File. As the litigation has unfolded, however, the Court has gradually unsealed and released documents in accordance with Colorado case law and the statutory legal standards set forth in the Colorado Criminal Justice Records Act ("CCJRA"), § 24-72-301, C.R.S. (2012).

The affidavits and records warrants remain sealed pursuant to the rationale articulated by the Court in previous Orders, including: (1) the Order Re: Motion to Unseal Court File (Including

[2] The Court infers that in referring to requests seeking the production of records, Media Petitioners mean records search warrants with attached affidavits in support thereof.

Docket)/("Suppression Order") (C-4c), issued August 13, 2012; (2) the Amended Order Unsuppressing Court File (C-12), issued September 25, 2012; and (3) the Order Re: Media's Motion to Unseal Redacted Information (Victims' Identities) (C-13), issued October 25, 2012 (hereafter "C-13 Order").

In a previous Order, the Court explained that it was reluctant to release the affidavits and records warrants before the combined preliminary hearing/proof evident-presumption great hearing (hereafter "preliminary hearing"). *See* C-13 Order at pg. 10. The preliminary hearing was completed on January 7, 8, and 9 of 2013, after the C-13 Order was issued. Following the hearing, the Court issued extensive findings of fact and conclusions of law in the Order Re: Preliminary/Proof Evident Hearing (C-19), issued January 10, 2013 (hereafter "C-19 Order"). The C-19 Order included a detailed summary of the evidence presented during the preliminary hearing. Media Petitioners filed their Motion on January 16.[3] The Motion was fully briefed and became ripe for ruling on April 2.

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[3] Because of a clerical error, the Court did not become aware of the Motion until March 12, when the defendant was arraigned.

MEDIA PETITIONERS' MOTION AND PARTIES' OBJECTIONS

Media Petitioners seek to have the Court unseal and release the affidavits and records warrants. Media Petitioners remind the Court that it previously implied it would consider releasing the requested materials after the preliminary hearing was held. *See* C-13 Order at pg. 10 ("disclosure . . . would be imprudent at this stage of the proceedings where the [preliminary hearing] has yet to take place."). Relying on the Court's C-19 Order, which summarized in detail the evidence presented at the preliminary hearing, Media Petitioners note that there has been a "wealth of information already made public in the proceedings thus far." Thus, aver Media Petitioners, "there is no basis for the continued sealing of the documents" sought.

The People object to the Motion to the extent it seeks information identifying the named victims and witnesses, arguing that the release of such information at this juncture of the proceedings: (1) is detrimental to the administration of justice; (2) is contrary to the Colorado Victims' Rights Act and the Colorado Constitution; (3) jeopardizes the named victims' and witnesses' continued cooperation in this case; and (4) increases the named

victims' and witnesses' already heightened safety and privacy concerns. The People also object to the release of any police reports attached to the affidavits, as well as to the release of the records warrants, as being contrary to "the public interest."

The defendant opposes the Motion on the ground that the public's First Amendment right of access is fully satisfied by the ability to attend the hearings in this case, all of which have been held in open Court. According to the defendant, the additional requested disclosures will jeopardize his constitutional rights to due process, a fair trial, the presumption of innocence, and a fair and impartial jury.

ANALYSIS

A. Standing

At the outset, the Court concludes, as it has done in previous Orders, that Media Petitioners, as members of the public, have standing to be heard on the issue of whether the affidavits and records warrants should be unsealed and released. *See People v. Thompson,* 181 P.3d 1143 (Colo. 2008); *Star Journal Publ'g Corp. v. Cnty. Court.,* 591 P.2d 1028 (Colo. 1979); *see also* Colo. R. Civ. P. 121(c) §1-5(4) (Upon notice to all parties of record, and after

hearing, an order limiting access may be reviewed by the court at any time on its own motion or upon the motion of any person) (applicable as per Colo. R. Crim. P. 57(b)). Thus, the Court addresses the merits of their Motion.

B. Legal Standard Governing Motion

Under the CCJRA, the affidavits and records warrants are criminal justice records held by the Court in its official capacity. As such, these documents are subject to discretionary disclosure. *See* §§ 24-72-304, 305, C.R.S. (2012). The CCJRA states that records of criminal justice agencies that are not records of official action "*may* be open for inspection," unless such inspection would be "contrary to state statute, or is prohibited by any rules promulgated by the supreme court or by any order of the court." *Id.* at § 24-72-304(1), C.R.S. (emphasis added). Thus, subject to exceptions not pertinent here, "the General Assembly has consigned to the custodian of a criminal justice record the authority to exercise its sound discretion in allowing or not allowing inspection." *Harris v. Denver Post Corp.*, 123 P.3d 1166, 1170 (Colo. 2005).

