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:** JAMES E. HOLMES and, **Non-Party Movants:** ABC, Inc.; The Associated Press; Bloomberg L.P.; Cable News Network, Inc. ("CNN"); CBS News, a division of CBS Broadcasting Inc., and 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 ("NPR"); NBCUniversal Media, LLC; The New York Times Company; The E.W. Scripps Company; and *The Washington Post*	▲ COURT USE ONLY ▲
Attorneys for Movants: Thomas B. Kelley, #1971 Steven D. Zansberg, #26634 Christopher P. Beall, #28536 LEVINE SULLIVAN KOCH & SCHULZ, LLP 1888 Sherman Street, Suite 370 Denver, Colorado 80203 Phone: (303) 376-2400 FAX: (303) 376-2401 szansberg@lskslaw.com	Case No. 12-CR-1522 Division: 201
MOTION TO UNSEAL COURT FILE (INCLUDING DOCKET) **(With request for expedited hearing)**	

Movants, ABC, Inc.; The Associated Press; Bloomberg L.P.; Cable News Network, Inc. ("CNN"); CBS News, a division of CBS Broadcasting Inc., and 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 ("NPR"); NBCUniversal Media, LLC; The New York Times Company; E.W. Scripps Company; and *The Washington Post* (collectively "Media Petitioners"), by their undersigned counsel at Levine Sullivan Koch & Schulz, LLP, respectfully move this honorable Court to unseal the court file forthwith, and in particular to unseal the affidavit(s) of probable cause submitted in connection with already executed search warrants, and to make available for public inspection the docket identifying all pleadings that are on file in this case.

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

INTRODUCTION

The Defendant in this action stands accused of a shocking mass murder: shooting and killing twelve innocent people, unprovoked, and wounding fifty-eight others in a movie theater. In addition to his alleged attack on scores of innocent theater-goers, the Defendant has been accused in public statements by Aurora Police Chief Dan Oates of deliberately arming his apartment with a series of incendiary devices intended to kill the "first responder" police officers who entered that apartment.

The District Attorney has announced that she will be filing formal charges against the Defendant on Monday, July 30, 2012, and the criminal justice process will then unfold over the following weeks and months. The public has an obvious and legitimate interest in knowing on a timely basis the actions being taken by the government officials—law enforcement agencies, prosecutors, and judges—responsible for the investigation, prosecution and trial of the Defendant. Yet, virtually all records now on file with the Court in connection with this case are under seal, entirely unavailable for public inspection. There is not even a complete index of the filings available to allow the public to monitor developments in this case as they occur.

This status quo violates the public's constitutional right of access to the records of criminal prosecutions, and undermines our nation's firm commitment to the transparency and public accountability of the criminal justice system. While the public's right of access to court records is a qualified—not an absolute—right, judicial records may properly be sealed from public inspection only where findings of fact have been made that sealing is necessary to protect a governmental interest of the highest order. Such findings have not been made, nor could they be made, with respect to the *entirety* of the court file in this case. Nor could they possibly be made with respect to the *index* of the court file, the Register of Actions.

Through this Motion, the Media Petitioners respectfully seek the unsealing of the Register of Actions and all records currently filed with the Court, and seek contemporaneous access to records filed in this case going forward. Such access is mandated by law and critical

to the maintenance of public confidence in the criminal justice system. As Chief Justice Warren Burger once famously stated: "People in an open society do not demand infallibility from their public institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980).

THE INTEREST OF THE MEDIA PETITIONERS

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

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

ARGUMENT

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

3. The First Amendment to the United States Constitution, article II, section 10 of the Constitution of the State of Colorado, 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.

4. Movants' standing to be heard to vindicate those rights is well established. *See Star Journal Publ'g Corp. v. Cnty. Ct.*, 591 P.2d 1028 (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 (Colo. 1966); *see also In re N.Y. Times Co.*, 878 F.2d 67 (2d Cir. 1989); *In re Dow Jones & Co.*, 842 F.2d 603, 606-08 (2d Cir. 1988).[1]

5. The press routinely has been permitted to be heard in criminal cases in Colorado for the limited purpose of challenging the sealing of court files, and have succeeded in such challenges before both trial courts and Colorado's Supreme Court. *See In re People v.*

[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) (2012) (provision also cited as instructive in Colo. R. Crim. P. 57(b)).

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. Bryant*, No. 03-CR-204 (Eagle Cnty. Dist. Ct. Feb. 4, 2004) (granting media representatives' motion to order clerk of the court to release a docket, pursuant to Colo. R. Crim. P. 55 and § 13-1-119, C.R.S.); *People v. Cox*, No. 10-SA-196 (July 22, 2011) (denying criminal defendant's C.A.R. 21 petition that sought review of district court's order granting media organizations' motion to unseal arrest warrant affidavit in sexual assault case); *see also* Ex. 6 (*People v. Cox*, No. 11-CR-661 at 2-4 (Douglas Cnty. Dist. Ct. June 22, 2011) (recognizing press standing to seek unsealing of court file over parties' objection to standing)); *see also infra* ¶¶ 27 & 43.

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

6. The public's right to inspect court documents is enshrined in the common law. *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978) ("the courts of this country recognize a general right to inspect and copy . . . judicial records and documents"); *In re NBC*, 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." *United States v. Mitchell*, 551 F.2d 1252, 1258 (D.C. Cir. 1976), *rev'd on other grounds sub nom. Nixon*, 435 U.S. 589. The common law right of access to judicial records exists to ensure that courts "have a measure of accountability" and to promote "confidence in the administration of justice." *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995); *accord United States v. Hubbard*, 650 F.2d 293, 314-15 (D.C. Cir. 1981).

7. Court records in criminal cases are also subject to public access under the Colorado Criminal Justice Records Act, § 24-72-301, C.R.S. (2011); *see Thompson*, 181 P.3d at 1145. Here, an order of the Court bars the custodian from releasing the criminal justice records at issue, *see* § 24-72-305(1)(b), C.R.S., so this Court, not the custodian, must determine whether the sealing order should be lifted. *See also* Ex. 6 at 3 (recognizing that requiring a party seeking to lift an existing sealing order to file a separate action "is unnecessary, unduly burdensome, and an inefficient use of court resources and time.").

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

9. When, as here, documents in the court's file involve a matter of public concern, access to such records is also guaranteed by article II, section 10 of the Constitution of

Colorado. *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).

10. 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 create *a clear and present danger* to the administration of justice, or to some equally compelling governmental interest, *and* no alternative exists to adequately protect that interest. *See* § 8-3.2 of ABA Standards on Criminal Justice, 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." *Id.*

11. Colorado Supreme Court Chief Justice Directive 05-01 entitled "Directive Concerning Access to Court Records" reinforces this standard by requiring a specific court order before judicial records may be withheld from the public. The Directive applies to this Court and provides that all court records are presumed open for public inspection and copying unless specifically identified as not accessible to the public or as a result of a court order. C.J.D. 05-01 § 4.00; *see also State Court Adm'r*, 994 P.2d at 430.

III. UNDER THE CONTROLLING STANDARD, NO PROPER BASIS EXISTS FOR SEALING THE REGISTER OF ACTIONS IN THIS CASE

12. The Court's Register of Actions ("ROA") for this case is currently unavailable for public inspection. The Clerk of the Court has informed the press that it is "under seal."

13. Other than the recitation of the pleadings on file made during the Advisement on July 23, 2012, and ten documents that have been posted on the Court's website at http://www.courts.state.co.us/Courts/District/Case_Details.cfm?Case_ID=152, the public has no information about the ongoing activity in this case, including any motions and responses that may have been filed, and orders that have been entered.

14. For example, the Court's Order of July 24, 2012, denying EMC for the Announcement of Charges on July 30, 2012, made express reference to the Objection filed by the Defendant (D-7), but no docket is available that reflects that filing, nor any others. Similarly, the Court's Amended Order Re: Motion for Compliance With Order Limiting Pre-Trial Publicity (July 26, 2012) references the Defendant's motion D-10, but prior to the Order the public was unaware the Defendant had filed motions numbers 8, 9 or 10. (The nature or subject matter of Defense motion numbers 8 and 9 is presently unknown, as is the total number of filings by both parties and the nature or subject matter of those filings).

15. Sealing the ROA from public inspection in this manner violates the public's constitutional right of access to the courts. *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93 (2d Cir. 2004). As the U.S. Court of Appeals for the Second Circuit has explained, the constitutional access right applies fully to a court docket because "the ability of the public and press to attend civil and criminal cases would be merely theoretical if the information provided by docket sheets were inaccessible." *Id.; see also United States v. Ochoa-Vasquez*, 428 F.3d

1015, 1029-30 (11th Cir. 2005) ("[P]ublic docket sheets are essential to provide meaningful access to criminal proceedings." (internal quotation marks omitted)); *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897-98 (7th Cir. 1994) (holding that the district court erred in sealing, *inter alia*, the civil docket for a case), *superseded on other grounds as stated in Bond v. Utreras*, 585 F.3d 1061 (7th Cir. 2009); *Wash. Post v. Robinson*, 935 F.2d 282, 289 (D.C. Cir. 1991) (striking down a trial court's practice of failing to publicly docket certain filings in criminal cases); *In re State-Record Co.*, 917 F.2d 124, 128-29 (4th Cir. 1990) (per curiam) (requiring public docketing of a criminal case because of the constitutional right of access); *In re Search Warrant for Secretarial Area*, 855 F.2d 569, 575 (8th Cir. 1988) (reversing order sealing docket entries); *Associated Press*, 705 F.2d at 1147 (striking down district court's blanket order requiring sealed filings in a high-profile criminal prosecution).[2]

16. Consistent with the constitutional right, Colorado law provides:

> The judgment record and register of actions shall be open at all times during office hours for the inspection of the public without charge, and it is the duty of the clerk to arrange the several records kept by him in such manner as to facilitate their inspection. In addition to paper records, such information may also be presented on microfilm or computer terminal.

§ 13-1-119, C.R.S. (2011); *see also* § 13-1-102, C.R.S. (2011); Colo. R. Crim. P. 55.

17. Moreover, the Colorado Supreme Court Chief Justice Directive 05-01 entitled "Directive Concerning Access to Court Records" explicitly requires the register of action for a case (including "a listing of documents filed in [the] case") to be made available for public access and remote electronic access unless there has been a sealing order that meets the "least restrictive means" test of Section 4.50 of the Directive. *See* C.J.D. 05-01 § 4.20(a)(3).

