DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO Court Address: 7325 S. Potomac St. Centennial, CO 80112 **Plaintiff:** PEOPLE OF THE STATE OF COLORADO **vs.** **Defendant:** SIR MARIO OWENS and, **Non-Party Movant:** The Colorado Independent	Filed NOV 07 2017 CLERK OF THE COMBINED COURTS ARAPAHOE COUNTY COLORADO ▲ COURT USE ▲
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MOTION TO UNSEAL JUDICIAL RECORDS IN THE COURT FILE

Movant The Colorado Independent ("Movant"), by undersigned counsel, respectfully moves this honorable Court to unseal certain of the judicial records contained in the court file, as specified herein.

Counsel for Movant has conferred with counsel for the People and the Defendant. The People oppose the relief requested herein. The Defendant does not oppose the relief requested herein.

INTRODUCTION

Over nine years ago, the Defendant in this action was tried in open court, found guilty of murder, and sentenced to death. In the September 17, 2017 P.C. Order (SO) No. 18 Re: SOPC-163 (the "Post-Conviction Order"), the Court identified numerous instances in which the prosecution failed to disclose or suppressed evidence that would have been favorable to the Defendant.

Specifically, the Post-Conviction Order concludes that the prosecution either withheld from the Defendant or suppressed evidence related to multiple issues, including, but not limited to, the facts that:

- The prosecution had negotiated with a witness's attorney before the arrest of the Defendant (Post-Conviction Order at 150);
- The prosecution promised to give a witness a car and worked with out-of-state authorities to clear warrants so that she could get her license (*id.* at 212-18);
- A witness had provided false testimony to detectives after witnessing an unrelated shooting, but his probation was not revoked (*id.* at 222, 227, 353-54);
- A witness had been involved with a gang and was present at a gang-related shooting (*id.* at 232-33, 355-56);
- A witness was a paid informant (*id.* at 263, 357-58); and
- A witness that had been labeled as a "chronic offender" in 1990 had also assisted the police with two other homicide investigations (*id.* at 265, 359-62).

Ultimately, the Court found that the withheld or suppressed exculpatory evidence would not have had an impact on the outcome of the trial. (*Id.* at 371.) Thus, in effect, the Court

found that there had been prosecutorial misconduct, but that such misconduct was "harmless error" because it did not sufficiently prejudice the Defendant's right to a fair trial.

On information and belief, the Defendant (through his post-conviction counsel) filed one or more motions asking the Court to appoint a special prosecutor related to the prosecution's failure to disclose or suppressing of exculpatory evidence. Although the Register of Actions (the "ROA") does not contain sufficient detail to identify this or these motion(s) and related court filings, Movant believes that the motions identified on the ROA as SOPC-351, SOPC-352 and SOPC-353 are related to the Defendant's motion seeking the appointment of a special prosecutor, and that there was also a sealed order or orders denying that or those motion(s) (collectively, along with any related motions, responses, replies, exhibits, transcripts, minute orders, orders or records of any kind, hereinafter the "Prosecutorial Misconduct Records").

All of the Prosecutorial Misconduct Records are currently sealed. Movant now moves the Court to unseal those records.

While the public's right of access to court records is qualified, judicial records may properly be sealed from public view only where express findings have been made and entered that (1) continued sealing is necessary to protect a governmental interest of the highest order, (2) sealing will be effective in protecting that interest, (3) any sealing order is narrowly tailored, and (4) no reasonably available alternatives can adequately protect the compelling state interest.

In a case where the public trial occurred over nine years ago, and there is a 1,500-page public order detailing some of the information sought, it is simply not possible for any party to meet this high burden. Movant respectfully submits that this Court must unseal the Prosecutorial Misconduct Records.

THE INTEREST OF MOVANT

Movant, *The Colorado Independent,* is a not-for profit online journalism organization, engaged in gathering news and other information on matters of public concern, including these judicial proceedings, and disseminating it to the general public.

Movant appears before this Court on its own behalf—as a member of the public—entitled to the rights afforded it by the U.S. Constitution, the Colorado constitution, all applicable statutes, and the common law. In addition, Movant appears on behalf of the broader public that receives the news and information that *The Colorado Independent* gathers and disseminates. *See, e.g., Richmond Newspapers, Inc. v. Va.*, 448 U.S. 555, 573-74 (1980) (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. Movant Has Standing to Assert the Right of Public Access to Court Records.

