DISTRICT COURT, CHAFFEE COUNTY, STATE OF COLORADO Court Address: 142 Crestone Ave. Salida, CO 81201 **PEOPLE OF THE STATE OF COLORADO** v. **BARRY LEE MORPHEW,** Defendant **Attorney for Media Consortium:** Steven D. Zansberg, 26634 LAW OFFICE OF STEVEN D. ZANSBERG, LLC 100 Fillmore Street, Suite 500 Denver, CO 80206 (303) 385-8698 steve@zansberglaw.com	▲ **COURT USE ONLY** ▲ Case Number: **21CR78** Division: 2 Hon. Patrick W. Murphy

MEDIA CONSORTIUM'S RESPONSE TO, AND REQUEST FOR RECONSIDERATION OF, THE COURT'S ORDER GRANTING DEFENDANT'S MOTION TO LIMIT PUBLIC ACCESS TO ARREST WARRANT AFFIDAVIT FILED MAY 5, 2021 (D-7)

The Associated Press, The Denver Post, The Gazette, KCNC-TV/Channel 4, KDVR-TV/Channel 31, KKTV-TV/Channel 11, KMGH-TV/Channel 7, KOAA-TV/Channel 5, KRDO-TV/Channel 13, KUSA-TV/Channel 9, KXRM-TV/Channel 21 ("the Media Consortium") by and through their undersigned counsel, hereby respond to the Court's above-referenced Order, as they were specifically invited to do therein (Order at 5, 6).

INTRODUCTION

The Court's order grants, in its entirety, the Defendant's motion, barring the public from inspecting *any portion* of the 130-page Arrest Warrant Affidavit, on grounds that (1) disclosure of portions (*not all*) of the affidavit would interfere with or "impede" the "ongoing

defense investigation," (2) disclosure of portions (*not all*) of the affidavit might subject Mallory and Macy Morphew to "harassment, abuse or intimidation," and (3) the process of preparing and releasing a redacted version of the affidavit, to reduce or eliminate concerns (1) and (2),[1] prior to the completion of the Proof Evidence Presumption Great Hearing and Preliminary Hearing, would be unduly burdensome on the parties and the Court.

For the reasons stated below, Media Petitioners respectfully request that the Court reconsider its ruling, and, in compliance with C.R.C.P. 55.1, order the forthwith release of a redacted version of the Arrest Warrant Affidavit.

ARGUMENT

I. THE LENGTH AND DETAILS CONTAINED IN THE AFFIDAVIT ARE NOT LEGITIMATE GROUNDS TO DENY THE PUBLIC'S PRESUMPTIVE RIGHT TO INSPECT IT

The Order indicates that the "substantial interest[s] justifying the continued sealing of the [entire] Affidavit under Rule 55.1" include protection of the Morphew daughters and "the nature of the Affidavit." Order at 3. The Order notes that the affidavit is unique in the Court's experience, in that it is 130 pages in length and "[a] significant portion of the information in the Affidavit was not relevant to the Court's finding of probable cause and possibly not admissible at trial under the Colorado Rules of Evidence. *Id.* While the affidavit is not a "record of official action" subject to mandatory disclosure under the

[1] The Order cursorily mentions that the Defendant's right to a fair trial, through seating of an impartial jury untainted by pretrial publicity, is "not *the only* ground" the Court relies on in granting the Defendant's Motion. Order at 5 (emphasis added). However, the Order makes no finding, as required by C.R.C.P 55.1(a)(6), that "no less restrictive means . . . exists to achieve or protect" the Defendant's fair trial rights, including the ineffectiveness of *all* of the alternatives canvassed in *People v. Botham*, 629 P.2d 589 (Colo. 1981). While *Botham* itself does not command that those means be exhausted or found inadequate, Rule 55.1(a)(6) quite expressly does so.

Colorado Criminal Justice Records Act, it is subject to C.R.C.P. 55.1, which imposes a heightened burden on any party seeking to overcome the public's *strong presumptive right* to access it, as a "court record." *See* C.R.C.P. 55.1(a)(1) ("Court records in criminal cases are *presumed* to be accessible to the public.") (emphasis added).