18. The important role played by a public ROA was underscored by then-Eagle County Chief District Judge Terry W. Ruckriegle in addressing the need to identify adequately the nature of records being filed in the Kobe Bryant prosecution:

> The Court does not agree that all sealed documents are to be referenced only as "sealed document." **Failure to reference the nature of the documents precludes or unnecessarily complicates any meaningful opportunity for public or Media review or challenge.** Although specific factual assertions may

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[2] Other courts have reached the same conclusion—requiring public access for court dockets—under the common law right of access to judicial records, without reaching the question of a constitutional right of access. *See Webster Groves Sch. Dist. v. Pulitzer Publ'g Co.*, 898 F.2d 1371, 1377 (8th Cir. 1990); *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 178, 181 (4th Cir. 1988); *In re Knoxville News-Sentinel Co.*, 723 F.2d 470, 475-76 (6th Cir. 1983).

be prejudicial, general identification of the contested issues is typically not prejudicial and is necessary for an informed public.

People v. Bryant, No. 03-cr-204, Order re News Media's Motion For Public Access to Complete and Accurate Docket Listing of All Events and Filings in This Criminal Action (Eagle Cnty. Dist. Ct. Feb. 24, 2004) (emphasis added) (interpreting prior language of C.J.D. 98-05, which was superseded by C.J.D. 05-01) (copy attached as Ex. 1).

19. Accordingly, the Media Petitioners respectfully request the Court to direct the Clerk of the Court to make available to the public, forthwith, (either at the Clerks' office, or, as was the case in the Kobe Bryant case, on the Court's website) a Register of Actions that identifies all of the parties' appearances and filings (including motions and exhibits), and the Court's orders.

IV. UNDER THE CONTROLLING STANDARD, NO PROPER BASIS EXISTS FOR THE BLANKET SEALING OF THE ENTIRE CASE FILE

20. With the limited exception of ten documents posted on the Court's website, the entire court file is currently under seal. On information and belief, among the records on file are one or more affidavits of probable cause in support of a warrant, or "order for production of records," issued by this Court.

21. The same rules governing public access to the ROA apply to search warrant affidavits and other records typically filed with the court in connection with a criminal prosecution. As explained in the *Media Guide to Colorado Courts* (6th ed. 1998), published by the Colorado Supreme Court's Committee on Public Education:

> Generally, court records in criminal cases are open for public inspection. *This includes search warrants and search warrant affidavits . . . and other information contained in the file.*
>
> . . . The First Amendment require[s] the party seeking to seal the file to show that there is *a clear and present danger to the fairness of the trial* and that the prejudicial effect of such information on trial fairness *cannot be avoided by any other reasonable means.*

Id. at 50 (emphasis added) (copy attached as Ex. 2).

A. ALL AFFIDAVITS OF PROBABLE CAUSE SHOULD BE UNSEALED

22. Regularly, and routinely, courts have held that arrest warrant affidavits must be made available to the public after a defendant's arrest and initial charging. *See, e.g.*, *Commonwealth v. Fenstermaker*, 530 A.2d 414, 418-19 (Pa. 1987); *Greenwood v. Wolchik*, 544 A.2d 1156, 1158 (Vt. 1988) ("Public access to affidavits of probable cause is all the more

important because the process of charging by information involves no citizen involvement, such as is present with juries and grand juries.").

23. Courts similarly have found search warrant affidavits subject to the public right of access. The presumption favoring access to judicial records is at its apex for search warrant affidavits because those documents "adjudicate[] the right of individuals under the Fourth Amendment not to be subjected to government intrusion into areas in which they might reasonably have expected privacy absent a judicial determination of sufficient cause." *In Re Sealed Search Warrant*, Nos. 04-M-370 & 04-M-388, 2006 WL 3690639, at *3 (N.D.N.Y. Dec. 11, 2006). Because "[t]he judicial determination whether to permit the government to enter and search a person's private property and possessions" is an exercise of power "at the heart of the performance of judicial functions," the common law presumption of access to search warrant affidavits also "carries the maximum possible weight." *Id.*

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

25. Recognizing the compelling importance of public access to such probable cause affidavits, the U.S. District Court for the Western District of North Carolina rejected a criminal defendant's argument that the common law right of access should be abridged because a search warrant affidavit contained statements not admissible at trial and could compromise his right to a fair trial. *See United States v. Blowers*, No. 3:05-CR-0093, 2005 WL 3830634, 34 Media L. Rep. (BNA) 1235 (W.D.N.C. Oct. 17, 2005). Courts regularly have required search warrant affidavits to be disclosed under the common law presumption of access. *See, e.g., In re Search Warrant*, No. 00-138M-01 (JMF), 2000 WL 1196327, at *1 (D.D.C. July 24, 2000) (recognizing common law right of access to affidavit filed in support of a search warrant); *In re Search Warrants Issued on May 21, 1987*, Misc. No. 87-186 (JHG), 1990 WL 113874, at *3 (D.D.C. July 26, 1990) (same); *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 65 (4th Cir. 1989) (common law right of inspection attaches once a search warrant affidavit is filed with the clerk); *In re Eye Care Physicians of Am.*, 100 F.3d 514, 517 (7th Cir. 1996) (same); *In re Search of 1638 E. 2nd Street*, 993 F.2d 773, 775 (10th Cir. 1993) (same); *In re Search Warrant for Secretarial Area*, 855 F.2d at 573 (same).

26. Other courts have concluded that the First Amendment independently protects public access to search warrant affidavits. As the U.S. Court of Appeals for the Eighth Circuit held:

> [T]he first amendment right of public access *does* extend to the documents filed in support of search warrant applications. First, although the process of issuing

> search warrants has traditionally not been conducted in an open fashion, search warrant applications and receipts are routinely filed with the clerk of court without seal. Under the common law[,] judicial records and documents have been historically considered to be open to inspection by the public. Second, public access to documents filed in support of search warrants is important to the public's understanding of the function and operation of the judicial process and the criminal justice system and may operate as a curb on prosecutorial or judicial misconduct.

In re Search Warrant for Secretarial Area, 855 F.2d at 573 (emphasis added) (citations omitted). *See also, In re Application of N.Y. Times Co.*, 585 F. Supp. 2d at 89.[3]

27. While not expressly addressing search warrant affidavits, the Colorado Supreme Court has adopted the same premise on which these decisions are based, that the records supporting a court's actions must not be sealed from 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)).

28. This conclusion is based not solely on the First Amendment right of access, but also on the broader protections conferred to free speech by article II, section 10 of the Colorado Constitution. *P.R.*, 637 P.2d at 354; *see People v. King*, 19 Media L. Rep. 1247, 1249-50 (Denver Cnty. Ct. July 29, 1991) (copy attached as Ex. 3) (recognizing that the Colorado Supreme Court decision in *Star Journal* established a constitutional right of access to affidavits on file with the court); *see also People v. Blagg*, No. 02-CR-623, Affidavit in Support of Arrest Warrant (Mesa County Dist. Ct. June 5, 2002) (first-degree murder arrest affidavit unsealed before trial) (copy attached, along with press report of its release, as Ex. 4); *People v. Garcia-Flores*, No. 01-CR-46, Affidavit in Support of Warrantless Arrest (Pitkin County Dist. Ct. July 20, 2001) (felony sexual assault and attempted murder unsealed upon motion by news media) (copy attached, along with press report of its release, as Ex. 5).

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

> When a shocking crime occurs, a community reaction of outrage and public protest often follows, and thereafter, the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. . . .

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

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

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

B. THE PEOPLE'S "ONGOING INVESTIGATION," POST-CHARGING, DOES NOT WARRANT BLANKET SEALING OF THE COURT FILE

30. It is anticipated that the People will argue that disclosure of court records would compromise the ongoing law enforcement investigation. However, as of Monday, July 30, 2012, the People will have completed enough of its investigation to permit the formal filing of charges against the Defendant.

31. Aurora Police Chief Dan Oates has repeatedly stated law enforcement's conclusion that no other party was complicit in the Defendant's alleged crimes, meaning no charges will be filed against any other defendant. *See* Karen Crummy, *Aurora theater shooting suspect acted alone, police chief says*, THE DENVER POST, July 22, 2012.

32. Bald assertions of harm to investigations have been rejected where they are made **after** a defendant has been formally charged and the search or arrest warrant materials have been filed with the court. *See In re Search Warrant for Second Floor Bedroom*, 489 F. Supp. 207, 212 (D.R.I. 1980); *In re Grand Jury Proceedings Dated May 6, 1996*, 932 F. Supp. 904, 905-06 (S.D. Tex. 1996), *rev'd on other grounds*, 115 F.3d 1240 (5th Cir. 1997); *see also United States v. Gonzales*, 927 F. Supp. 768, 779 (D. Del. 1996); *In re Search of Up N. Plastics, Inc.*, 940 F. Supp. 229, 234 (D. Minn. 1996) (rejecting government's speculative assertion of compromise to ongoing criminal investigation).

33. In last year's mass shooting incident in Tucson, Arizona, the court initially refused to unseal search warrants and associated affidavits due to an active and ongoing criminal investigation, but later ordered them released after the grand jury returned an indictment and the government acknowledged that its active investigation was completed (that no additional charges were expected). *Loughner*, 769 F. Supp. 2d at 1190, 1197 ("once an investigation has concluded and the indictment has issued" there is an historical and well-supported right of access under the First Amendment); *see also In re Application & Affidavit for a Search Warrant (Wash. Post Co. v. Hughes)*, 923 F.2d 324, 331 (4th Cir. 1991) (affirming order unsealing search warrant at post-indictment but pre-trial phase).

34. To the extent there actually is evidence establishing that disclosure of certain discrete information in any probable cause affidavit will compromise an active and ongoing investigation, the People must further demonstrate that the *entirety* of the affidavit must remain under seal. *See In re Freedom Colo. Info., Inc. v. El Paso Cnty. Sheriff's Dep't*, 196 P.3d 892, 900 n.3 (Colo. 2008) (holding that under Colorado Criminal Justice Records Act, custodian of records "should redact sparingly" in order "to provide the public with as much information as possible"); *Baltimore Sun*, 886 F.2d at 66 (finding that search warrant materials may be produced in redacted form so as to meet 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).

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

35. At this early stage of these criminal proceedings, the Defendant cannot meet his burden of demonstrating that unsealing the court file will create a "clear and present danger" to his fair trial rights, one of two prerequisites for continued sealing. *See Star Journal Publ'g*, 591 P.2d at 1030; *see also United States v. Noriega*, 917 F.2d 1543, 1549 (11th Cir. 1990) (finding "a conclusory representation that publicity might hamper a defendant's right to a fair trial is insufficient to overcome the protections of the First Amendment"). Nor can he show that no alternatives to closure are available to adequately protect his fair trial rights.