While the Legislature did not establish a balancing test in the CCJRA for custodians considering the discretionary release of

criminal justice records to the public, the Colorado Supreme Court has concluded that such custodians should balance: "the pertinent factors, which include the privacy interests of individuals who may be impacted by a decision to allow inspection; the agency's interest in keeping confidential information confidential; the agency's interest in pursuing ongoing investigations without compromising them; the public purpose to be served in allowing inspection; and any other pertinent consideration relevant to the circumstances of the particular request." *Id.* at 1175. Additionally, the Supreme Court has cited with approval ABA Standard 8-3.2, which provides that a Court may properly suppress Court documents if unrestricted access would pose a substantial probability of harm to the fairness of the trial, if suppression would effectively prevent such harm, and if there is no less restrictive alternative reasonably available to prevent the harm. *Star Journal Publ'g Corp.*, 591 P.2d at 1030.

C. *Application*

In striking the balance required by *Harris*, the Court first analyzes the interests of Media Petitioners and the public. The Court then addresses the parties' objections.

1. The Interests of Media Petitioners and the Public

Media Petitioners contend that they and other members of the public have a constitutional right protected by the First Amendment to the information sought which may only be curtailed by the showing of an overriding and compelling state interest. The Court agrees. *See Star Journal Publ'g Corp.*, 591 P.2d at 1030 (stating that First Amendment rights "may only be abridged upon a showing of an overriding and compelling state interest.").

In *Gordon v. Boyles*, 9 P.3d 1106 (Colo. 2000), the Supreme Court described the vital role a free press plays in this nation's democracy as follows:

> Enlightened choice by an informed citizenry is the basic ideal upon which an open society is premised, and a free press is thus indispensable to a free society. Not only does the press enhance personal self-fulfillment by providing people with the widest possible range of fact and opinion, but it also is an incontestable precondition of self-government . . . . As private and public aggregations of power burgeon in size and the pressures for conformity necessarily mount, there is obviously a continuing need for an independent press to disseminate a robust variety of information and opinion through reportage, investigation, and criticism, if we are to preserve our constitutional tradition of maximizing freedom of choice by encouraging diversity of expression.

Id. at 1115–16 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 726–27 (1972) (Stewart, J., dissenting) (footnotes omitted)).

The question raised by the Motion is whether an overriding and compelling state interest has been advanced by the parties which takes precedence over the First Amendment interests of Media Petitioners and the public. The Court concludes that they have not.

2. People's Objections

The Court is sensitive to the named victims' and witness' privacy and safety concerns, and appreciates the additional grounds raised by the People in opposing the release of these individuals' identifying information. However, the named victims' and witnesses' identifying information has already been publicly released. During the past eight months, through pleadings and hearings, information identifying the named victims and witnesses has become public. Thus, the People's objection, while generally valid, does not have merit under the circumstances present here. Of course, the Court will vigorously demand compliance with the provisions of the Victims' Rights Act, § 24-4.1-301 *et seq.*, C.R.S. (2012), and the Colorado Constitution.

The People's objection to the release of the records warrants and the police reports attached to the affidavits is equally unpersuasive. The investigation in this case has entered its ninth month now. Since July 20, a lot of details of the alleged incident have been released through the pleadings and pretrial hearings, including the three-day preliminary hearing held in January and the extensive C-19 Order issued shortly thereafter. Under these circumstances, the Court cannot in good conscience conclude that the release of the records warrants and the police reports attached to the affidavits would be contrary to "the public interest."

In sum, inasmuch as the named victims' and witnesses' identification has already been disclosed, and given how long this investigation has been pending and the information that has previously been released, the Court concludes that the fundamental nature of the First Amendment rights of Media Petitioners and the public may not be abridged. The People have failed to show that the release of the requested documents would pose a substantial probability of harm to the fairness of the trial. The People have likewise failed to establish that, to the extent any harm would result from the release of the affidavits and records warrants, the

continued suppression of all, or even portions, of those documents would effectively prevent such harm. Accordingly, the People's objections to the Motion are overruled.