In *People v. Thompson*, 181 P.3d 1143 (Colo. 2008), Colorado's Supreme Court held that a lengthy (64-page) and incredibly detailed indictment, accusing the defendant of child abuse resulting in the death of his daughter (whose body, also, has never been found), as well as 59 other counts, must be released to the public under the CCJRA. *Id.* at 1144 ("In great detail, the factual allegations described various events that occurred in the Thompson home, including a possible sexual assault by an unindicted person, going far beyond the 'essential facts" that must be included in a grand jury indictment."). This was so, notwithstanding the fact that, as here, "the factual allegations in the indictment far exceed the essential facts of the charged offenses." *See id*. at 1147. The Colorado Supreme Court in that case denied the District Court's petition for rehearing which argued the criminal defendant's fair trial rights, guaranteed by the federal constitution, would be violated if the entire indictment were released to the public. *See, e.g.*, Carlos Illecas, *Aaron's Sibling Heard Beating*, Denver Post (Apr. 30, 2008) https://www.denverpost.com/2008/04/30/aarons-sibling-heard-beating/. Indeed, the length or detail of judicial records has never been a sufficient grounds for overriding the public's presumptive right of access. *See, e.g.*, Howard Berkes, *Unsealed Documents Reveal Lax Attention To Safety Before Mine Blast*, NPR (Jun. 2, 2011) (reporting on the contents of "more than 5,300 pages of documents that a West Virginia judge ordered unsealed in response to a joint motion"), https://www.npr.org/sections/thetwo-

way/2011/06/02/136900784/unsealed-documents-reveal-lax-attention-to-safety-before-mine-blast.

To the extent that there are discreet pieces of highly sensitive and/or personal and private information in the affidavit that are *completely unrelated* to the People's request for a warrant to be issued by a judge or magistrate for the Defendant's arrest – which, frankly, is difficult to contemplate – Rule 55.1 provides that such information may be redacted,[2] but only upon a judicial finding that its disclosure would countervail some specified "substantial interest."

II. THE DEFENDANT'S OWN "INVESTIGATION" IS NOT A "SUBSTANTIAL GOVERNMENT INTEREST" THAT WARRANTS DENIAL OF THE PUBLIC'S PRESUMPTIVE RIGHT TO INSPECT JUDICIAL RECORDS

The Order cites Judge Sylvester's ruling, in August 2012, in *People v. Holmes*, No. 12CR1522 (Arapahoe Cty. Dist. Ct.), as support for the proposition that suppressing probable cause affidavits is appropriate to allow "*law enforcement officials* to continue to conduct a complete investigation thoroughly and efficiently." Order at 4 (emphasis added); *see also U.S. v. Valenti*, 987 F.2d 708, 714 (11th Cir. 1993) (stating that a continuing *law enforcement investigation* is a compelling government interest justifying the denial of access to judicial records); *ACLU v. Holder*, 673 F.3d 245, 253 (4th Cir. 2011) (recognizing "a compelling interest in protecting the integrity of ongoing fraud investigations," which justifies the

[2] This duty is also imposed by the Colorado Criminal Justice Records Act, and the common law. *See, e.g., In re Freedom Colo. Info., Inc. v. El Paso Cnty. Sherif"s Dep't,* 196 P.3d 892, 900 n.3 (Colo. 2008) (holding that under Colorado Criminal Justice Records Act, the custodian of records "*should* redact *sparingly*" in order "to provide the public with as much information as possible") (emphasis added); *Baltimore Sun Co. v. Goetz,* 886 F.2d 60, 66 (4th Cir. 1989) (finding that search warrant materials may be produced in redacted form so as to meet the public interest in access to judicial records); *In re N.Y. Times Co.,* 878 F.2d 67, 67-68 (2d Cir. 1989) (same).

temporary sealing of certain judicial records). Notably, Judge Sylvester's order in *Holmes* was entered only 24 days after the mass murder of 12 individuals, and the wounding of 70 others in the Aurora Theater Shooting, which resulted in Holmes being charged with (and convicted of) 165 separate counts. Thus, at that *extremely early stage* in that massive criminal *law enforcement investigation*, the court decided that multiple additional witnesses needed to be interviewed by the police, sheriff's deputies and the District Attorney's office.