36. Courts have recognized that boilerplate concerns about "high-profile" criminal cases posing a difficulty to empanelling an impartial jury are frequently overstated. *See, e.g.*, *see Skilling v. United States*, 130 S. Ct. 2896, 2925 (2010) (finding no presumption of prejudice arising from pervasive negative pre-trial publicity and approving of trial court's *voir dire* to empanel an impartial jury); *CBS, Inc. v. U.S. Dist. Ct. (United States v. DeLorean)* 729 F.2d 1174, 1179 (9th Cir. 1984) ("even when exposed to heavy and widespread publicity many, if not most, potential jurors are untainted by press coverage"); *In re Charlotte Observer (United States v. Bakker)*, 882 F.2d 850, 855-56 (4th Cir. 1989) ("Cases such as those involving the Watergate defendants, the Abscam defendants, and more recently, John DeLorean, all characterized by massive pretrial media reportage and commentary, nevertheless proceeded to trial with juries which – remarkably remarkably in the eyes of many – were satisfactorily disclosed to have been unaffected (indeed, in some instances, blissfully unaware of or untouched) by that publicity."); *see also United States v. McVeigh*, 153 F.3d 1166, 1180-81, 1184 n.6 (10th Cir. 1998) (more than one half of potential jurors were unaware of Timothy McVeigh's purported confession to the Oklahoma City bombing despite ubiquitous press coverage given to that confession on the eve of trial).

37. In highly publicized cases "'[t]he relevant question is not whether the community remembered the case, but whether the jurors . . . had such fixed opinions that they

could not judge impartially the guilt of the defendant.'" *Mu'Min v. Virginia*, 500 U.S. 415, 430 (1991) (quoting *Patton v. Yount*, 467 U.S. 1025, 1035 (1984)).

38. Moreover, any party who seeks to seal a court record has the burden of showing that there are no less restrictive measures available to protect the defendant's fair trial rights short of the continued sealing of whatever portion of the court file the Court has found to be constitutionally permissible. *See Star Journal Publ'g*, 591 P.2d at 1030; *Press-Enter. Co. v. Super. Ct.*, 478 U.S. 1, 14 (1986) ("*Press-Enterprise II*"); *Richmond Newspapers, Inc.*, 448 U.S. at 580-81. It is not sufficient for a trial court to seal a record based solely on the perception of substantial pretrial publicity, rather the court must conclude that there are **no** other available measures that would adequately protect the defendant's fair trial rights. *See Press-Enterprise II*, 478 U.S. at 14; *see also P.R.*, 637 P.2d at 354 (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)).

39. Myriad alternative measures exist to protect the Defendant's fair trial rights. *See Press-Enterprise II*, 478 U.S. at 15. Those include a variety of jury restrictions that would properly balance the Defendant's fair trial rights with the news agencies' free press rights, such as:

> The trial judge may: (1) cause extensive voir dire examination of prospective jurors; (2) change the trial venue to a place less exposed to intense publicity; (3) postpone the trial to allow public attention to subside; (4) empanel veniremen from an area that has not been exposed to intense pretrial publicity; (5) enlarge the size of the jury panel and increase the number of peremptory challenges; or (6) use emphatic and clear instructions on the sworn duty of each juror to decide the issues only on the evidence presented in open court.

People v. Botham, 629 P.2d 589, 596 (Colo. 1981); *see also Associated Press*, 705 F.2d at 1146 ("[W]e believe that careful jury selection is an alternative that can adequately protect the right to a fair trial. In a large metropolitan area . . . it is unlikely that 'searching questioning of prospective jurors . . . to screen out those with fixed opinions as to guilt or innocence' and 'the use of emphatic and clear instructions . . . to decide the issues only on evidence presented in open court' will fail to produce an unbiased jury, regardless of the nature of the pre-trial documents filed." (quoting *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 563-64 (1976)).

40. Under applicable law, therefore, the issue is not whether the Defendant or the Court would prefer not to resort to "cumbersome" measures such as change of venue, jury *voir dire* or jury instructions. Rather, the binding U.S. Supreme Court case law (and the ABA Standards for Free Press/Fair Trial as adopted by the Colorado Supreme Court) make clear that before sealing may constitutionally be ordered, the alternatives must be considered and found to be *unavailable* and *inadequate*, based on specific reasons that the court must articulate on the record. *Press-Enterprise I*, 464 U.S. at 513; *ABC, Inc. v. Stewart*, 360 F.3d 90, 102 (2d Cir. 2004); *P.R.*, 637 P.2d at 354; *see also Rockdale Citizen Publ'g Co. v. State*, 463 S.E.2d 864, 866 (Ga. 1995) (holding that news media have a right of access to pretrial evidentiary hearings

where the availability of a potential change of venue eliminates any basis for a claim of prejudice).

41. The argument that jurors may be exposed to information and material that may not otherwise be admissible at trial is not sufficient to constitute a "clear and present danger" to Defendant's fair trial rights, nor does it mean that less restrictive measures than sealing the affidavit would not be available. As the Supreme Court noted more than thirty years ago, in any "important case,"

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

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

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

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

42. Moreover, empirical research confirms that jurors are able to set aside their conclusions based on extensive and prejudicial pretrial publicity, and base their verdict solely on the evidence presented in court. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1054-55 (1991); *see Skilling*, 130 S. Ct. at 2925 (holding that defendant had "failed to establish that a presumption of prejudice arose or that actual bias infected the jury" because "[i]t is sufficient if the juror[s] can lay aside [their] impression[s] or opinion[s] and render a verdict based on the evidence presented in court" where trial was held amidst massive press coverage concerning Enron's collapse and alleged crimes perpetrated by firm's management, including the defendant) (quotation omitted); *id.* at 2920 n.28 (citing numerous cases where, despite extensive pretrial publicity, the court was able to seat an impartial jury).

43. In the aftermath of the mass shooting in Arizona, the federal district court ruled that the defendant's fair trial rights would not be compromised by release of the warrant affidavits because the court, "with the assistance of counsel . . . intends to develop a comprehensive jury questionnaire, which will help identify the extent of exposure prospective jurors may have had to the news coverage about th[e] case and assist counsel in ferreting out

people with fixed opinions." *See Loughner*, 769 F. Supp. 2d at 1196. Further, the court noted it would "permit counsel to personally and extensively voir dire prospective jurors" and would "consider granting additional peremptory challenged to each side, if voir dire establishes that is necessary." *Id.*

44. Lastly, in the recent high-profile prosecution, in this Judicial District, of former Denver Bronco player Perrish Cox, after the graphic and detailed arrest warrant affidavit was released, over the objections of both the People and the defendant (both of whom claimed that pre-trial disclosure would compromise the defendant's fair trial rights), *see* Ex. 6, an impartial jury was seated and Mr. Cox was *acquitted.*

45. In light of the fact that prophylactic measures such as change of venue, extended, skillful *voir dire* by the Court and the parties, as well as jury admonitions and jury instructions, are clearly available, and the absence of any showing that such alternative measures would be ineffective in protecting the Defendant's right to receive a fair trial, the Court must conclude that neither the People nor the Defendant can meet their burden of showing the lack of any alternative measures short of continued sealing. *See Stewart*, 360 F.3d at 102; Ex. 6 at 5, 7.

D. THE RIGHT OF PUBLIC ACCESS IS A RIGHT OF *CONTEMPORANEOUS* ACCESS

46. It is also anticipated that the People and/or the Defendant will urge the Court to simply "postpone" releasing the judicial records at issue to the public, and will argue that "the public will be fully informed at the time of trial; the public enjoys no right to receive information *now*, when this information will be made available *later*." Such arguments are unavailing.

47. The public's right of access to judicial records is a right of *contemporaneous* access. *See Lugosch*, 435 F.3d at 126-27 ("Our public access cases and those in other circuits emphasize the importance of *immediate* access where a right of access is found." (emphasis added) (citations omitted)); *Grove Fresh Distribs.*, 24 F.3d at 897 (noting that access to court documents "should be immediate and contemporaneous").

48. 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").

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

50. Accordingly, any unnecessary delay in affording access to judicial records in this case constitutes an infringement of the movants' rights under the First Amendment.

WHEREFORE, the Media Petitioners respectfully request that the Court forthwith enter an order unsealing the Register of Actions, any affidavit(s) of probable cause in support of a warrant or order for production of records, and any other judicial record in the court file for which no showing of necessity for continued sealing has been made.

Media Petitioners hereby respectfully request that the Court enter an expedited briefing schedule on this Motion and further provide them the opportunity to be heard on the issues presented herein at the earliest practical time.

Respectfully submitted this 27th day of July, 2012, by:

LEVINE SULLIVAN KOCH & SCHULZ, LLP

Thomas B. Kelley, #1971
Steven D. Zansberg, #26634
Christopher P. Beall, #28536

Attorneys for Media Petitioners

CERTIFICATE OF MAILING

I hereby certify that on this 27th day of July, 2012, a true and correct copy of this **MOTION TO UNSEAL COURT FILE (INCLUDING DOCKET)** was delivered via COURIER to the attorneys below and was deposited in the United States Mail, postage prepaid, correctly addressed to the following:

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Karen Pearson, Esq., Deputy District Attorney
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Centennial, CO 80111

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Tamara A. Brady, Esq.
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Office of the State Public Defender
1290 Broadway, #900
Denver, CO 80203

Marla D. Kelley
Paralegal

APPENDIX A

Media Petitioners

ABC, Inc. is a broad-based communications company with significant holdings in the United States and abroad. Alone or through its subsidiaries, it owns ABC News, abcnews.com, and local broadcast television stations that regularly gather and report news to the public. ABC News produces the television programs *World News with Diane Sawyer*, *Good Morning America*, *Nightline*, *20/20*, and *This Week with George Stephanopoulos*, among others.

The Associated Press ("AP") is a news cooperative organized under the Not-for-Profit Corporation Law of New York, and owned by its 1,500 U.S. newspaper members. The AP's members and subscribers include the nation's newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from 300 locations in more than 100 countries. On any given day, AP's content can reach more than half of the world's population.

Bloomberg L.P. operates Bloomberg News, one of the world's largest newsgathering organizations, comprised of more than 2,500 journalists around the world in more than 120 bureaus. Bloomberg provides business, legal and financial news through the Bloomberg Professional Service, Bloomberg's website and Bloomberg Television.

Cable News Network, Inc. ("CNN"), a division of Turner Broadcasting System, Inc., a Time Warner Company, is the most trusted source for news and information. Its reach extends to nine cable and satellite television networks; one private place-based network; two radio networks; mobile applications and websites around the world; CNN Digital Network, the No. 1 network of news Web sites in the United States; CNN Newsource, the world's most extensively syndicated news service; and strategic international partnerships within both television and the digital media.

CBS News, a division of CBS Broadcasting Inc., broadcasts and produces morning, evening and weekend news programming, as well as news and public affairs news magazine shows such as *60 Minutes* and *48 Hours*. CBS Broadcasting Inc. and **CBS Television Stations Inc.** are indirect wholly-owned subsidiaries of CBS Corporation. CBS Broadcasting Inc. owns and operates ten television stations across the county, and CBS Television Stations Inc. owns and operates two television stations, including Media Petitioner **KCNC-TV** in Denver, CO.

