DISTRICT COURT, ADAMS COUNTY, COLORADO Court Address: 1100 Judicial Center Drive Brighton, CO 80601 **THE PEOPLE OF THE STATE OF COLORADO** **v.** **Defendants:** Peter Cichuniec, & Jeremy Cooper **Attorney for Media Coalition:** Rachael Johnson, #43597 Reporters Committee for Freedom of the Press c/o Colorado News Collaborative 2101 Arapahoe Street Denver, CO 80205 Telephone: (970) 486-1085 Facsimile: (202) 795-9310 rjohnson@rcfp.org	**COURT USE ONLY** Case Numbers: 2021CR2806, 2021CR2800 Division: L

MEDIA COALITION'S MOTION TO UNSEAL/UNSUPPRESS JUDICAL COURT RECORDS AND CASE FILES

KDVR Fox31 Nexstar Media Group, Inc.; KUSA 9News; KMGH The Denver Channel; KCNC, CBS4 News; The Associated Press; The Gazette and The Denver Gazette, and the Colorado Freedom of Information Coalition (collectively, the "News Media Coalition"), by and through undersigned counsel, hereby submit this motion to unseal/unsuppress all judicial or court records in the above-captioned criminal prosecutions of Defendant Peter Cichuniec, 2021CR2806 and Defendant Jeremy Cooper, 2021CR2800. In support of this motion, the News Media Coalition states the following:

INTRODUCTION

1. Defendants Peter Cichuniec and Jeremy Cooper were indicted on multiple felony counts related to the August 24, 2019 killing of Elijah McClain. *See* Office of the Colorado Attorney General, *Statewide grand jury returns 32-count indictment against Aurora Police officers and Aurora Fire Rescue paramedics in the death of Elijah McClain* (September 1, 2021) https://perma.cc/6DBM-8N54 (last visited October 27, 2021). On information and belief, on or

around September 16, 2021, both Defendants filed motions with the Court seeking to suppress/seal all judicial records filed in their criminal cases.

2. The publicly available court dockets in the Cichuniec and Cooper matters indicate that a motion to limit public access was filed on September 16, 2021 in Adams County Court. That motion is not publicly available. Thereafter, on September 21, 2021, an order was entered by the Court that is also not available to the public. And, on September 28, 2021 an order restricting public access was entered by the Court.

3. On October 19, 2021, KDVR reporter Lori Jane Gliha sent an email to Mr. Jon Sarche, deputy public information officer at the Colorado Judicial Department, inquiring about the orders issued by the Court to restrict press and public access to court filings in the Cichuniec and Cooper matters. Mr. Sarche responded to Ms. Gliha's email stating, "there was a motion filed to suppress the case" and "Judge Priscilla Loew granted the motion and expects to address the suppression during the Nov. 1 hearing. There are no public documents at this time." A true and correct copy of Ms. Gliha's email and Mr. Sarche's response is attached hereto as Exhibit A

4. Mr. Sarche's email also indicated that the motion filed by Defendants to suppress/seal the case was not publicly available. *Id*. As a result, the entire case file—including the motion to suppress/seal itself—appears to be currently under seal and only available to the public if a court order is secured. The Media Coalition understands that the Court has entered an order suppressing public access under C.R.Cr.P. 55.1 pending the hearing set for November 1, 2021.

5. The Media Coalition consists of news organizations in Colorado who are engaged in gathering news and information about matters of public concern, including these judicial proceedings. For the reasons stated below, the Media Coalition respectfully requests that the Court, in compliance with C.R.Cr.P. 55.1, order that all judicial or court records on file in these cases be unsealed and that all future filings in these cases be filed on the public docket and available to the press and public.

ARGUMENT

I. The Court's order suppressing the entire case file does not comply with rule 55.1 of the Colorado Rules of Criminal Procedure.

6. The judicial and court records on file in these cases are subject to C.R.Cr.P. 55.1, which imposes a high burden on any party seeking to overcome the public's strong *presumptive* right to access a "court record" in a criminal case. *See* C.R.Cr.P. 55.1(a)(1) ("Court records in criminal cases are *presumed* to be accessible to the public.") (emphasis added).

7. C.R.Cr.P. 55.1(a)(1) and (a)(2) state that "a party may file a motion requesting that the court limit public access to *a court record*" that has been previously filed or that will be filed "*or to any part of such a court record* by making it inaccessible to the public or by allowing

only a redacted copy of it to be accessible to the public." (emphasis added). This rule does not allow a party to file a motion to seal *an entire case*. It allows a party to file a motion to limit public access to a specific *court record* or to a *part of such a court record* if the party can make the requisite showing, described below.

8. In this case, however, Defendants appear to have filed motions on September 16, 2021 seeking to seal their entire case files, including all judicial or court records that have been or will be filed with the Court in connection with their criminal prosecutions. And members of the public, including the Media Coalition, do not even know the grounds proffered by Defendants for requesting this extreme level of sealing, as the motion to suppress/seal are themselves under seal and inaccessible to the public. Rule 55.1 simply does not contemplate such wholesale secrecy; to the contrary, it imposes a rigorous standard that a party seeking to seal an individual court record—or portions thereof—must satisfy to demonstrate that the public's presumptive right to access that record is overcome.