Here, in sharp contrast, the arrest warrant affidavit was prepared *a full year* after the crimes alleged to have been perpetrated against a single homicide victim, *following* the extensive criminal law enforcement investigation. So much painstaking investigation has been performed by "law enforcement officials" in preparing the 130-page affidavit that **the People (acting through the District Attorney) do not oppose the public release of that document**. In other words, there is absolutely no concern here that release of the affidavit, *in its entirety*, would interfere with the People's (still ongoing) criminal law enforcement investigation as it prepares this case for trial.

Instead, the Order cites as justification for denying public access "the *Defendant's* investigation" of his case in preparing to mount a defense. Undersigned counsel is not aware of any case, in any jurisdiction, that has found that interest a sufficient weighty one to overcome the public's presumptive right of access to judicial records or proceedings. Criminal defendants do not engage "investigations" to gather sufficient evidence to file charges or successfully prosecute some other individual(s); unlike the prosecutor, a criminal defendant is not required to provide the government with the "fruits" of his "investigation." Criminal defendants need only persuade a jury that *the Government's criminal investigation* was inadequate, and/or that it failed to produce evidence of the defendant's guilt "beyond a

reasonable doubt." Criminal defendants are not required to produce a scintilla of evidence at trial.

Furthermore, this particular Defendant was aware, on the date of his wife's disappearance, that her suspicious absence was the subject of keen law enforcement interest. He, too, has had more than a full year now to conduct his own "investigation" for purposes of preparing a defense. In the event that the Court finds sufficient probable cause to hold Defendant over for trial, it is presumed that the Defendant will have several additional months to continue his "investigation."

And again, as the party who is asking this Court to deny the public *its presumptive right* to access court records, the Defendant bears the burden of showing that public disclosure of each page, each paragraph, each sentence, each word, in the affidavit poses a substantial and real threat to his ability to prepare and present his defense. He has not done so; nor could he. Accordingly, no Order can be entered consistent with C.R.C.P. 55.1 that suppresses the entirety of the affidavit.

III. THERE ARE MULTIPLE ADEQUATE AND LESS RESTRICTIVE MEANS TO PROTECT THE SAFETY AND WELL BEING OF THE MINOR VICTIMS

The Order cites concerns for the safety and well-being of Mallory and Macy Morphew that, for unspecified reasons, might be jeopardized by public release of the affidavit. Certainly the Morphew girls maintain the freedom and ability to "review, or decide not to review, the evidence alleged against their father," Order at 3, whether or not that information is released to the public. As for unspecified concerns the Court may have that these two minor victims may become subject to "harassment, abuse or intimidation," there are numerous available "less restrictive means" to prevent such harms. As Judge Sylvester found in a subsequent ruling in *People v. Holmes*, 12CR1522, in rejecting the request of both the People

and the Defendant to redact the names of all victims from the court records, "there are other methods of protection available to witnesses and victims, including, but not limited to, C.R.S. § 13-14-102 (civil protection orders), C.R.S. § 18-9-111 (criminal harassment), C.R.S. § 18-8-707 (tampering with a witness or victim), and C.R.C.P. 365 (injunctions, restraining orders, and orders for emergency protection). Any victim or witness can seek assistance from the District Attorney's Office, the county courts, or a local police station to bring criminal charges or to obtain a protection order if that individual believes he or she has been stalked, threatened, assaulted, or harassed." Order Re: Media's Motion To Unseal Redacted Information (Victims' Identities) (C-13), *People v. Holmes*, 12CR1522 at 8 (Arapahoe Ct. Dist. Ct. Oct. 25, 2012), https://www.courts.state.co.us/userfiles/file/Court_Probation/18th_Judicial_District/18th_Courts/12CR1522/001/2012-10-26%2012CR1522%20Order%20Re%20C-13.pdf. Accordingly, in order to satisfy C.R.C.P. 55.1 and continue the suppression of the *entire* arrest warrant affidavit, the Court must enter a record finding that each and every one of those alternatives is inadequate to protect the two child victims in this case from harassment, abuse or intimidation by third parties.