The Denver Post is a daily newspaper of general circulation, distributed throughout Colorado and also on the internet at www.denverpost.com. *The Denver Post* provides around-the-clock breaking news and award-winning, in depth coverage to issues of public concern affecting the people of this state and region, including criminal proceedings in courts of law.

Dow Jones & Company, Inc. is the publisher of ***The Wall Street Journal***, a daily newspaper with a national circulation of over two million, *WSJ.com*, a news website with more than one million paid subscribers, *Barron's*, a weekly business and finance magazine, and through its Dow Jones Local Media Group, community newspapers throughout the United States. In addition, Dow Jones provides realtime financial news around the world through Dow

Jones Newswires as well as news and other business and financial information through Dow Jones Factiva.

Fox News Network, LLC is the producer of the Fox News Channel (FNC), among other things. FNC is a 24-hour all-encompassing news service dedicated to delivering breaking news as well as political and business news. A top five cable network, FNC has been the most watched news channel in the country for more than ten years and according to Public Policy Polling, is the most trusted television news source in the country. Owned by News Corp., FNC is available in more than 90 million homes and dominates the cable news landscape, routinely notching the top ten programs in the genre.

Gannett Co., Inc. is an international news and information company headquartered in McLean, Virginia that publishes 82 daily newspapers in the U.S., including USA Today and the Ft. Collins Coloradoan, as well as hundreds of non-daily publications. Gannett's daily newspapers reach 11.6 million readers every weekday. In broadcasting, the company operates 23 television stations in the U.S. with a market reach of more than 21 million households. Each of Gannett's daily newspapers and TV stations operates Internet sites offering news and advertising that is customized for the market served and integrated with its publishing and broadcasting operations. Media Petitioner **KUSA-TV**, an award-winning Denver TV station owned by Gannett Co., Inc., is an affiliate of NBC. KUSA serves most of Colorado and portions of neighboring states and is the top-ranked TV station in Colorado in terms of viewers.

KDVR-TV/FOX 31 in Denver is owned and operated by Local TV, LLC and is an affiliate of Fox Television Stations. In its 44 hours of newscasts, and on its website, http://kdvr.com, KDVR provides its viewers and readers with breaking news and investigative reports on a wide range of topics affecting the daily lives of Coloradoans.

Los Angeles Times, published by the Los Angeles Times Communications LLC, is the largest metropolitan daily newspaper in the country. The Los Angeles Times operates the website www.latimes.com, a leading source of national and international news.

The McClatchy Company owns 30 daily newspapers in 29 U.S. markets, including *The Sacramento Bee*, *The Fresno Bee*, and *The Merced Sun-Star*, as well as *The Miami Herald*, *The Star-Telegram* of Fort Worth, *The Charlotte Observer*, and 45 non-daily papers. In each of its daily newspaper markets, McClatchy operates the leading local website, offering readers information, comprehensive news, advertising, e-commerce and other services.

National Public Radio, Inc. (NPR) is an award winning producer and distributor of noncommercial news programming. A privately supported, not-for-profit membership organization, NPR serves a growing audience of more than 26.5 million listeners each week by providing news and information programming to 285 member stations which are independently operated, noncommercial public radio stations. In addition, NPR provides original online content and audio streaming of its news programming. NPR distributes its programming worldwide. NPR.org offers hourly newscasts, special features and archived audio of its programming. NPR has no parent company and does not issue stock.

NBCUniversal Media, LLC is one of the world's leading media and entertainment companies in the development, production, and marketing of news, entertainment and information to a global audience. Among other businesses, NBCUniversal owns and operates the NBC television network, the Spanish-language television network Telemundo, NBC News, several news and entertainment networks including MSNBC and CNBC, NBCNews.com (formerly MSNBC.com), and an NBC television stations group consisting of 10 owned-and-operated television broadcast stations and a Telemundo stations group consisting of 12 owned-and–operated Telemundo broadcast stations, both of which produce substantial amounts of local news, sports and public affairs programming. NBC News produces the "Today" show, "NBC Nightly News with Brian Williams," "Dateline NBC," "Meet the Press" and "Rock Center with Brian Williams."

The New York Times Company is headquartered in New York and is the publisher of *The New York Times*, *the International Herald Tribune*, and *The Boston Globe*. *The Times* covers national and international news through bureaus around the U.S. and throughout the world.

The E.W. Scripps Company is a diverse media concern with interests in newspaper publishing, broadcast television stations and digital products. Scripps operates nineteen broadcast television stations in major U.S. markets, including Media Petitioner **KMGH-TV**, the ABC affiliate in Denver, and daily newspapers in fourteen markets.

The Washington Post publishes one of the nation's most prominent daily newspapers, as well as a website (www.washingtonpost.com) that reaches an audience of nearly 20 million unique visitors per month.

DISTRICT COURT **EAGLE COUNTY, COLORADO** 885 E. Chambers Road P.O. Box 597 Eagle, Colorado 81631	
Plaintiff: PEOPLE OF THE STATE OF COLORADO. **Defendant:** KOBE BEAN BRYANT.	▲ **COURT USE ONLY** ▲
	Case Number: 03 CR 204 Div.: R
ORDER RE NEWS MEDIA'S MOTION FOR PUBLIC ACCESS TO COMPLETE AND ACCURATE DOCKET LISTING OF ALL EVENTS AND FILINGS IN THIS CRIMINAL ACTION	

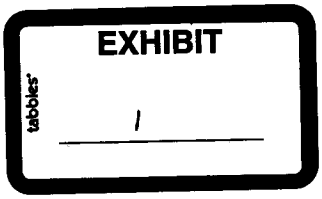
THIS MATTER comes before the Court on the News Media's Motion for Public Access to Complete and Accurate Docket Listing of All Events and Filings in this Criminal Action. The Court has reviewed the motion, Defendant and the People's responses, and the reply. Being fully advised, the Court finds as follows.

It appears to the Court that some clarification is required. The public website was established to alleviate the demand on the court clerks for copies of public filings.[1] The website was not and is not intended as a secondary docket system. The docketing system is the Register of Actions (ROA) maintained by the court clerks as entries are made in the ICON (Colorado On-Line Network) system. An ROA is generated by printing the ROA from ICON. The procedure has been that the ROA is released publicly only at the court location after printing and the Clerk of Court has had the opportunity to review the ROA and make the required redactions. The ROA contains a listing of all documents filed, scheduled events and minutes of proceedings.

Although the Media[2] and Defendant have presented argument pertaining to the First Amendment right of access, the Court finds such argument is unnecessary as Colorado law

[1] The public filings posted on the website do not include correspondence or other documents filed by the public or other nonparties. The correspondence and documents have been made available to the public and the Media for review at the clerk's office and copies, redacted as required by statute, have been provided upon request.

[2] The Media include ABC, Inc., the Associated Press, Cable News Network LP, LLLP, CBS Broadcasting, Inc., Colorado Mountain News Media, Inc, d/b/a *The Vail Daily,* The Denver Post Corporation d/b/a *The Denver Post,* FOX News Channel, Freedom Communications, Inc., d/b/a *The Orange County Register, Los Angeles Times,* National Broadcasting Company, Inc, the *New York Times* and *USA Today.*



makes express provision for the public release of an ROA as noted by Media and ignored by Defendant in his response. The People have no objection to the Media's motion. No motion has been made to seal the ROA.

> The judgment record and register of actions shall be open at all times during office hours for the inspection of the public without charge, and it is the duty of the clerk to arrange the several records kept by him in such manner as to facilitate their inspection. In addition to paper records, such information may also be presented on microfilm or computer terminal. C.R.S. § 13-1-119.
>
> Crim. P 55 provides in relevant part.
>
> **(a) Register of actions (criminal docket).** The clerk shall keep a record known as the register of actions and shall enter therein those items set forth below.
> ....
> (4) ... All papers filed with the clerk, all process issued and returns made thereon, all costs, appearances, orders, verdicts and judgments shall be noted chronologically in the register of actions. These notations shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. Crim P. 55.

Pursuant to Chief Justice Directive 98-05 (1998)[3] "[m]aterials associated with court files including ... registers of actions (whether or not printed from ICON) ... shall be available to the public at each court respectively" unless "declared to be private or confidential by statute or specific order of court" and subject to the exceptions set forth in I.A including good cause shown. Requests to inspect or copy an ROA are to be made pursuant to C.R.S. § 24-72-301. Pursuant to C.R.S. § 24-72-304(4), the records in sexual assault cases are open to the public with the exception of the name of a victim of sexual assault or alleged sexual assault. Also, release of criminal justice records is subject to C.R.S. § 24-72-301, *et seq*.

Upon review of the statutes, Crim. P. 55, the directive and the ROA, and in the absence of any motion or showing of good cause to seal the ROA, the Court finds that public access to the ROA is appropriate subject to redaction of prejudicial matters or matters determined to be confidential by statute or previous court order.[4] Documents filed with the Court are generally entered on the ROA by the title given by the parties. The Court does not agree that all sealed documents are to be referenced only as "sealed document." Failure to reference the nature of the documents precludes or unnecessarily complicates any meaningful opportunity for public or Media review or challenge. Although specific factual assertions may be prejudicial, general identification of the contested issues is typically not prejudicial and is necessary for an informed public. The printed version in PDF form of the current ROA will be released with the full title of the document unless a showing is made that a specific prejudice will result which redaction would mitigate, or that redaction is compelled by statute or court order. Therefore, a copy of the

[3] Chief Justice Directive 98-05 may be accessed on the Colorado Judicial Branch website in the Colorado Supreme Court section.

[4] For example, minutes of *in camera* court proceedings will be redacted as necessary.

existing ROA will be provided to Defendant and the People under seal. Each shall have 5 days from the date of this Order in which to submit proposed redactions. Any such proposed redactions shall be supported by citation to the appropriate legal authority or court order.

Upon receipt of the proposed redactions, the Court will review the ROA and determine whether the proposed redactions are valid. In order to alleviate the demand on the court clerks, the ROA will then be posted on the public website in redacted form. The Court will continue to post weekly updates of the ROA on the public website after 1:00 p.m. each Friday. All parties are advised that the title of any document filed in this Court, regardless of whether it is sealed, and as entered on the ROA will be posted on the public website. The titles of documents shall reflect the general nature of the subject matter of the document. The Court will continue to redact the minutes as it determines is necessary and to redact the name of the victim and identifying information as required by statute. If any other document is submitted for which the title is required to be kept confidential by statute or court order, the party filing the document shall so advise the Court and cite the specific authority at the time of filing.

Of particular concern to the Court upon review of the ROA is the number of documents filed under seal notwithstanding the Court's previous Order Denying People's Request for Forthwith Motion That All Motions Containing Evidentiary or Potential Evidentiary Material Be Filed Under Seal entered on December 8, 2003. It appears to the Court that many of the documents could have been filed as a public motion with a sealed offer of proof as ordered or could also have been submitted in redacted form for public distribution. Based on this lack of compliance, the Court hereby orders as follows.