The First Amendment to the U.S. Constitution, article II, section 10 of the Colorado constitution, and the common law all protect the right of the people to receive information about the criminal justice system through the news media, and the right of the news media to gather and report that information.

Movant's standing to be heard to vindicate those rights is well established. *See Star Journal Publ'g Corp. v. Cnty. Ct.*, 591 P.2d 1028, 1029-30 (Colo. 1979); *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 609 n. 25 (1982); *Times-Call Publ'g Co. v. Wingfield*, 410 P.2d

511, 514 (Colo. 1966); *see also In re N.Y. Times Co.*, 878 F.2d 67, 67-68 (2d Cir. 1989); *In re Dow Jones & Co.*, 842 F.2d 603, 606-08 (2d Cir. 1988).[1]

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 has succeeded in such challenges before both trial courts and the Colorado Supreme Court. *See In re 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-1255, Order Regarding Pet's' Mot. to Unseal Affs. Of Probable Cause in Supp. of Arrest and Search Warrants and Req. for Orders for Prod. Of Docs. (C-24) (the "April 2013 Order") (Arapahoe Cnty. Dist. Ct. Apr. 4, 2013) (one of several court orders granting media representatives' petition to unseal court records in Aurora Theater Shooting case) (attached as Exhibit A).

Indeed, this Court has previously granted a prior request, by various members of the press, including *The Colorado Independent*, to unseal certain judicial records *in this case*. *See* P.C. Order (SO) No. 11 Re: Motion to Unseal at 7 (Mar. 17, 2014) (ordering the unsealing to the Register of Actions and the transcripts of prior hearings conducted in open court, with the sole exception of "the addresses and location information" of witnesses).

II. The Public Is Entitled to the Prosecutorial Misconduct Records Unless There Is Both a Compelling Governmental Interest and No Alternative to a Blanket Seal.

The public's right to inspect court records is protected by the First Amendment to the U.S. Constitution. *See, e.g., Press-Enter. Co. v. Super. Ct.*, 464 U.S. 501, 510-11 (1984)

[1] 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) (2013) (provision also cited as instructive in Colo. R. Crim. P. 57(b)).

(transcript of closed jury *voir dire*); *Associated Press v. Dist. Ct.*, 705 F.2d 1143, 1145 (9th Cir. 1983) (various pretrial documents); *In re N.Y. Times Co.*, 585 F. Supp. 2d 83, 89 (D.D.C. 2008) (finding First Amendment and common law right to search warrant materials relating to the 2001 anthrax attacks).

Further, when documents in the court's file involve a matter of public interest or concern, access to such records is also guaranteed by article II, section 10 of the Colorado constitution. *See Wingfield*, 410 P.2d at 513-14; *Office of State Ct. Adm'r v. Background Info. Sys.*, 994 P.2d 420, 428 (Colo. 1999).

Court records in criminal cases are also subject to public access under the Colorado Criminal Justice Records Act, § 24-72-301, C.R.S. (2013); *see Thompson*, 181 P.3d at 1145. Here, an order of the Court bars the custodian from releasing the criminal justice records at issue, so this Court, not the custodian, must determine whether the sealing order should be lifted. *See* C.R.S. § 24-72-305(1)(b).

The public's right to inspect court documents is also 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 . . . public records and documents"); *In re Nat'l Broad. Co.*, 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).

The common law access right "is not some arcane relic of ancient English law," but, rather, "is fundamental to a democratic state." *U.S. 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." *U.S. v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995); *accord U.S. v. Hubbard*, 650 F.2d 293, 314-15 (D.C. Cir. 1980).

Under the standard adopted by Colorado's Supreme Court, the press and public cannot be denied access to the records of this Court unless such access would both: (1) pose a substantial probability of harm to the administration of justice or to some equally compelling governmental interest; *and* (2) no alternative exists to adequately protect that interest. *See* ABA CRIMINAL JUSTICE STANDARDS § 8-5.2 (2013) (cited as § 8-3.2 (1979) and adopted in *Star Journal Publ'g Corp.*, 591 P.2d at 1030). Moreover, this standard requires "that the trial judge issue a written order setting forth specific factual findings in this regard." *Star Journal Publ'g Corp.*, 591 P.2d at 1030.