9. Under C.R.Cr.P. 55.1(a)(6), a "court shall not grant any request to limit public access to a court record or to any part of a court record, or enter an order on its own motion limiting such public access, *unless* it issues a written order *in which it*":

> (I) specifically identifies one or more substantial interests served by making the court record inaccessible to the public or by allowing only a redacted copy of it to be accessible to the public;
>
> (II) finds that no less restrictive means than making the record inaccessible to the public or allowing only a redacted copy of it to be accessible to the public exists to achieve or protect any substantial interests identified; *and*
>
> (III) concludes that any substantial interests identified override the presumptive public access to the court record or to an unredacted copy of it.

C.R.Cr.P. 55.1(a)(6) (emphasis added.)

10. Further, C.R.Cr.P. 55.1(a)(7) specifies that any limitation on the public's presumptive right of access to judicial or court records on file in a criminal case must be of a fixed, limited duration. This subsection of the Rule recognizes "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).

11. Here, the Court entered orders suppressing public access to court records in the above-captioned cases on September 21 and 28, respectively. Though C.R.Cr.P. 55.1(a)(8) requires that any order limiting public access to a court record or to any part of a court record "be accessible to the public," no written sealing order is publicly available in Defendants' cases. Thus, it is not clear what the Court considered before entering its orders restricting public access to Defendants' entire case files. Nor, to the Media Coalition's knowledge, has the Court set any date upon which its sealing orders will expire, as required under C.R.Cr.P. 55.1(a)(7).

II. The public has a right to access judicial records in Defendants' criminal cases.

12. The public has a presumptive right to inspect court records rooted 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.2d609, 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). Among other things, the common law right of access to judicial records ensures that courts "have a measure of accountability" and promotes "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).

13. The press has succeeded in challenges to denials of access to court records before both trial courts and Colorado's Supreme Court. *See People v. Robert LewisDear*, 2016 SA 13 (Colo. Mar. 21, 2016) (following grant of C.A.R. 21 petition by media 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); *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); *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).

14. Although the Colorado Supreme Court has declined to recognize that the qualified First Amendment right of access applicable to criminal proceedings extends to documents on file in criminal cases, the Colorado Supreme Court has recognized that "[p]ublic confidence cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the court's decision sealed from public view." *P.R. v. Dist. Ct.*, 637 P.2d 346, 353 (Colo. 1981) (quoting *United States v. Cianfrani*, 573 F.2d 835, 851 (3d Cir. 1978)).

a. Rule 55.1 requires Colorado Courts to apply a strong presumption of public access to judicial records in criminal cases.

15. Since Rule 55.1 went into effect in May 2021, Colorado courts have applied it to unseal court records in contravention of its provisions. For example, in *People v. Mark D. Thompson*, No. 2021CR264 (Colo. Dist. 2021), the district court judge initially assigned to the matter entered a one-word order closing an entire case file after the district attorney argued that the defendant "is a prominent member of the Summit County community" and that the release of court records in the defendant's criminal case "could jeopardize the on-going investigation." Recognizing that order contravened C.R.Cr.P 55.1, on October 20, 2021, after the case was reassigned to District Court Judge Sean Finn, Judge Finn entered an order unsealing the case file, exclusive of the victim's name and address, and the defendant's home address, which were redacted. A true and correct copy of Judge Finn's order is attached hereto as Exhibit C.

III. Defendants' fair trial rights can be adequately protected without depriving the public of access to judicial or court records in their cases.

16. Defendants in this case cannot meet their burden to demonstrate that unsealing the case files, will create a "substantial probability of prejudice" to their rights to a fair trial.

17. As the U.S. Supreme Court has explained, "pretrial publicity, even pervasive, adverse publicity does not inevitably lead to an unfair trial." *Nebraska Press Association,* 427 U.S. 539, 554 (1976). And in *People v. McCrary,* 549 P.2d 1320, 1325 (Colo. 1976), the Colorado Supreme Court reasoned that pre-trial publicity is not enough to require a change of venue, even if the publicity is extensive.[1] The court held that "[o]nly when the publicity is so ubiquitous and vituperative that most jurors in a community could not ignore its influence is a change of venue required *before* voir dire examination." *Id.* at 1326 (emphasis added).

18. Further, in *People v. Hankin*s, 361 P.3d 1033, 1036–37 (Colo. App. 2014), the Colorado Court of Appeals held that pretrial publicity infringes on a defendant's right to a fair trial only in extreme circumstances.[2] The appellate court in *Hankin*s defined extreme circumstances as present "[o]nly when the publicity is so ubiquitous and vituperative that most

[1] *See Id*. at 1325 (denying change in venue despite many newspaper and broadcast reports on the allegations, including a story about the defendant's family indicating a connection to as many as 22 murders; distinguishing from the kind of massive, pervasive and prejudicial publicity in *Sheppard v. Maxwell*, 384 U.S. 333 (1966)).