1. No documents, except as provided in Paragraphs 2 and 3 below, shall be filed under seal unless a motion to seal is filed simultaneously or the document is also filed in redacted form for public distribution. The motion to seal shall include citation to legal authority in support of the request to seal and shall be publicly posted. Upon the filing of a motion to seal, any opponent shall have 10 days to respond and the movant shall have 5 days to reply unless otherwise ordered.

2. Unsealed documents may be supported by offers of proof filed under seal. The offers of proof shall include only the specific factual assertions pertaining to matters not previously disclosed and which may reasonably be characterized as prejudicial or mandated as confidential pursuant to court order or statute. All legal argument shall be contained in the unsealed document.

3. Documents may be filed under seal when required by court order or statute subject to the provisions of this Order pertaining to the title of documents.

4. Any Court order filed under seal and any oral orders made from the bench shall be reflected in the ICON ROA.

IT IS THEREFORE ORDERED,

The News Media's Motion for Public Access to Complete and Accurate Docket Listing of All Events and Filings in this Criminal Action is granted as set forth above.

DATED THIS 24th DAY OF FEBRUARY, 2004.

BY THE COURT

W. Terry Ruckriegle
Chief District Court Judge

CERTIFICATE OF MAILING

I hereby certify that I have, on this _____ day of _____, 2004, mailed and/or faxed a true and correct copy of the foregoing ORDER by U.S. Mail, postage prepaid, to the following:

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MEDIA GUIDE TO COLORADO COURTS

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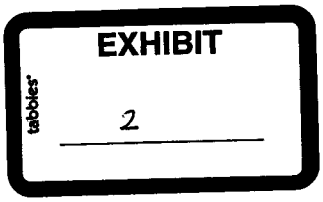

6th printing, Summer 1998

INTRODUCTION

"Law is the pride of the human intellect; the collected wisdom of ages combined with the boundless varieties of human concerns." - Sir Edmund Burke.

This guide seeks to accomplish three primary goals: (1) to provide a basic understanding of the principles and procedures guiding Colorado's judiciary; (2) to answer some basic questions about the role of the judiciary; and (3) to assist in finding answers to other questions that may arise.

The authority of judges, is different than the authority of members of the executive and legislative branches of government. It is defined and limited by the state and federal constitutions, legislative enactments, common law appellate decisions and the facts of the case before the court. Judges have the responsibility of deciding cases fairly and impartially. That is the hallmark of the judicial function. Judicial decisions cannot be base on personal caprice or public outcry.

While attention often focuses only on some isolated aspect of a judge's decision, these decisions cannot be understood and therefore explained without reference to the branch as a whole. We hope this book will increase your understanding of the judicial branch and aid you in conveying that understanding to the public.

The Colorado Supreme Court
Committee on Public Education
The Hon. Thomas W. Ossola, Chair

This booklet is published by the Public Education Committee of the Colorado Supreme Court, with cooperation from the Freedom of Information Council, whose membership includes 16 organizations with an active interest in First Amendment issues.

It is intended to be a resource for journalists covering the courts and legal issues in Colorado. Its purpose is to supplement reference information about the law and the judicial branch. Information in this book is designed to guide reporters through the Colorado court system. The questions-and-answers, while based on Colorado law, are not endorsed by the Colorado Supreme Court. Sections could change as court decisions are issued and laws are passed after the publication of this booklet.

Please contact the Colorado Judicial Branch if you have questions or if you have suggestions on how this publication might be improved or changed:

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Open Records

Sources of Open Records Law

Colorado law generally requires that all court files in all courts remain open for inspection by the public during the hours that courts are open for business. There are three sources of this policy.

Colorado Revised Statutes Section 30-10-101(1) provides that all records in the offices of the clerk of the district and county courts are generally open to examination by any person during court hours.

In Times-Call Publishing Co. v. Wingfield, 159 Colo. 172, 410 P.2d 611 (1966), the Colorado Supreme Court held that the statute governing public access to court files authorizes access to the media because of First Amendment considerations and that access must be permitted where the subject matter of the case is of public interest.

Chief Justice Directive 98-05 provides policies for access of the public to documents and materials in the court. The directive: creates a public access committee to provide direction to the courts; authorizes the local court to enter a blanket order declaring certain types of materials shall not be made available to the public; authorizes the court to suppress publication of documents for good cause for a specific period of time; establishes procedures for accessing electronic data and sets out electronic data which shall not be released to the public.

Section 1-5 of Rule 121 of the Colorado Rules of Civil Procedure, applicable in civil cases, provides that access may be limited to court files only in certain circumstances and only by order of the court. This rule reflects the general policy that court files are open to the public unless otherwise ordered.

Criminal

Generally, court records in criminal cases are open for public inspection. This includes search warrants and search warrant affidavits, the information or indictment, motions, and other materials contained in the file. Nevertheless, court records may be sealed at the request of either the prosecution or defense. In criminal cases, the American Bar Association Standards for Fair Trial and Free Press, which were adopted by the Colorado Supreme Court in Star Journal Publishing Corp. v. County Court, 197 Colo. 234, 591 P.2d 1028 (1978), and the First Amendment require the party seeking to seal the file to show that there is a clear and present danger to the fairness of the trial and that the prejudicial effect of such information on trial fairness cannot be avoided by any reasonable alternative means. This is a higher standard than would be required to close a file in a civil case and must be met because the First Amendment guarantees the right of public access to court records in criminal cases and because the Sixth Amendment guarantees the right to a public trial.

There are certain specific exceptions to the presumption of open records in criminal proceedings. By statute, grand jury proceedings are kept secret until an indictment is made public or a grand jury report is issued. In sexual assault cases, Colorado Revised Statutes Section 24-72-304(4) requires that the name of any victim of certain sexual assaults or alleged sexual assaults be deleted from any court file before it is released to the public.

Civil

Under Section 1-5 of Rule 121 of the Colorado Rules of Civil Procedure, a court may limit public access to court files only upon a showing by a person in interest, i.e., a party or witness, that the public interest in access to the files is outweighed by the harm to that person's privacy that would be caused by public access. Typical cases where the court might be asked to seal the file include cases involving trade secrets or other proprietary information, and cases involving allegations of sexual misconduct, identities of minors, and psychiatric or mental health records. The court may also issue protective orders to restrict public access to materials obtained in discovery in civil litigation.

Arkansas Valley Publishing Co. 675 P.2d 747 (Colo.App. 1983).

The allegations in the article contain many defamatory facts — both disclosed and undisclosed. The allegations that the buyer of the Sheridan has the motto, "We screw the other guy and pass the savings to you," that they are not as nice as terrorists, that they don't care about people, that they got the hotel in a hostile takeover, and that they have drug-money partners, are all defamatory. Some statements are defamatory in themselves and some because of undisclosed, but implied, defamatory facts. These facts could reasonably be expected to exist as the writer portrayed himself as an expert on financial matters who could know background facts on the purchaser. In this case some underlying facts were disclosed but only in a publication six weeks after the initial publication. Thus, the underlying facts were not published prior to or simultaneously with the alleged libel as in *Lane, supra*, and *Sall v. Barber*, 782 P.2d 1216 (Colo.App. 1989).

D. *Susceptible of Proof or Disproof*

To be actionable, a statement must be factual and capable of proof or disproof. *Milkovich v. Lorain Journal Co.*, 111 LEd.2d 1 (1990); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767; *Burns, supra; Sall, supra*

These allegations, or their implied underlying facts, are capable of proof or disproof. The plaintiff could call witnesses to testify he is nicer than terrorists, had no drug-money partners, bought the hotel at a sale, etc. This is not opinion without a provable factual foundation such as "the defendant shows abysmal ignorance by accepting the teachings of Marx and Lenin." *See Milkovich, supra.* Thus the plaintiff could also prevail on this point.

E. *Rhetorical Hyperbole*

Speech is protected if it is rhetorical hyperboe, imaginative expression, or cannot reasonably be interpreted as stating actual facts. *Milkovich, supra; Greenbelt Cooperative Publishing Assoc. v. Bresler*, 398 U.S. 6 (1970); *Old Dominion Branch No. 46, Letter Carriers of America v. Austin*, 418 U.S. 264 (1974); *Hustler v. Falwell*, 99 LEd.2d 41; *Pring v. Penthouse*, 695 F.2d 438 (1982); *Sall, supra;* and *Lane, supra.* Contrary to plaintiff's position, his type of speech is protected even if it is apparently based on undisclosed facts. Ms. Pring (in *Pring, supra*) was portrayed as winning a beauty pageant by levitating pageant officials by acts of fellatio. This is literally impossible but there could be the implied assertion that she had sex with pageant officials. Nevertheless, her case was thrown out. In *Falwell, supra*, the plaintiff was portrayed as having sex with his mother in an outhouse. This appears ridiculous on its face but there could be an implied assertion that the author knows of sexual improprieties by the plaintiff. However, this parody was held to be protected speech. In *Burns, supra*, the Court held the statements could be defamatory because they were not rhetorical hyperbole. *Burns, supra*, footnote two, page 1357. The protection of rhetorical hyperbole appears to apply whether the matter is of public concern or not. The court could find no decisions limiting it to matters of public concern. The issue of public concern relates only to the burden of proving actual malice.

The article in question starts from a factual basis — the owner of the Sheridan building has to sell out and the new owner is replacing the current bar and restaurant management. The author then wants to illustrate what an "unfriendly takeover" is by starting from these facts and elaborating a fictional scenario. The name of the new buyers, Ruth Less Securities Company, is obviously fictional. Its office locations are also obviously fictional as they are all what are commonly perceived as undesirable places. Their motto is also an obvious fiction. Their future plans — a taco take-out, half-way house for mental patients, parties of only thirty or more for dinner, being a hang out for gay terrorists, etc. — can not be reasonably interpreted as true. The town is rescued by the Yuppie Sheepherder. He cannot exist as his name is a contradiction in terms (unless he only herds sheep on weekends while away from his urban base).

This exaggerated scenario comes close to "the comments of a fictional character with an unlikely background" that "cannot be taken as serious allegations" that were protected in *Lane, supra*, p. 752. It is also similar to the parodies and fictions that were protected in *Pring* and *Falwell*.

The allegations that the buyer is not as nice as a terrorist, has a motto that he "screws the other guy", and that the takeover was like Germany invading Poland are similar to such protected allegations as: "fascist" (*Buckley v. Littell*, 539 F.2d 882 (2nd Cir. 1976); "a SCAB is a traitor to his God, his country, his family and his class" (*Old Dominion Branch No. 46, Letter Carriers of America, supra*); "journalistic scum of the earth" (*Pease v. Telegraph Publishing Co.* 426 A.2d 463 (1981). All of these are rhetorical hyperbole rather than statements of fact.