3. The Defendant's Objections

The Court is obviously mindful of the defendant's constitutional rights. Indeed, the Court has repeatedly made clear that it will do its utmost to ensure that all of the defendant's constitutional rights are given effect in this case. However, the defendant has failed to demonstrate, or even state with any degree of specificity, how the release of the affidavits and records warrants under the circumstances present here would pose a substantial probability of harm to the fairness of the trial or to any of his constitutional rights. Moreover, even assuming, for the sake of argument, that any harm would result from the release of the affidavits and records warrants, the defendant has not shown that the continued suppression of those documents would effectively prevent such harm. Therefore, the Court concludes that at this juncture in the proceedings, and under the circumstances present, the defendant's interests in keeping the affidavits and records warrants sealed are outweighed by the First Amendment rights of

Media Petitioners and the public in having those documents released.

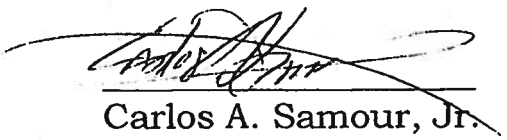
Based on the specific circumstances present at this stage in the litigation, the Court holds that the defendant has failed to advance an overriding and compelling state interest to abridge the First Amendment rights of Media Petitioners and the public. Accordingly, the defendant's objections to the Motion are overruled.

CONCLUSION

For all the foregoing reasons, the Court concludes that Media Petitioners' Motion has merit. Accordingly, it is granted. The Court hereby unseals and releases the affidavits and records warrants. To the extent that any of these affidavits and records warrants were suppressed, not sealed, they, too, are released. These documents shall be made available to Media Petitioners for inspection, subject to the requirements of CJD 05-01 and CJO 99-3, as well as the standard procedures of the Clerk's Office in the Arapahoe County Justice Center.

Dated this 4th day of April of 2013.

BY THE COURT:



Carlos A. Samour, Jr.
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2013, a true and correct copy of **Order regarding media petitioners' motion to unseal affidavits of probable cause in support of arrest and search warrants and requests for orders for production of documents (C-24)** was served upon the following parties of record.

Karen Pearson
Amy Jorgenson
Arapahoe County District Attorney's Office
6450 S. Revere Parkway
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(via email)

Sherilyn Koslosky
Rhonda Crandall
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Steven D. Zansberg
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Denver, CO 80203
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Cheryl Robinson

DISTRICT COURT, DOUGLAS COUNTY, COLORADO Court Address: 4000 Justice Way Castle Rock, CO 80109-7546	
Plaintiffs: THE PEOPLE OF THE STATE OF COLORADO Defendant: PERRISH EUGENE COX	Case Number: 10CR661 Ctrm.: Div. 1
ORDER	

THIS COURT, having reviewed the file, the sealed arrest warrant affidavit, the Motion to Unseal filed by the Denver Post and the Associated Press (the media) and having heard from counsel for the Defendant, the People, the victim and the media, hereby issues the following order:

The Defendant was arrested pursuant to an arrest warrant on December 9, 2010 and charged with Sexual Assault, a class three felony, in violation of Section 18-3-402(1)(h) and Sexual Assault, a class four felony, in violation of Section 18-3-402(1)(b). The arrest warrant affidavit, along with other documents, was sealed by the Douglas County Court at the request of the People on December 9, 2010. Certain documents were unsealed by the Douglas County Court on February 6, 2011. The arrest warrant affidavit was not unsealed. On March 10, 2011 the Defendant waived his right to a preliminary hearing and the matter was bound over to Division 1.

The media previously made requests of the Douglas County Court to release the arrest warrant affidavit. Those requests were denied. After the matter was bound over to district court the media renewed its request for the unsealing of the arrest warrant affidavit. The Court has heard argument from counsel for the media, counsel for the Defendant and the People and counsel for the victim. The Court shall now resolve the media's request for unsealing of the arrest warrant affidavit.

STANDING

The People, joined by the Defendant, object to the efforts of the media to secure the release of the arrest warrant affidavit in this criminal case. Relying on *People v. Ham* 734 P.2d 623 (Colo. 1987) and Section 24-72-301 *et.seq.* the People and the Defendant argue that the media has no standing to make a request for the release of the affidavit and that any request for the release of this document must be made in accord with the requirements of Section 24-72-308 *et.seq.* These arguments are misplaced.