The fact that this case is the subject of much media attention and a capital case serves only to increase the burden on any party wishing to shield portions of the court file from public scrutiny. Indeed, in this very courthouse, both judges who have presided over the capital murder case of *People v. Holmes*, No. 12CR1522, have recognized that the First Amendment right of public access applies with full force to the judicial records on file in that case:

> 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.

Ex. A (April 2013 Order) at 8; *see also* Ex. B (*Holmes*, No. 12CR1522, Order Unsuppressing Ct. File at 1 (Arapahoe Cnty. Dist. Ct. Sept. 21, 2012) (recognizing that "the fundamental nature of First Amendment rights . . . may only be abridged upon a

showing of an overriding and compelling state interest" (quoting *Star Journal Publ'g Co.*, 591 P.2d at 1030)).

III. There Is No Proper Basis for Continuing to Seal the Prosecutorial Misconduct Records, and They Must Therefore Be Unsealed Without Delay.

A. The Compelling Interest Standard Cannot Be Met at this Point in the Case.

Because the ROA does not contain detail sufficient to identify the stated basis for sealing the Prosecutorial Misconduct Records, Movant can only speculate about the bases for this Court's ruling to seal such records. However, given the posture of this case, it is virtually impossible for any party to sustain the high burden of proving that there is a substantial probability of prejudicing a compelling governmental interest capable of overriding the public's First Amendment rights.

As this Court recognized in its March 17, 2014 P.C. Order (SO) No. 11 Re: Motion to Unseal (the "ROA Order"), the Court had previously "entered various redaction, suppression, and sealing orders" due to concerns related to preserving the Defendant's right to a fair trial and witness protection. (ROA Order at 4-7.) However, because "the factual landscape and procedural posture of this case were markedly different" by March 2014, those concerns either "no longer exist[ed]" or could no longer be addressed by sealing records because the public trial had already been conducted. (*Id.*) In October 2017—over nine years after the public trial—the Court's reasoning in the ROA Order is even more apt.[2]

Further, the Court's extremely thorough Post-Conviction Order discusses in detail some of the facts surrounding the prosecution's failure to disclose or suppression of exculpatory

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[2] Aside from the fact that the public trial occurred nearly a decade ago, the Defendant does not contest unsealing the Prosecutorial Misconduct Records, and there is thus no concern regarding his right to a fair trial.

evidence. Thus, much of the information contained in the Prosecutorial Misconduct Records has already been disclosed to the public in open judicial documents, and there is no basis to seal such information. *See U.S. v. Pickard*, 733 F.3d 1297, 1305 (10th Cir. 2013) (holding that information that has "been disclosed in public . . . court proceedings" is not properly subject to sealing); *see also In re Herald Co.*, 734 F.2d 93, 101 (2d. Cir. 1984) (holding that a closure order cannot stand if "the information sought to be kept confidential has already been given sufficient public exposure").

Simply put, at this point in the case, there is no way that a party could satisfy the high burden of showing a substantial probability of harm to a compelling governmental interest that could override the public's First Amendment right.

B. *The Release of Prosecutorial Misconduct Records in Redacted Form Is a "Less Restrictive Means" that Must Be Employed as an Alternative to Blanket Sealing.*

Any order that removes from the public information posing no harm to "an interest of the highest order" while also sealing discreet, sensitive information does not comport with the constitutionally-imposed standard for closure. *See P.R. v. Dist. Ct.*, 637 P.2d 346, 354 (Colo. 1981) (stating a finding of clear and present danger by itself is not sufficient to warrant sealing, but merely "triggers the next level of inquiry – that is, whether reasonable and *less drastic alternatives are available*" (emphasis added)).

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." *U.S. v. Aref*, 533 F.3d 72, 82 (2d Cir. 2008); *see also Pickard*, 733 F.3d at 1304-05 (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"); *Kanza 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 N.Y. Times Co.*, 834 F.2d 1152, 1154 (2d Cir. 1987) (approving of requirement "to minimize redaction in view of First Amendment considerations"); *In re Providence Journal Co., Inc.*, 293 F.3d 1, 15 (1st Cir. 2002) ("The First Amendment requires consideration of the feasibility of redaction on a document-by-document basis.").[3]

In applying the Colorado Criminal Justice Records Act, the Colorado Supreme Court has instructed that the custodian of records "should redact sparingly" in order "to provide the public with as much information as possible." *In re Freedom Colo. Info., Inc. v. El Paso Cnty. Sheriff's Dep't*, 196 P.3d 892, 900 n. 3 (Colo. 2008).

