Colorado Freedom of Information Coalition
The Voice for Open Government in Colorado

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November 7, 2016

Hon. John Dailey, Chair
Colorado Supreme Court
Rules of Criminal Procedure Committee
c/o Colorado Supreme Court
Ralph R. Carr Judicial Center
2 E. 14th Ave.
Denver, CO 80203

Re: Proposed New Rule of Criminal Procedure

Dear Judge Dailey and Members of the Criminal Procedure Committee:

Attached is a "Corrected/Updated" version of my letter dated October 25, 2016, which inserts an important sentence that was inadvertently omitted from the prior version. The previously omitted sentence makes clear that the views and proposal set forth in that letter do not necessarily reflect that of CFOIC's member organizations or individuals.

Thank you for replacing this new version with the earlier draft.

I apologize for any confusion that my prior letter may have created.

Sincerely,

Steven D. Zansberg
President
Colorado Freedom of Information Coalition

SDZ/cdh
Enclosure
cc: Thomas R. Raynes, Executive Director, District Attorneys Council
Douglas Wilson, State Public Defender
Maureen Cain, Policy Director, Colorado Criminal Defense Bar (cainmoya@aol.com)

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★★★ CORRECTED/UPDATED VERSION ★★★

Hon. John Dailey, Chair
Colorado Supreme Court
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c/o Colorado Supreme Court
Ralph R. Carr Judicial Center
2 E. 14th Ave.
Denver, CO 80203

Re: Proposed New Rule of Criminal Procedure

Dear Judge Dailey and Members of the Criminal Procedure Committee:

I write as the President of the Colorado Freedom of Information Coalition, an association of organizations and individuals committed to furthering and increasing government transparency in the State of Colorado. Among the constituent member organizations of the CFOIC Coalition member organizations include the American Civil Liberties Union of Colorado, the Associated Press, BillTrack 50, Chalkbeat Colorado, the Colorado Bar Association, the Colorado Broadcasters Association, Colorado Common Cause, Colorado Ethics Watch, *The Colorado Independent*, the Colorado Press Association, Colorado Press Women, the Colorado Springs Independent, the Colorado Springs Press Association, the Colorado Student Media Association, the Independence Institute, Krystal Broadcasting, Inc., the League of Women Voters of Colorado, the Professional Private Investigators Association of Colorado, Rocky Mountain PBS I-News and the Society of Professional Journalists. Members also include newspapers affiliated with the Colorado Press Association and broadcast stations affiliated with the Colorado Broadcasters Association. **The views and proposal set forth herein do not necessarily reflect that of CFOIC's member organizations or individuals.**

Attached hereto, for the Committee's consideration, is a proposed new Rule of Criminal Procedure governing access to the court file and all documents therein, in criminal matters adjudicated in Colorado state courts. The proposed rule is modeled after, and practically a verbatim copy of, the American Bar Association's Standard of Criminal Justice, Fair Trial and Public Disclosure Rule No. 8-5.32 (2013). The prior version of this Criminal Justice Standard, § 8-3.2, was adopted by the Colorado Supreme Court in *Star Journal Publ'g Corp. v. Cty. Ct.*, 591 P.2d 1028 (Colo. 1979). That case addressed only the question of closure of a court *proceeding* (a preliminary hearing) in a criminal case, but even at that time the earlier version of

Standard 8-3.2 declared that the same standard for closing a courtroom *proceeding* applied to all judicial *records* in the court's file.

There is a decided need for the Rules Committee to adopt the proposed Rule we have tendered. As members of the Committee are themselves familiar, in the recent past, Colorado state courts have adjudicated several high-profile criminal cases of local, national, and even international interest (*e.g.*, *People v. James Eagan Holmes*, *People v. Robert Lewis Dear*, *People v. Kobe Bean Bryant*, to name a few). Ironically, in the ordinary run-of-the-mill criminal case, including homicides and other felony crimes, the entire court file is almost always unsuppressed and open to public inspection; yet in those exceptional cases where the public interest is greatest, courts have granted motions by defendants and prosecutors to suppress, and to maintain under suppression, numerous documents – not only at the outset of the case, but for months after a case has been filed. When members of the press, acting as surrogates for the public, have filed motions in these cases seeking the unsealing or unsuppression of documents in the court file, the parties often dispute not only whether unsealing should occur, but more importantly, *by what standard* such motions are to be adjudicated.