IV. THE DUTY TO RELEASE REDACTED VERSIONS OF JUDICIAL RECORDS, AS SPECIFICALLY MANDATED BY C.R.C.P. 55.1, IS DESERVING OF AS MUCH WEIGHT AS OTHER TASKS THE PARTIES ARE PERFORMING IN THIS LITIGATION

The Order excuses both the parties and the Court from complying with the clear mandate of Rule 55.1(a)(6)(II) – which requires a written finding that "no less restrictive means other than . . . *allowing only a redacted copy of* [the judicial record at issue] *be*

accessible to the public exists to achieve or protect any substantial issue identified"[3] – on grounds that "the Court cannot meaningfully complete" the "time-consuming process" of redaction "without the input and involvement of both parties, who are currently involved in the early stages of these proceedings . . ." The fact that it may be "time-consuming" or might interfere with other duties the Court and the parties must fulfill in litigating a criminal case does not excuse their failure to comply with *any* Rule of Criminal Procedure formally adopted by the Colorado Supreme Court.

While the process of preparing a releasing a redacted version of the Arrest Warrant Affidavit may be time-consuming or burdensome, there is no suggestion in Rule 55.1(a)(6)(II) that its requirements can be suspended or disregarded because the Court and the parties are engaged in performing other (presumably *more important*) tasks. Colorado's Supreme Court carefully considered all of the burdens associated with complying with Rule 55.1, over the course of many months,[4] and, after taking those considerations into account, it enacted the Rule in its current form. The Rule specifies that any limitation on the public's *presumptive right of access* to <u>*all*</u> judicial records on file in a criminal case[5] must be of a fixed limited duration, C.R.C.P. 55.1(a)(7), making clear that any such denial is to be only *temporary*, not

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[4] *See, e.g.,* Jeff Roberts, *Colorado Supreme Court Holds Public Hearing on Proposed Rule for Sealing and Suppressing Criminal Court Records*, Colorado Freedom of Information Coalition (Oct. 14, 2020), https://coloradofoic.org/colorado-supreme-court-holds-public-hearing-on-proposed-rule-for-sealing-and-suppressing-criminal-court-records/

[5] At present, **more than 280 separate court records on the docket in this case are completely suppressed from public inspection**, including the Media Consortium's Response to Defendant's Motion D-7 (which obviously was shared with members of the media before it was filed). Rule 55.1 imposes a duty on the Court to enter the requisite findings with respect to each of those judicial records, even in the absence of any party or member of the public requesting access thereto; any *denial* of *the presumption of access* requires the entry of detailed judicial findings. *See* C.R.C.P. 55.1(a) ("the court may deny the public access to . . . any part of a court record *only* in compliance with this rule.").

indefinite or for any unnecessarily protracted period of time. Other courts have recognized "the importance of immediate access when a right of access is found." *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 126-27 (2d Cir. 2006); *Grove Fresh Distributors, Inc. v. Everfresh Juice Co*., 24 F.3d 893, 897 (7th Cir. 1994) (access to court records "should be immediate and contemporaneous"); *Republic of the Philippines v. Westinghouse Elec. Corp*., 949 F.2d 653, 664 (3d Cir. 1991) ("the public interest encompasses the public's ability to make a *contemporaneous review* of the basis of an important decision") (emphasis added). In other words, access delayed is access denied.

CONCLUSION

For the reasons set forth above, the Media Consortium respectfully urges this honorable Court to reconsider its Order granting in full the Defendant's Motion to Limit Public Access to the Arrest Warrant Affidavit Filed May 5, 2021.

DATED: June 17, 2021

By /s/ *Steven D. Zansberg*
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I hereby certify that a copy of this filing was served, this day, June 17, 2021, on the following counsel of record, by my designating that they should be served electronically through the ICCES e-filing system:

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