Thus, to the extent there is evidence establishing that the disclosure of certain discrete portions of the Prosecutorial Misconduct Records will pose a substantial likelihood of harm to a compelling governmental interest "of the highest order," the proponent of continued sealing must further demonstrate that the entirety of the court records must remain under seal. *See Press-Enter. Co. v. Super. Ct.*, 478 U.S. 1, 14 (1986) (holding that trial court had committed constitutional error because it "failed to consider whether *alternatives short of complete closure* would have protected the interests of the accused." (emphasis added)); *Pickard*, 733 F.3d at 1303-05 (once a request is made to unseal court records, the burden shifts to the party seeking to maintain sealing to demonstrate the need for continued sealing and that party must show that

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[3] *See also Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 66 (4th Cir. 1989) (finding that search warrant materials may be released in redacted form to satisfy the public interest in access to such judicial records); *In re N.Y. Times Co.*, 878 F.2d at 67-68 (same); *In re Search Warrants Issued on June 11, 1998*, 710 F. Supp. 701, 705 (D. Minn. 1989) (same).

"redacting documents instead of completely sealing them would [not] adequately serve [the] government interest to be protected." (citations omitted)).

C. *The Prosecutorial Misconduct Records Should Be Unsealed Forthwith.*

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., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (noting that access to court documents "should be immediate and contemporaneous").

Since the public's presumptive right of access attaches as soon as a document is submitted to a 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 and is, therefore, unconstitutional").

As the Supreme Court observed in *Neb. Press Ass'n. 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. 539, 560-61 (1976).

CONCLUSION

WHEREFORE, for the reasons stated above, Movant respectfully requests that the Court forthwith enter an order unsealing the Prosecutorial Misconduct Records, including, but not limited to, all motions, responses, replies, briefings, minute orders, orders, transcripts, and records of any kind, regardless of whether such records have been specifically identified in this Motion.

Respectfully submitted this 7th day of November 2017, by:

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CERTIFICATE OF MAILING

I hereby certify that on this 7th day of November, 2017, a true and correct copy of this **MOTION TO UNSEAL JUDICIAL RECORDS IN THE COURT FILE** was served via electronic mail and/or United States Mail, postage prepaid, addressed to the following:

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EXHIBIT A

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.*

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.

[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.

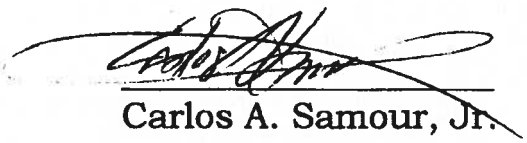
Based on the specific circumstances present at this stage in the litigation, the Court holds that the defendant has failed to advance an overriding and compelling state interest to abridge the First Amendment rights of Media Petitioners and the public. Accordingly, the defendant's objections to the Motion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

EXHIBIT B

REDACTED

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO 7325 South Potomac Street Centennial, Colorado 80112	
Plaintiff(s): People of the State of Colorado **v.** **Defendant(s): Holmes, James Eagan**	**♦ COURT USE ONLY ♦** Case Number: 12CR1522 Div.: 22

ORDER UNSUPPRESSING COURT FILE

This Matter comes before the Court pursuant to Media Petitioners' Motion to Unseal Court File (Including Docket), filed July 27, 2012; People's Response to Motion to Unseal Court File (Including Docket) (P-9), filed August 6, 2012; Media Petitioners' Reply in Support of Motion to Unseal Court File, filed August 8, 2012; Defendant's Response to Motion to Unseal Court File and Prosecution's Response (P-9), filed August 9, 2012; and Media Petitioners' Request for Timely Release of Court Filings to Provide for Meaningful Right to Observe Judicial Proceedings, filed August 27, 2012. The Court also heard oral argument from the People, Defendant, and the Media Petitioners during a hearing on September 20, 2012. Having reviewed the pleadings and the oral argument, the Court hereby Finds and Orders:

In its Order Re: Media Petitioners' Request for Timely Release of Court Filings to Provide for Meaningful Right to Observe Judicial Proceedings (C-9), issued August 28, 2012, this Court denied the Media's Request to release certain documents and stated that "[i]t may well be that the posture of the case is different after a determination regarding privilege and confidentiality is made." Order, p.3. Although the privilege issue has not been resolved but is currently being held in abeyance, the Court nonetheless FINDS that it is appropriate to GRANT Media Petitioners' request as set forth herein. As justification therefor, the Court hereby incorporates the standards used in its Order Re: Motion to Unseal Court File (Including Docket)/("Suppression Order") (C-4c), issued August 13, 2012, and the standards reiterated in its Order Re: Media Petitioners' Request for Timely Release of Court Filings to Provide for Meaningful Right to Observe Judicial Proceedings (C-9), issued August 28, 2012.

Specifically, the Court notes that in *Star Journal v. County Court,* 591 P.2d 1028, 1030 (Colo. 1979), the Colorado Supreme Court stated that "[t]his court has continually recognized the fundamental nature of First Amendment rights and ruled that these rights may only be abridged upon a showing of an overriding and compelling state interest." Pursuant to the standards and analysis this Court has consistently used over the course of the proceedings, the Court makes the following findings: 1) using a balancing test taking into account relevant public and private interests pursuant to *Harris v. Denver Post Corp.,* 123 P.3d 1166, 1171 (Colo. 2005), no sufficient private interest now exists that outweighs the public's and media's interest in disclosure of the file, with a few exceptions as listed below; 2) under the ABA Standard 8-3.2

adopted in *Star Journal*, unrestricted access to the court file, with a few exceptions listed below, would no longer pose a substantial probability of harm to the fairness of the trial, and even if a substantial probability of harm to the fairness of the trial still exists, and suppression of the documents would effectively prevent such harm, a less restrictive alternative, that of redaction, is reasonably available to prevent the harm; and 3) under the Colorado Criminal Justice Records Act (CCJRA), C.R.S. § 24-72-301 *et seq.* (2012), the pleadings comprising the file constitute criminal justice records and all such records may be open for inspection, and inspection of said documents would not be contrary to state statute, nor is inspection prohibited by any rules of the supreme court or any order of the court, with the exception of a few pleadings listed below. Therefore, mindful of the Colorado Supreme Court's instruction in *Star Journal, supra*, the Court ORDERS that any documents which until now have been suppressed in the file in this case shall be released to the public and media, with appropriate redactions as made by the parties, with the following exceptions.

First, anything which has been filed under seal shall remain so, pending further order of this Court. This includes evidence which has been submitted to the Court under seal. As to the People's Response to Defendant's D-16 Motion for Sanctions Filed Under Seal, filed September 13, 2012, and Defendant's Reply to People's Response to Defendant's Motion for Sanctions Resulting from Prosecution's Reckless Disregard for the Truth, filed September 17, 2012, as well as People's Notice of Endorsement (P-15), filed August 20, 2012, those pleadings were filed under seal but would now more properly be characterized as remaining suppressed (understanding that *sealed* means available only to the Court, while *suppressed* means available to the Court and the Parties, but not the public and/or media). Defendant's Motion for Sanctions Resulting from Prosecution's Reckless Disregard for the Truth (D-16), filed August 27, 2012, shall be released, as well as the Court's Order relating to same, because the Court has already heard oral argument on the matter and the substance of the Motion has already been divulged to the public. The People's Response to D-16 and Defendant's Reply to People's Response remain suppressed because they contain potentially privileged and/or suppressed information.

Second, all warrants and affidavits of probable cause remain suppressed, under the rationale previously stated by the Court in its Order Re: Motion to Unseal Court File (Including Docket)/("Suppression Order") (C-4c). Specifically, that Order stated that after considering the positions of Media Petitioners, the People, and Defendant, under C.R.S. § 24-72-305(5), disclosure of affidavits of probable cause, subpoenas, arrest warrants, search warrants, and requests for and court orders for production of records would be contrary to the public interest at this time. This remains true today, though that may well change after the preliminary/proof evident hearing currently scheduled for November 13, 2012. The Court also found that, using the balancing test and taking into account relevant public interests such as the public's interest in knowing the contents of affidavits of probable cause, subpoenas, arrest warrants, search warrants, and requests for and court orders for production of records versus the private interests of witnesses and victims, disclosure of such documents would be imprudent at that stage of the proceedings. The Court reiterates that finding now, and specifically notes that disclosure of such documents prior to the preliminary hearing would be premature, given the People's continued assertions that release would interfere with their ability to conduct an investigation. Previously, the Court also found that, under the ABA Standard 8-3.2 adopted in *Star Journal, supra,* unrestricted access to those documents would pose a substantial probability of harm to the