People v. Ham does not preclude the media from making a request in this criminal action for the release of the arrest warrant affidavit. In *Ham* the Colorado Department of Corrections sought to intervene in a criminal case. The Department contested the legality of a sentence imposed by the trial court and also sought, pursuant to Colo. R.Crim. Pro 35(a) to correct what the department believed to be an illegal sentence. Neither the Defendant nor the People sought to challenge the sentence imposed by the trial court. Instead, the Department sought to challenge the sentence imposed by the Court by intervening in the litigation. The intervention was linked directly to an effort by the Department to insert itself into this case to change or modify the sentence handed down by the trial court. The Colorado Supreme Court noted that the Colorado Rules of Criminal Procedure made no provision for the intervention by a third party to a criminal prosecution. The intervention sought by the Department was made under color of Colorado Rule of Civil Procedure (C.R.C.P.) 24. The Supreme Court determined that intervention standards of C.R.C.P. 24 did not apply to a criminal prosecution.

"The concept of intervention proceeds from the principle that the efficient resolution of a civil controversy often requires the addition of other persons whose interests might be jeopardized by the resolution of the controversy between the original parties" *Ham* at p. 625. Employing this standard definition of intervention to the situation in this criminal prosecution, the Court finds that the media is not seeking to intervene in this criminal prosecution. The media is not seeking to insert itself in this

litigation because its interests might be negatively affected by the outcome of this criminal prosecution. Instead, the media wants to report on the proceedings. It does not have an interest in the outcome of this matter nor does it have an interest that must be addressed by the Court or the jury at the same time the Court and the jury are considering the allegations brought by the People against the Defendant. The media wants access to records in order to report on this criminal matter. It does not have an interest in the outcome of the prosecution, other than to report what has occurred. The media is not an intervenor as contemplated by C.R.C.P. 24. The media also has First Amendment rights of access to court proceedings and records. See *Star Journal Publishing Corp v. County Court* 591 P.2d 1028 (Colo. 1979); *Nixon v. Warner Communications* 435 U.S. 589 (1978); *Richmond Newspapers, Inc., v. Virginia*, 448 U.S. 555, 100 S. Ct. 2814, 65 L.Ed. 2d 973 (1980) and *P.R. v. District Court*, 637 P.2d 346 (Colo. 1981). Any request by the People or the Defendant to preclude the media from seeking access to the arrest warrant affidavit based on *Ham* is DENIED.

Section 24-72-301 *et.seq.* is the Colorado Criminal Justice Records Act (CCJRA). It provides for the inspection, release and sealing of arrest and criminal records information and criminal justice records. The People and the Defendant argue that this criminal prosecution is not the appropriate avenue for the media to obtain the arrest warrant affidavit. Instead, the People and the Defendant argue the media must make application under Section 24-72-304 for the inspection of the affidavit. This argument exalts form over substance.

First, the court notes that the Colorado Supreme Court in *People v. Thompson* 181 P.3d 1143 (Colo. 2008) considered a motion filed by the media in a pending criminal action to unseal a grand jury indictment. The Supreme Court did not require a separate filing before resolving the motion filed by the media. In oral argument to this Court in the present matter the prosecutor averred that there was no objection made in the *Thompson* case to the media making such a request in that criminal matter. Here both the People and the Defendant object to the media being permitted to make such a

request and argue that the media must seek relief under the CCJRA for the release of the records.

Second, criminal justice records are defined at Section 24-72-302(4) as all "books, papers, cards, photographs, tapes, recordings or other documentary materials, regardless of form or characteristics, that are made maintained or kept by any criminal justice agency in this state..." The Court finds that the sealed arrest warrant affidavit is a criminal justice record. This Court is a "criminal justice agency" pursuant to Section 24-72-302(3) and is entitled to maintain criminal justice records. Litigation involving criminal justice records and a denial of access to a criminal justice record are to be made in the district court wherein the record is found. See Section 24-72-305(7). Therefore, litigation involving this sealed arrest warrant affidavit would occur in one of the district court divisions here in Douglas County.

This Court has maintained this sealed record since this matter was bound over to district court. The release of all or a portion of the affidavit and its potential affect on the trial in this case are issues that should be resolved, if at all possible, by the trial court. To require separate litigation on the issue of the release of the affidavit is unnecessary, unduly burdensome and an inefficient use of court resources and time. This is particularly so, given the fact that the affidavit is contained in this court file; has been read and considered by this Court; this court has listened to argument of all counsel; and this Court has reviewed all motions and responses on this issue. In determining whether to release all, a portion or none of the affidavit this Court shall apply applicable CCJRA standards and also consider other appropriate case law. The joint request to require the media to file a separate action seeking the release of the arrest warrant affidavit is DENIED.