[1] The question of whether allegedly defamatory language is constitutionally protected is a matter of law. *Sall, supra; Lane, supra; Pring, supra;* and *Greenbelt, supra.* What was written and the context in which it was written appears to be basically uncontroverted. There appear to be no genuine issues as to any material fact and thus the case is ripe for summary judgment. Based on the findings set forth above, the Court finds that the published article is rhetorical hyperbole and thus protected speech under the first Amendment to the United States Constitution and Section 10, Article II of the Constitution of Colorado.

Some people could find this article funny, harmless and instructive. Others could find it unfair, vicious, lacking in all humor, uninstructive and just plain stupid. It is not for the Court to judge on these matters as that would amount to censorship. The Court can only judge whether the article is protected as free speech. The worth of the article is to be tested in "the market place of ideas", not in the courts.

F. *Libel per se*

Plaintiff alleges this is a libel *per se* case and admits he cannot prove special damages. Defendants allege that since the plaintiff is not named in the article, it requires an "innuendo" (or further proof) to show the article is about him. Since an innuendo is required, it cannot be libel *per se*. The defendants' argument appears to be persuasive.

[2] To qualify as libel *per se*, the article must be "defamatory on its face . . . such that no extrinsic evidence is necessary to show either its defamatory nature or that it is of and concerning the plaintiff." *Lind v. O'Reilly*, 636 P.2d 1319 (Colo.App. 1981), p. 1320. In *Lininger v. Knight*, 226 P.2d 809 (Colo. 1951) the alleged libel named a business but did not identify the owner. The court held that linking the plaintiff to the business could only be done by innuendo and thus it could not be libel *per se*. In *Lininger, supra*. The correct name of the business was given and plaintiff's name was even part of that name. In this case, the business name is fictitious and so even more proof is necessary to link the libel to the plaintiff. The court believes this link could be made, as plaintiff was the owner of the corporation buying the Sheridan, but this requires extrinsic evidence and thus makes this a libel *per quod* case. Since plaintiff cannot show special damages, his case of libel must be dismissed.

III. *CLAIMS FOR OUTRAGEOUS CONDUCT AND INTERFERENCE WITH BUSINESS RELATIONS*

Both of these claims stem from the publication of the June 22, 1989 article. Since this publication has been found to be protected speech, any other tort claims based on it are also barred. *See, Falwell, supra*, and cases cited by the defendants.

IV. *MOTION TO AMEND*

Plaintiff has moved to amend his complaint to further specify his libel *per se* claims and to add a fourth claim for interference with business relations of New Sheridan, Inc. The amendment to the first claim is useless based on the ruling on libel *per se* on summary judgment. The new fourth claim cannot succeed since it is based on protected free speech. Therefore, the motion to amend is denied.

V. *MOTION TO DISMISS*

Defendants have moved to dismiss based on discovery violations. Apparently this issue is moot as plaintiff has supplie[illegible]rts and aut[illegible]

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COLORADO v. KING

Colorado County Court
City and County of Denver

THE PEOPLE OF THE STATE OF COLORADO v. JAMES KING, No. 356315-12, July 29, 1991

NEWSGATHERING

Access to records—Judicial—Criminal—Pre-trial/discovery (§38.1503.04)

Access to records—Law enforcement—In general (§38.1701)

Affidavits filed in support of search warrants issued in murder investigation should be unsealed, in view of Colorado trial court's finding that disclosure of such records would not create clear and present danger to defendant's fair trial rights, and that any prejudicial effects upon that right can be avoided by other reasonable alternatives.

News media organizations sought access to sealed affidavits and other documents filed in support of search and arrest warrants.

Records ordered unsealed in bench ruling.

[Editor's Note: On Aug. 2, 1991, the Colorado Supreme Court denied the defendant's motion for a writ of prohibition].

A. Bruce Jones, Stephen A. Bain, and Gordon A. Greiner, of Holland & Hart, Denver; Elizabeth McCann, of Cooper & Kelley, Denver, for media organizations.

Walter L. Gerash, of Gerash, Robinson & Miranda, Denver, for defendant.

William P. Buckley and S. Lamar Sims, deputy district attorneys, Denver, for the state.

Transcript of Court's Ruling

Bohning, J.:

The record then will reflect we're back in open court regarding this matter in the—in the King matter. The record should reflect that this Court has completed an in-camera hearing with the district attorney, defense counsel, and the defendant present, for purposes of allowing them to record any specific objections they have to release of information contained in the affidavits that were ordered sealed previously by three other County Court Judges and a District Court Judge. The District Court Judge, Judge Fullerton, remanded certain sealed documents to this Court for purposes of hearing any proceedings regarding the propriety of unsealing or ordering that the matters remained sealed.

And I—the record should reflect that defense counsel's present, Mr. King is present, the deputy district attorneys are present, Ms. McCann, representing the *Denver Post* is present; and Mr. Jones is present, representing various media organizations.

Certainly, this is a very significant case which in all likelihood will be appealed, no matter what this Court holds. This Court having been a Denver County Court Judge 11-1/2 years, I'm going to make just a couple observations on warrants in Denver.

The vast majority of warrants issued in Denver are—are ordered upon order of the—one of the 17 County Court Judges; and I know from 11-1/2 years experience and being familiar with the practices of other Denver County Court Judges, that very, very few warrants are ordered sealed. In my—I have not taken a scientific count, but I myself have signed maybe several—at least several thousand warrants; and I can—I would conclude that not more than one percent of search warrants and arrest warrants in the City and County of Denver are ordered sealed. And that is, generally they are ordered sealed until the time of arrest or possibly until the time charges are filed. So it's hardly like the City and County of Denver is a bastion of sealed arrest warrants and sealed search warrants.

In fact, the cases cited by *Denver Post* in this matter, curiously enough, were all litigated in Boulder. It would lead me to believe that Boulder Judges order more warrants sealed than in the City and County of Denver. Now, of course, the Denver District Court Judges have to, by statute, act on warrants for wire-tapping investiga—investigations that involve wire-tapping. I can say, with almost certainty, that the district attorney in Denver does not request more than one percent of the warrants be sealed; and the Courts do not order records sealed, unless it's on a—on motion of the district attorney.

I've noted before reasons that warrants may be sealed. They may be sealed to assist ongoing investigations. They may be for protection of witnesses. They may involve confidential informants. They may involve possible attorney/client matters, other matters of confidentiality.

I might note that there's a split of authority in these cases cited by the parties. In the cases cited by the attorneys for the media, there is not one—not one case that holds that the press has an absolute access to public records, including search warrants. That is, that each and every one of these decisions recognize some limited exception; and there is an absolute split of authority—as noted by Mr. Gerash, there's an absolute split of authority in the Federal Circuit Court cases. That is, for example, in the—the case cited previously, *Baltimore v. Getz* (phonetic) at 886 F.2d, specifically at page 64. That Court, in its decision, notes that the Federal Circuit Courts are split on the press's First Amendment right of access to search warrant affidavits. For example, the *Times Mirror Company v. Copley Press*, 873 F.2d 1210, found no First Amendment right of access. In regard to the search warrant for *Secretarial Area*, 855 F.2d 569, that Court, the Eighth Circuit, found a right—a First Amendment right of access.

As noted by Mr. Gerash, there was a Tenth Circuit Court of Appeals case that involved request for access to records; specifically, a plea bargain record. The Tenth Circuit Court of Appeals, which is the Federal jurisdiction that includes Colorado, found there was a common law right of access to inspect and copy judicial records. However, under a Federal Court Rule, the Tenth Circuit Court of Appeals found the District Court had discretion to grant or deny a hearing on defendant's motion to produce a sealed Court file. So there is a significant division of authority in the Federal Courts.

The Colorado Supreme Court has not yet been called upon to decide this specific issue about application for public access to search warrants; nor has the U.S. Supreme Court been called—or have they been called upon to decide this specific access issue to public records. However, many cases refer to the—the important role the press plays in reporting on trials. As noted in the *Gentile* case, many people rely on information in the media for their information about the judicial process; so this Court does certainly acknowledge the strong presumption in favor of the press for access to public documents.

Now I'm also aware of the publicity that has sometimes jeopardized cases. For example, a—one murder conviction was overturned because of prejudicial reporting by the *Denver Post and Rocky Mountain News*. And that was a case involving *Walker v. People*, a 1969 Colorado Supreme Court decision, 458 P. 2d 238. In that particular case, a young lady was murdered in Boulder; a man was tried and convicted by a jury. And the Colorado Supreme Court found that there had been massive, pervasive, and prejudicial publicity about the case that they overturned this murder conviction.

In that particular case, for example, the *Denver Post* hired Earl Stanley Gardner; and he hired a nationally recognized expert on lie detectors, a nationally recognized expert in criminology. These people participated in the investigatory process to such a great extent that it was part of the reason this murder conviction was overturned. In that same case, the *Rocky Mountain News* reported, for example, the last minutes of the victim here; a one Theresa Catherine (phonetic) Foster. The *Rocky Mountain News* printed a picture of the eyes of the victim, as she would appear before she was murdered. The only trouble was, they weren't really her eyes; and this story was interspersed with the—her suspected last words were—which were the Hail Mary Prayer, throughout the article. So we can say, well, this is an older case. We hope the journalistic standards have become of higher magnitude here. But nevertheless, since this case was decided in 1969, the Colorado Supreme Court has referred to this case a number of times since then, so it is still a yardstick in this state.

It was referred to in *People v. Botham* (phonetic), where four murder convictions were reversed, based in part because of extensive pre-trial publicity. That case is found at Colorado 629 P. 2d 589. So I am not unmindful of these matters and have taken these matters into consideration on this motion to unseal the records.

While the Colorado Supreme Court has not acted specifically on this question of whether search warrants should remain sealed, or whether there is a right of public access by either the U.S. Constitution, the Colorado Constitution, by statute, or by common law right of access, after considering these matters, after considering all of the evidence introduced in this matter, after considering the arguments of all counsel, I'm going to find that the best yardstick that the Colorado Supreme Court has found to measure these matters is that set forth in *Star Journal Publishing Corporation v. County Court*, which held that criminal proceedings—or pre-trial proceedings in crimi-

nal cases are presumptively open, and a Court may close a hearing only, one, if the dissemination of information therefrom would create a clear and present danger to the fairness of the trial; and secondly—the second prong of the test is that the prejudicial effect upon the defendant's right cannot be avoided by any reasonable alternative means.

And after having reviewed the record in this matter, having reviewed all of these warrants in camera, allowing counsel for the district attorney and the defense to make specific objections to the motion to unseal the records, I'm going to find that—that opening these records for public access would not create a clear and present danger to the fairness of the trial, and that prejudicial effect upon the defendant's right can be avoided by other reasonable alternatives. For example, in the *Botham* case, Justice Erickson, writing for the Colorado Supreme Court, wrote that a trial Judge, one, may cause extensive voir dire examination of prospective jurors; change the trial venue to a place less exposed to intense publicity; three, postpone the trial to allow public attention to subside; four, impanel veniremen from an area that has not been exposed to intense pre-trial publicity; five, enlarge the size of the jury panel and increase the number of preemptory challenges; and six, use emphatic and clear instructions on the sworn duty of each juror to decide the issues only on the evidence presented in open court.