fairness of the trial, suppression of the documents would effectively prevent such harm, and there is no less restrictive alternative reasonably available to prevent the harm. This finding also remains applicable today, based on the People's prior assertions that disclosure would hinder the investigation, and that law enforcement needs the opportunity to contact witnesses and victims unfettered by possible intrusion by the media or public.

The Parties have also requested that curricula vitae, and references to such curricula vitae in pleadings, should not be released to the public out of concerns for the privacy of the persons described therein. Specifically, the People have referenced People's Pleading P-17 Brief Relating to Correct Statutory Privilege, Doctor-Patient Privilege or Psychologist-Patient Privilege, filed August 24, 2012, and Defendant has cited Defendant's Response to People's Motion for Disclosure of Defense Expert, filed September 17, 2012. Both the People and Defendant request that their respective experts' curricula vitae remain suppressed, and the Court GRANTS that request. Because the curricula vitae are attached to the respective pleadings, the Court shall release the pleadings without the curricula vitae. Any references to the contents of the curricula vitae in the body of the pleadings will need to be redacted by the Parties, as those pleadings shall be released.

Having released the file, with the above exceptions, the Court also FINDS that, in the future, any documents which are filed with the Court shall be presumed released to the public and the media. The Court shall determine, *sua sponte*, which documents shall be displayed on the judicial website, while the public file shall remain available at the Clerk's office Monday through Friday during normal business hours. On August 21, 2012, this Court solicited input from the People and Defendant regarding the filing of redacted copies of pleadings. On September 7, 2012, this Court issued its Supplemental Case Management Order (C-11) requiring the People and Defendant to file one redacted copy and one unredacted original of all motions and pleadings. The logistical issue this Court envisioned has now come to fruition, and pleadings which were filed previous to this Order and were suppressed may need appropriate redactions, including redactions for privileged information, which the court staff is not best qualified to do. This task falls to the attorneys in this case. Counsel is now expected to review any previous pleadings and file redacted copies as necessary for release to the public and the media. There may be circumstances in which the Court disagrees with redactions made by Counsel. In that case, the Court reserves the right to amend or modify redactions. If Counsel feels that highly unusual circumstances exist such that it is necessary to suppress any future pleadings or documents filed with the Court, Counsel must state the grounds for suppression in that pleading. Counsel must also alert court staff by stamping or writing "SUPPRESSED" at the top of both the original and the redacted version of the pleading (i.e., the original would read "SUPPRESSED" at the top and the redacted version would read "REDACTED SUPPRESSED"). Counsel should continue to comply with the Supplemental Case Management Order (C-11) when filing documents under seal. Counsel may continue to file pleadings and/or documents under seal, with the understanding that sealed documents or pleadings may be viewed only by the Court.

Finally, given the anticipated crush of requests from the public and/or the media, and in order to give the People and Defendant the opportunity to review previous pleadings and file redacted copies as required by the Court's Order, this Order, although issued today, will not take

effect until one week from today, on September 28, 2012, at 8:00 am. On that date, the file, with the exception of any evidence filed under seal or any documents excepted herein, shall be released to the public and the media. To assist Counsel in making redactions of documents which were filed prior to the Court's entry of the Supplemental Case Management Order (C-11), the Court encourages, and shall permit, Counsel to review the public/redacted file which the Court has maintained thus far in the Clerk's Office.

Media Petitioners' Motion to Unseal Court File (Including Docket) and Media Petitioners' Request for Timely Release of Court Filings to Provide for Meaningful Right to Observe Judicial Proceedings are now GRANTED, with the exceptions noted above.

Entered September 21, 2012.

BY THE COURT:

WILLIAM BLAIR SYLVESTER
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2012, a true and correct copy of **Order Unsuppressing Court File** was served upon the following parties of record.

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Sherilyn Koslosky
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