RELEASE OF THE AFFIDAVIT

Access to court proceedings and records is guaranteed and protected by the First Amendment. See *Star Journal,* and *United States v. McVeigh* 918 F. Supp. 1452

(W.D. Okla. 1996). The court system in Colorado also favors openness and transparency with respect to court proceedings and records. See Colorado Supreme Court Chief Justice Directive 2005-01 and the Media Guide to Colorado Courts (6th ed. 1998), published by the Colorado Supreme Court's Committee on Public Education. Indeed, as counsel for the media repeatedly asserted during argument to the Court, the continued sealing of the affidavit can occur only if the People or the Defendant can establish that 1) there is a clear and present danger to a fair trial should the affidavit be released and 2) there are no less restrictive means available short of the continued sealing of the affidavit. Counsel for the media asserted that neither the Defendant nor the People presented any evidence on the issue of clear and present danger. The People and the Defendant, with good reason, rely on the contents of the affidavit in support of their claim that there is a clear and present danger to the right to a fair trial should the affidavit be unsealed. This court has reviewed the affidavit. The media may well determine that the contents of the affidavit should be published. However, the fact that media reports about the contents of the affidavit might and probably will occur as a result of the release of the affidavit is not a sufficient reason, by itself, to continue with the sealing of the affidavit. There can be no presumption that everyone in the jury panel will read, follow and find important the media accounts of this case. Furthermore, there are methods that can be used by the Court to address widespread media coverage and protect the right to a fair trial. These methods include, but are not limited to, the following: extensive voir dire by either the Court, counsel or both; clear and emphatic instructions to the jury with respect to their sworn duty and that they cannot be swayed by prejudice and must rely on the evidence presented in the courtroom; continuing the trial; enlarging the size of the jury panel; increasing the number of preemptory challenges; and potentially changing venue. Whether implementation any of these methods is necessary will be determined by the Court as the trial approaches and after conferring with counsel.

More problematic is the right to privacy raised by counsel for the victim. There are privacy interests at issue here that go beyond the facts of the alleged sexual assault

and the results of any rape kit. These privacy interests are significant, personal and sensitive to the victim and others and are, in part, related to medical and other concerns. These interests are particularly concerning given the fact that the victim, by making a report to the police concerning this sexual assault, certainly did not authorize or seek the broadcast of these interests to the media or the general public. In addition there certainly are relevancy issues with respect to these sensitive personal matters that may preclude the admissibility of these matters at trial. This is an issue that would need to be addressed by the court in advance of trial. If the Court were to permit access by the media to these personal issues, only to determine later that these matters were not relevant and not admissible, it would be more than mere disservice to a victim. Certainly the ability to obtain a fair trial could be impacted. The Court has recognized that methods can be employed by the Court to safeguard the guarantee of a fair trial. However, the combination of the private and sensitive nature of a portion of the affidavit, along with the uncertain admissibility of this information coupled with the harm to the privacy of the victim and the potential harm to a fair trial lead the Court to address this privacy issue prior to any release of the affidavit. In doing so the Court is guided by the requirements of the CCJRA.

According to Section 24-72-301(2) it is the public policy of the State of Colorado to maintain records of official actions and that such records shall be open to inspection. As our Supreme Court noted in *People v. Thompson* court documents in criminal cases fall into one of two categories: 1) records of official actions (Section 24-72-302(7)) and 2) criminal justice records (Section 24-72-302 (4)). The Court has already determined that the arrest warrant affidavit is a criminal justice record.

Records of official actions are to be maintained and released by the appropriate criminal justice agency. While the release of records of official actions is mandatory, the release of criminal justice records is discretionary. See Section 24-72-304(1). However, the denial of the release or inspection of criminal justice records must be based on one of the following: 1) release or inspection would be contrary to state statute; 2) release or inspection is prohibited by rules promulgated by the Colorado

3. The name of a friend of the victim associated with personal information of the victim and limited medical information of the victim.

The Court finds that this redaction relates directly to limiting information that would identify the victim or preclude information related to the personal issue previously discussed in this Order.