So I believe these are alternatives that are available. Even assuming—and there has not been a preliminary hearing conducted yet, so we don't know if probable cause will be found or not; but even assuming probable cause is found and the matter is set for trial in this matter, we know that all of those safeguards are in place to ensure a fair trial for the defendant in this matter.

Now, I would note that now the City and County of Denver has a population—total population of somewhere between 475,000 to 500,000; and noting that—

(WHEREUPON, the tape is changed.)

THE COURT: We would note that both the defense and the district attorney are opposing this motion to allow public access to these records, so I anticipate an appeal may be filed in this matter. I have made specific findings about the contents of the search warrants, arrest warrant, the in-camera proceeding that's been preserved for any Appellate Court action; but in order to give counsel—well, any counsel time to appeal this matter, I'm going to stay execution on this order. I'm going to allow through Thursday of this week, August 1st. If no appeal is filed by that time, then we'll order that the public have access to these documents as of Friday morning, August 2nd.

BELTH v. GILLESPIE

California Court of Appeal
First Appellate District

JOSEPH M. BELTH v. ROXANI M. GILLESPIE, etc., No. AO51541, July 25, 1991

NEWSGATHERING

Statutory right of access—State open records acts (§44.17)

Judicial review—Attorney's fees; costs (§66.07)

California Government Code Section 6259, subdivision (d), mandates award of attorney's fees to plaintiff who prevails in action filed under California Public Records Act; litigant whose lawsuit resulted in defendant's voluntary disclosure of documents, in response to suit, has "prevailed," even if disclosure was not judicially mandated.

Action to compel disclosure of public records. From decision of the California Superior Court, San Francisco County, denying requests for attorney's fees, plaintiff appeals.

Reversed.

Robert C. Fellmeth and Carl Oshiro, San Francisco, Calif., for plaintiff.

Daniel E. Lungren, attorney general, Timothy G. Laddish, senior assistant attorney general, and Richard F. Finn, supervising deputy attorney general, San Francisco, for defendant.

Full Text of Opinion

Before Low, P.J., and King and Haning, JJ.

King, J.:

In this case we hold that Government Code section 6259, subdivision (d), mandates an award of court costs and reasonable attorney fees to a plaintiff who prevails in litigation filed under California's Public Records Act. We further hold that the plaintiff has prevailed within the meaning of the statute when he or she files an action which results in defendant releasing a copy of a previously withheld document.

Joseph M. Belth appeals from an order denying his request for statutory attorney fees in connection with Public Records Act litigation against then-Insurance Commissioner Roxani M. Gillespie.

Belth is a Professor of Insurance at Indiana University School of Business and Editor of *The Insurance Forum*, a monthly industry periodical. On April 13, 1990, under California's Public Records Act (Gov. Code, §§6250 et seq.), Belth requested from the Department of Insurance copies of seven sets of documents regarding Executive Life Insurance Company. On April 19, the Department denied his request, stating that as to item 1, "the Insurance Commissioner has determined that these documents are confidential and, therefore, not open to public inspection, in accordance with California Insurance Code Section 1215.7," and with regard to items 2 through 7, "we deem these documents to be confidential, pursuant to Government Code Section 6254 and Insurance Code Section 12919, since they were received as part of information collected during a special examination by the Department on Executive Life Insurance Company."

On September 10, Belth petitioned for a writ of mandate compelling the Commissioner to provide him with the information in item 1 of his original request, i.e., "all documents reflecting her approval of the $45 million repayment by Executive Life Insurance Company to its parent First Executive Corporation," as well as reasonable attorney fees and costs. (Gov. Code, §6259.) After the trial court issued an alternative writ, the Commissioner filed a return in which she averred that "the subject documents have been provided to petitioner . . . because Executive Life Insurance Company consented to the waiver of the[ir] statutory confidentiality," opposed Belth's attorney fee request, and asked that the Department be awarded attorney fees on the grounds that Belth's request was "clearly frivolous." (Gov. Code, §6259.) After a hearing, the trial court issued an order denying both attorney fee requests.

Subdivision (d) of Government Code section 6295 provides, "The Court shall award court costs and reasonable attorney's fees to the plaintiff should the plaintiff prevail in litigation filed pursuant to this section." Belth maintains he prevailed in this litigation by obtaining the requested documents. The Commissioner responds that the threshold question is whether the statutory provision is mandatory or discretionary.

A.

" 'Shall' is mandatory and 'may' is permissive." (Gov. Code, §14.) "Ordinary deference to the Legislature entails that when in a statute it uses a term which it has defined as a word of art the term be given its legislatively defined meaning by the courts. Such, however, is not always the case in the use of the word 'shall.' " (*Governing Board v. Felt* (1976) 55 Cal.App.3d 156, 161.) "The use of the word 'shall' does not in every instance require that the language be construed as mandatory. Whether the word 'shall' occurring in a code section is to be construed to be mandatory or directory depends upon the intention of the Legislature." (*People v. Superior Court* (1970) 3 Cal.App.3d 476, 485–486.) "The definition of 'shall' as mandatory in the pertinent provision of the [Government] Code itself requires that absent some indication that the statutory definition was not intended, it must be applied." (*Governing Board v. Felt, supra*, 55 Cal.App.3d at p. 163, citation omitted.)

There is no such indication in this case. On the contrary, all the evidence suggests the Legislature intended subdivision (d) to be mandatory. The attorney fee provision was added to section 6259 in 1975 as part of Assembly Bill 23. (Stats. 1975, ch. 1246, §9, p. 3212.) The Legislative Counsel's Digest of Assembly Bill 23 (2 Stats. 1975 (Reg. Sess.) Summary Dig., p. 345) states, "In addition, this bill would, with respect to both the Legislative Open Records Act and the Public Records Act, require the award of court costs and reasonable attorney's fees to a plaintiff who prevails in the action, and to the public agency when the court

COUNTY COURT, MESA COUNTY, COLORADO

Criminal Action No. 02CR

AFFIDAVIT IN SUPPORT OF ARREST WARRANT

PEOPLE OF THE STATE OF COLORADO

V.S.

Michael Francis Blagg (DOB 02/18/63) White male, 6'01", 200 lbs, brown hair, hazel eyes, SSN: 507-94-2197

COMES NOW, ***Sergeant Wayne Weyler,*** being of lawful age and first duly sworn upon oath, states and alleges in support of an arrest warrant for the above-named Defendant as follows:

1. Your affiant is a duly employed law enforcement officer with the Mesa County Sheriff's Office, Grand Junction, Colorado at all times relevant to this affidavit. The information contained in this affidavit was compiled by your affiant in the course of an official criminal investigation by speaking to fellow law enforcement officers, citizen informants, personal observations, and reviewing official law enforcement reports. All locations referred to are in Mesa County, Colorado unless specifically noted otherwise.

2. Your affiant is a 21-year employee of law enforcement, almost 16 years with the Adams County Sheriff's Office and a 5 year employee of the Mesa County Sheriff's Office. Your affiant has spent 16 years in Investigations, 15 years of that working crimes against persons cases. Your affiant has investigated in excess of 75 homicides and over 500 unattended deaths, suicides and accidental deaths. Your affiant has investigated approximately 30 kidnappings or purported kidnappings. Your affiant has had hundreds of hours of training throughout the Western United States in the investigation of homicides, unattended deaths, suicides, accidental deaths, kidnappings, domestic violence, crime scene interpretation and analysis, profiling, Interview and Interrogation and Investigative Techniques. Your affiant has instructed in Homicide & Death Investigations, Sexual Assaults, Child Abuse Investigations, Preliminary Investigations and Interview and Interrogation. See attachment A, two pages for further details.

3. At about 1637 hours on 11/13/01, Mesa County Sheriff's Office Deputies Tim Orr and Jeff Doty were dispatched by 911 to 2253 Pine Terrace Court reference an unknown problem. While en-route, dispatch advised the responding deputies that the reporting person said his 34-year-old wife and 6-year-old daughter were missing, there was blood on a bed, items scattered around the house, and the back door was open. The reporting person advised dispatch he had left for work at 0600 hrs. on 11/13/01. While on the phone with a dispatcher, the reporting person, identified as Michael Blagg, advised he came home and found that his wife and daughter were missing and the contents of his wife's purse were strewn around on the floor and there was blood on the floor, dripping from the bed. While

EXHIBIT

tabbies

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talking to dispatch, Mr. Blagg went and checked for his daughter in her room and found her bed was unmade and his daughter's school clothes were still laid out as if she never got dressed for school.

4. Upon arrival, Deputies Orr and Doty contacted the reporting person, Mr. Michael Blagg, DOB 02/18/63, in the front yard of 2253 Pine Terrace Court. The deputies asked Mr. Blagg how he was doing and he stated "not so well" and then he handed them the keys to the residence stating the home was locked. Deputies Orr and Doty used the keys to open the front door and they entered the residence. The first room they observed was the living room, then a dining room, and then kitchen. The deputies observed the back door to the residence was standing open. Deputies Orr and Doty then walked down a hallway and into the master bedroom. Upon entry into the bedroom, Deputies Orr and Doty observed a bed with the bed covers pulled down. Deputies Orr and Doty said on the bed sheets they saw a puddle of red liquid substance, which they believed to be blood. Deputies Orr and Doty observed that the red liquid ran off the bed and onto the floor where a puddle of red liquid had formed. Deputies Orr and Doty briefly looked around the bedroom and observed a jewelry box was laying in disarray on the floor and money was also laying on the floor.

5. Both Deputies exited the residence and advised Sgt. Coleman of their observations. Deputy Doty took Sgt. Coleman into the master bedroom and showed him the crime scene. They left the residence and sealed the scene by placing crime scene tape around the residence. Both Deputies maintained security around the residence while Sgt. Coleman notified Investigations.

6. Deputy Orr, in a subsequent interview with Investigator Barley and Lt. Dick Dillon, stated that some of the blood was dry and did not have a glazed look. Deputy Orr stated based on his life and law enforcement experiences, he believed the blood to have been there at least 4 to 5 hours. Deputy Orr has been in law enforcement almost 2 years and has prior experience with search and rescue in Phoenix, Arizona. Your affiant spoke to Sgt. John Coleman with the Mesa County Sheriff's Office who stated when he viewed the blood on the bed and floor it did not look extremely fresh. Sgt. Coleman stated some of the blood on the bed and floor was coagulating, the blood was somewhat glazing over. Sgt. Coleman stated in his opinion that the time the blood needed to strain over the bed and onto the floor would have taken some time. Sgt. Coleman stated it was his opinion based on his 8 years in law enforcement and approximately 30 to 40 suicide scenes in his career he believed the blood to have been there more than 3 to 4 hours but less than 24 hours.