[2] For context, in *Hankins*, the defendant was on trial for the murder of his wife. "The Craig Daily Press," published 24 articles regarding the crime, including some mentioning the defendant's confession to the killing and dismemberment of the victim's body. The defendant requested a change of venue because he believed the publicity from such articles would preclude him from receiving a fair trial. The court denied the request, reasoning that the publicity in the case was extensive "but *not* massive, pervasive and prejudicial as to create a presumption that defendant was denied a fair trial."

jurors ... could not ignore its influence." *Id.* at 1035. The court held the pretrial publicity in the case before it, though extensive, was not so massive, pervasive, and prejudicial as to create presumption of prejudice justifying change of venue before jury voir dire.

19. Courts have also held that purely factual reporting is not considered prejudicial. *See U.S. v. Angiulo*, 897 F.2d 1169, 1181 (1st Cir. 1990) (purely factual coverage creates no presumption of prejudice); *see also McCrary,* 549 P.2d at 1325.

20. Here, a grand jury indictment detailing the facts that led to the charges against the Defendants has already been released to the public by the Colorado Attorney General's office. A true and correct copy of that indictment is attached hereto as Exhibit B. It provides significant details about the alleged actions of Defendants. For example, the indictment describes how the incorrect dosage of Ketamine that allegedly killed Mr. McClain was administered by Mr. Cooper.

> A correct dosage of Ketamine is calculated according to a patient's weight, with 5 mg of Ketamine per kilogram of patient weight. COOPER said he estimated Mr. McClain's weight to be approximately 200 pounds (90.7 kg). At least that weight, in accordance with the standing order from their medical director, Mr. McClain should have been administered 453 mg of Ketamine. COOPER administered 500 mg of Ketamine. Mr. McClain actually weighted 143 pounds (65 kg) and as such his weight-based Ketamine does should have been closer to 325 mg of Ketamine. The paramedics did not ask Mr. McClain how much he weighed and overestimated his weight by 57 pounds and administered a dosage that was appropriate for a patient who weighed 77 pounds more than Mr. McClain.

Exhibit B at 11.

21. Further, body-worn camera footage of the incident that led to Mr. McClain's death also has been released to the public and reported on by members of the news media, including members of the Media Coalition. *See* KDVR, *Exclusive video shows interviews of officers involved in Aurora altercation; city notified of incoming civil suit*, (February 20, 2020) https://perma.cc/6JJA-F8CW (last visited October 27, 2021).

22. In sum, there are numerous facts already available to the public related to the charges against the Defendants and such factual information is not, by definition, prejudicial to Defendants ability to obtain a fair trial. *See Angiulo*, 897 F.2d at 1181; *see also McCrary,* 549 P.2d at 1325. Particularly given the amount of information already in the public record about Mr. McClain's death and the charges against Defendants, Defendants cannot demonstrate that restricting public access to all court records filed in their cases is either necessary or permissible under governing law.

23. Finally, to the extent Defendants assert that wholesale sealing of their criminal files is needed to guard against the possibility potential juror bias, courts have other, more

narrowly tailored tools at their disposal to address that concern that do not conflict with the public's presumptive right to inspect court records in criminal matters.

24. It is well-settled that *voir dire* is the "preferred safeguard against" pretrial publicity. *In re Charlotte Observer*, 882 F.2d 850, 855. Careful *voir dire* has been used successfully in "massive[ly]" publicized cases, including the prosecution of defendants involved in watershed controversies like Watergate and Abscam. *Id.* at 855-56; *see also People v. Bartowsheski*, 661 P.2d 235 (Colo. 1983) (where trial court allowed extensive voir dire of potential jurors to ensure impartial verdict and resolved most juror challenges in favor of defendant, voir dire examination failed to establish any obvious nexus between pretrial publicity of the case and juror prejudice against defendant). Indeed, in the high-profile multiple murder prosecution of James Holmes (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.

25. As the *McCrary* Court explained, "an 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." *Id*. at 1325.

26. The Supreme Court in *Nebraska Press* similarly underscored that "[p]rominence does not necessarily produce prejudice, and juror *impartiality*, we have reiterated, does not require *ignorance*." *Skilling v. United States*, 561 U.S. 368, 381 (2010) (emphasis in original). It is an underlying basis of our justice system "that jurors will set aside their preconceptions when they enter the courtroom and decide cases based on the evidenced presented." *Id.* at 399.

CONCLUSION

For the reasons set forth above, the case files of Defendants Cichuniec and Cooper, including all judicial and court records on file in these cases, should be unsuppressed/unsealed, forthwith, and the Court should enter an order requiring all future filings in Defendants' cases be filed on the public docket and accessible to the press and public.

Respectfully submitted this 28 day of October 2021.

By 

Rachael Johnson
Reporters Committee for Freedom of the Press
Attorney for The Media Coalition

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of October 2021, a true and correct copy of the foregoing **MEDIA COALITION'S MOTION TO UNSEAL/UNSUPPRESS JUDICAL COURT RECORDS AND CASE FILES** was served through the Colorado Courts E-File & Serve electronic court filing system, pursuant to C.R.C.P. 121(c), § 1-26:

Rachael Johnson