While it is incontestable that a Colorado statute, § 24-72-301, *et seq.*, the Colorado Criminal Justice Records Act, sets forth a standard --"contrary to the public interest"-- for public disclosure of "criminal justice records," and includes among the custodians of such records "courts of law," it is also incontestable that the Colorado Supreme Court, in 1966, recognized that a statutory prohibition on access to records on file in a court of law (even in a civil case) violates the rights of the free press and the public under the First Amendment to the Constitution of the United States. *See Times-Call Publ'g Co. v. Wingfield*, 410 P.2d 511 (Colo. 1966). Thus, whether it be under the balancing of all competing interests, as required by the CCJRA (*see In re Freedom Colo. Info., Inc. v. El Paso Cnty. Sheriff's Dep't*, 196 P.3d 892 (Colo. 2008), as Judge Samour did in the *People v. Holmes* case (courtesy copy attached), or directly under the Fourteenth Amendment's incorporation of the First Amendment, it is incumbent upon a trial court judge to satisfy the standards imposed by the First Amendment prior to restricting the public's fundamental rights thereunder.

While the press, the public, the prosecutor, and the defendant will inevitably disagree about how such a constitutionally-required standard should be applied in a particular case, or with respect to particular documents in a court file, it would greatly behoove all parties, the public, and the judiciary, to have this Committee recommend for adoption a Rule of Criminal Procedure that sets forth the standard that is to be applied in such cases. Such a standard has been adopted by the Civil Rules Committee with respect to records on file in civil cases. *See* C.R.C.P. § 121(c); 1-5. Notably, the Committee that promulgated the Statewide Practice Standards contained in Chapter 17A in 1988 commented that the Practice Standard for "limitation of access to court files" in civil cases

> was made necessary by [the] lack of uniformity throughout the districts concerning access to court files. Some districts permitted free access after service of process was obtained. Others, particularly in malpractice or domestic relations cases, almost routinely prohibited access to court file information. The Committee deemed it preferable to have machinery available for limitation in an appropriate case, but also a means for other entities having interest in the litigation, including the media, to have access.

It is on this same basis that we commend the attached Rule of Criminal Procedure to this Committee's consideration.

Please do not hesitate to contact me if I can be of any assistance to the Committee as it considers the proposed rule attached hereto.

Sincerely,

Steven D. Zansberg
President
Colorado Freedom of Information Coalition

SDZ/cdh
Enclosure
cc: Thomas R. Raynes, Executive Director, District Attorneys Council
Douglas Wilson, State Public Defender
Maureen Cain, Policy Director, Colorado Criminal Defense Bar (cainmoya@aol.com)

Proposed Rule of Criminal Procedure
Regarding Closure of Proceedings or Sealing of Judicial Records
in Criminal ("CR") Cases

Colo. R. Crim. Proc. ___:

(a) Subject to the limitations set forth below, in any criminal matter, the public presumptively should have access to all judicial proceedings, related court documents and exhibits, and any record made thereof not otherwise required to remain confidential. A court may impose reasonable time, place and manner limitations on public access to judicial records.

(b) A court may issue a closure order, denying access to the public to specified portions of a judicial proceeding, or to a related document or exhibit in the court file, only after:

(i) conducting a hearing after reasonable notice and an opportunity to be heard on the proposed order has been provided to the parties and to the public; and

(ii) making specific written findings, on the record, that:

(A) public access would create a substantial probability of harm to the fairness of the trial or other overriding interest which substantially outweighs the defendant's or the public's interest in public access;

(B) the proposed closure order will effectively prevent or substantially lessen the potential harm; and

(C) there is no less restrictive alternative means that is reasonably available to prevent that harm, including any of the measures listed below, or permitting access to one or more representatives of the public:

(1) ordering a continuance;

(2) conducting voir dire as to pretrial publicity;

(3) providing clear cautionary instructions to the jury from the outset of jury selection;

(4) providing clear cautionary instructions to court personnel, parties, lawyers, and witnesses;

(5) providing lawyers with additional peremptory challenges;

(6) impanelling additional alternate jurors;

(7) importing jurors from another district or locality;

(8) ordering a severance;

(9) impanelling an anonymous jury;

(10) sequestering the jury; and

(11) ordering a change of venue.

(c) In determining whether a closure order should issue, the court may accept the items for which suppression or closure is being requested under seal, *in camera* or in any other manner designed to permit a party to make a *prima facie* showing without public disclosure of that matter. The motion seeking to close access to those items must itself, however, be open to public inspection unless the requirements of subsection (b) are met as to portions of the motion papers.

(d) If the court issues a closure or suppression order, the court should consider imposing a time limit on the duration of that order and requiring the party that sought the order to report back to the court within a specified time period as to whether continued closure or suppression is justified pursuant to the requirements set forth in subsection (b). If those requirements are no longer met, the documents or suppressed transcripts of any closed proceeding should be unsuppressed forthwith.

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.

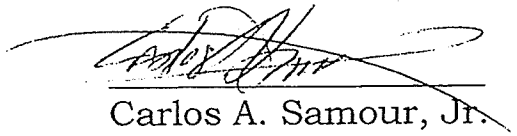
Based on the specific circumstances present at this stage in the litigation, the Court holds that the defendant has failed to advance an overriding and compelling state interest to abridge the First Amendment rights of Media Petitioners and the public. Accordingly, the defendant's objections to the Motion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

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