By this Order the Court is attempting to give life to the provisions of the statute that protect the identity of the victim and also attempting to protect certain privacy interests. While the Court has maintained control over the affidavit pending the resolution of this issue, the release of the redacted version ends the Court's supervision over the redacted affidavit. The parties may certainly disagree with the Court's order and seek appellate review. In light of that distinct fact the Court DIRECTS the following with respect to the dissemination of this Order and the redacted affidavit:

This order and copies of the redacted version of the arrest warrant affidavit shall be provided to counsel for the People, the Defendant and the victim. A copy of this order shall be provided to counsel for the media. The Court shall, absent any order from any appellate court, release the redacted affidavit to counsel for the media seven (7) days from the date of this order. Furthermore, if appellate review is taken of this Court's order the original sealed arrest warrant affidavit shall be made available to any reviewing court. The original sealed arrest warrant affidavit is **not to** be released to the media subject to further order of this Court or any reviewing Court.

Dated and signed this 22 day of June, 2011.

BY THE COURT:

PAUL A. KING
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a true, accurate and complete copy of said Order was emailed this 22 day of June, 2011, to the following:

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Attorney for Media
szansberg@lskslaw.com

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18th Judicial District
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Char Hansen
Court Judicial Assistant

EVENT COMMENTS
.. 3/29/06 9:06 AM
District Court, El Paso County

Case #: 2006CR001048 Div/Room: 5 Type: Homicide

The People of Colorado vs LAMBERTH, JEREMY ALEXANDER

Status: SUPP

Record Type: EVT Minute Order (print)
Judge Initials: LES Clerk Initials: Reporter Initials:

3-27-06 SCHWARTZ/MDH/HOLIDAY/DDA MAY & MULLANEY HEAR
DPWC PD MARTINEZ, MCATEER & NELSON; ATTY SANDSBERG APP FOR DENVER POST AND FREEDOM; ATTY CHARLES GREENLEY APP FOR EPSO; MOTIONS HEARD AND RULED UPON; PLEADINGS IN FILE MAY BE RELEASED TO THE PUBLIC; PARTIES AGREE TO VACATE 4-3-06 CT DATE, CONT FOR REVW OF DISCOVERY 4-10-06 230PM (DEF PRESENCE WAIVED) AND SETTING OF PRELIM 5-8-06 230PM (DEF PRESENCE REQUIRED). CUST.

NewsRoom

3/28/06 Rocky Mtn. News 13A
2006 WLNR 5131206

Denver Rocky Mountain News (CO)

March 28, 2006

Section: News

Arrest affidavit: Suspect admitted killing detective

Dick Foster, Rocky Mountain News

COLORADO SPRINGS

Jereme Lamberth confessed to police three hours after killing Detective Jared Jensen on Feb. 22 but never indicated he knew that Jensen was a police officer, according to an arrest affidavit.

In the affidavit, unsealed Monday by District Judge Larry Schwartz, Lamberth allegedly told a police interrogator that he pulled a .44-caliber pistol from his belt and fired two bullets at the police officer as the two struggled at a bus stop east of downtown.

Jensen, 30, was trying to arrest Lamberth on an attempted-murder warrant issued Feb. 2. Lamberth was wanted for allegedly stabbing his sister more than a dozen times during an argument.

Police received a tip on the morning of Feb. 22 that Lamberth was seen in the Prospect Lake neighborhood, east of downtown.

According to the affidavit, Lamberth told Detective Derek Graham after the shooting that he was sitting on a bench when a man approached him, telling Lamberth that he was "going with him" or the man would break his arm.

Lamberth said he used his right hand to draw the handgun from his waistband and shoot the man once, the affidavit stated.

"(Lamberth) said he was trying to shoot the individual in the arm at that time, however, he was not quite sure where the individual had been shot. He said after firing one round . . . the individual then fell to the ground," the affidavit stated.

Lamberth "then described how he waited for between one and two seconds and then fired a second round at the individual who was lying on the ground. Jereme Lamberth had indicated he did not want any more problems from this individual and that was the reason why he had fired the second shot," the affidavit stated.

Graham stated in the affidavit that "during the interview with Jereme Lamberth, he made no statements that he was aware this individual who had confronted him was a Colorado Springs Police Department officer."

However, Jensen's handcuffs and his police badge, which hung on a neck chain, were recovered where he was shot.

EXHIBIT
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tabbies