7. On 11/13/01, Mr. Blagg responded to the Sheriff's Office and spoke with Investigator Steven King and Sgt. Wayne Weyler for approximately 7 hours. Mr. Blagg said he last saw his wife, Jennifer Blagg, DOB 01/08/67, and his daughter, Abby Blagg, DOB 03/21/95, at approximately 0600 hours on 11/13/01, prior to leaving the home for work. Mr. Blagg stated he called home several times during the day to check on Jennifer. Mr. Blagg stated he called home at approximately 0700 hours, 0705 hours, 1000 hours, noon time and finally at around 1500 hours and was not able to make contact with Jennifer or Abby Blagg. Mr. Blagg stated he became concerned that Jennifer was not answering the home phone or her cellular phone by noontime. Mr. Blagg stated he did not call Abby's school to check on Abby or to see if his wife Jennifer was there. Jennifer Blagg volunteers some of her time at Abby's school, Bookcliff Christian School. Mr. Blagg in his interview said he got up at 0530 hours and he physically saw both Jennifer and Abby and they were both sleeping. Mr. Blagg states he got to work at 0600 hours.

8. Mr. Blagg, in his interview with Investigator King and your affiant, points out in detail that he saw that two pillows missing from the bed, a third was left on the bed, the jewelry box was on the floor and the contents of the purse were on the floor. Mr. Blagg stated his wife's vehicle, a maroon Ford Windstar, was parked in the garage. Mr. Blagg said the backdoor to his residence was open when he got home and this door normally has a small portable battery operated alarm on the handle. The alarm was still on the door handle but was not sounding when Mr. Blagg got home. Mr. Blagg gave specific details of items that had been tampered with. Mr. Blagg did not point out anything else in the house that was tampered with. It is noteworthy that Mr. Blagg could point out the only things in the house that had been tampered with and actually did match what was later found in the crime scene. Mr. Blagg denied having anything to do with his wife and daughter's disappearance or harming either of them in any way. Mr. Blagg said he has no idea where his wife and daughter are located or why the home was in disarray. Michael Blagg states his wife normally drives the maroon Ford Windstar and he drives a 1998 Dodge Stratus, SD, bearing Colorado license plate 356-BCM. Mr. Blagg states they do not own any other vehicles. Mr. Blagg described himself and his wife as devout "Born Again Christians" and that his life was open as a book for us to investigate.

9. On 11/13/01, your affiant contacted both St. Mary's Hospital and Community Hospital and found neither Jennifer nor Abby Blagg were there receiving medical treatment. Subsequently Investigators with the Mesa County Sheriff's Office have checked with all conventional modes of transportation leaving the Grand Junction, Colorado area, i.e., planes, trains, buses and automobile rentals and have found no evidence of Jennifer and/or Abby Blagg voluntarily leaving the Grand Junction area using their correct identifications. All known financial records and accounts available to Jennifer Blagg have been checked and no withdrawals or credit card usages have been found that would provide the finances needed to travel. As of 06/05/02 no ransom calls, letters or attempts from Abbey or Jennifer Blagg have been received.

10. On 11/13/01, Deputy Orr contacted Mesa County Deputy District Attorney Eret, who lives near Mr. Blagg's residence. DDA Eret stated she observed Mr. Blagg arrive at his home at about 1620 hrs. on 11/13/01, driving a white colored Dodge Stratus bearing Colorado License Plate #356BCM that was currently parked in the street in front of 2253 Pine Terrace Court. An NCIC/CCIC check of Colorado license plate #356BCM shows registered to a 1998 Dodge Stratus, VIN #1B3EJ46XXWN212268 to Michael and Jennifer Blagg.

11. Employees and co-workers at Ametek Dixson where Michael Blagg works stated they saw Michael Blagg arrive at work between 0540 hours and 0600 hours. A videotape at Ametek- Dixson showed Michael Blagg at an entrance door at 0556 hours on 11/13/01. Employees and coworkers have accounted for the majority of time for Michael Blagg between 0540 hours and 1600 hours. Some co-workers indicated that Michael Blagg was seen more frequently around the office than usual on 11/13/01. Employees stated Michael Blagg ate lunch in the company lunch room, which was unusual for him.

12. On 11/13/01 at approximately 0535 hours, Joan Cordova, an Ametek Dixson employee, saw Michael Blagg at Ametek-Dixson near the loading dock area. Joan Cordova said she saw Michael Blagg at the loading dock area over 20 times during the day on 11/13/01. Joan Cordova

stated on a normal day she would only see Michael Blagg once or twice a day, if at all. Joan Cordova described Michael Blagg as being dazed but also surprised which was unusual for his demeanor as he was usually very composed.

13. On 11/13/01, Shawn Wallace, another employee of Ametek-Dixson, saw Michael Blagg pushing a pallet jack with two large cardboard boxes toward the rear of the building where the loading docks are. Shawn Wallace asked if he could assist Michael Blagg in moving the boxes. Michael Blagg looked at Wallace with a serious look on his face and stated, "nope, just get away." Mr. Wallace stated that Michael Blagg's voice was serious and strong and Shawn Wallace was surprised by Michael Blagg's reaction. Wallace has offered assistance to Michael Blagg in the past and Michael Blagg had never responded in the manner he did on 11/13/01.

14. Michael Blagg was overseeing a operations move to Mexico where a trailer was being loaded in the loading dock area. According to Investigator King there is only one loading dock area and the trash compactor is on that loading dock. Investigator King also noticed that there is a bathroom and shower within approximately 20 feet of the loading dock.

15. Sergeant R. J. Russell with the Grand Junction Police Department determined that BFI had been requested to pick up the trash from the compactor on 11/13/01. Through further investigation it was determined that Julie Pommier with BFI was called on 11/13/01 by Jim Boden, who is an employee with Ametek-Dixson. BFI did pick up the trash from the compactor on 11/14/01. Jim Boden stated to Sergeant Russell that the trash is picked up when it is full and is not based on a schedule. Jim Boden stated that he (Jim Boden) specifically requested the trash be picked up and Michael Blagg had no conversations with him about when the trash would be picked up.

16. On 11/13/01, Investigator Ehlers obtained a search warrant for the Blagg residence, located at 2253 Pine Terrace Court, Grand Junction, Mesa County, Colorado, signed by the Honorable Judge Massaro. After the warrant was signed, Investigators G. Johnson and Jim Hebenstreit went through the residence in the evening hours of 11/13/01 to take video. While entering the front door in the foyer from the front door to the living room they observed clear liquid droplets on the floor. Investigator Hebenstreit recorded several messages from an answering machine in the residence none of which contained a ransom or kidnapping. There were several messages from Michael Blagg inquiring as to why Jennifer was not home.

17. On 11/14/01, agents with the Colorado Bureau of Investigations (CBI) and Investigators with the Mesa County Sheriff's Office executed the search warrant and processed the crime scene. CBI agents identified and collected several samples of a large amount of red stains on the top right corner of the master bedroom bed, below the bed and on the adjoining carpet. The mini van found parked inside the garage described as a Ford Windstar, maroon/beige in color bearing Colorado license plate 331 BCM, also had small droplets of red stains in the interior and exterior of the vehicle. Preliminary analysis of the blood samples resulted in identifying it as being "human" blood. There was no significant blood spatter high velocity or medium velocity patterns near the bloodstains on the sheets and bed. There were no trails or droplets of blood leading out of the master bedroom to the minivan.

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Luminol is a chemical agent which causes blood which is not visible to the naked eye to fluoresce under low light conditions. Luminol was used in the house and no stains, trails or droplets were found leading out of the bedroom to the garage or to any other portion of the residence. The bloodstain on the bed and adjoining carpet was unusual. Your affiant viewed the bloodstains on the bed and carpet at approximately 1800 hours on 11/13/01 and on 11/14/01. The stain was generally in a circular pattern. The stain was unusual in that the coagulated blood was along the perimeter or border of the circular pattern roughly between a 01:00 o'clock to 7:00 o'clock position. The top two-thirds of the stains were more watery than expected. Although the blood would separate into a more watery substance, there appeared to be more clear fluid than would be expected. Likewise the coagulation and breaking of blood to more clear fluid would indicate the blood had been there for a longer period of time. Several people with several years of experience, including your affiant, looked at the blood pattern and found it unusual. Wayne Bryant with the Colorado Bureau of Investigation, who has 30 plus years of processing crime scenes and Jerry Hill with the Grand Junction Police Department, who has over 20 years of processing crime scenes, viewed the blood pattern and found it unusual. It was your affiant and Jerry Hill's opinion that an additional clear liquid was introduced to the sheet where the bloodstaining was already present. There was also blood staining on the blanket and comforter, which was folded over at the foot of the bed. Below the bed on the carpet was dried blood indicating the blood was not fresh within the last few hours. There was a pattern off the bed down the mattress leading to the area where the carpet was, suggesting the blood on the carpet had dripped from the bed. There were no clear voids on the sheet on top of the bed suggesting a head or body had been lying there. There was a void on the side of the mattress on the sheet which appeared to be there from the dripping motion. There were transfer patterns of blood on the sheet near the circular bloodstaining. The minivan had trace amounts of blood in the front driver's side on the steering wheel, brake pedal, and driver's side front door handle. There were also trace amounts of blood droplets on the driver's side sliding door along the frame. There were no large amounts of blood found inside the van which could indicate the body or bodies could have been wrapped up tightly, not allowing blood from the body(s) to drip or drain inside the vehicle. The maroon/beige Ford Windstar Van has been seized and is in the custody of the Mesa County Sheriff's Office.

18. One pillow was found on the bed in the master bedroom. Michael Blagg told us that two pillows were missing from the bed that Jennifer would use on her side for comfort. There was a jewelry box and purse that appeared to have been tampered with lying on the floor of the master bedroom of the residence. The jewelry box was empty and the contents of a purse were dumped on the floor next to the empty jewelry box. There was a set of sweat clothes lying on the floor near the contents of the purse and jewelry box. In the sweat clothes were two sets of underwear. One pair of underwear that was inside the sweat pants indicated the sweatpants and one pair of underwear were taken off at the same time. On the dresser, a set of car keys belonging to the Ford Windstar were lying next to a black purse. In Abby's room, the bed was unmade and there was a doll on the bed with the doll's head partially on a pillow. The covers to the bed were pulled back leaving the bottom sheet and doll exposed. According to Mr. Blagg, as a matter of practice whenever Jennifer and Abby Blagg got up in the morning, they would make their beds. Nowhere else in the residence did it appear that anything had been tampered with or disturbed. No drawers appeared to have been opened and nothing appeared to have been rifled through. There were other valuables, including portable safes, a bag of money and a weapon in the master bedroom. The rest of the residence appeared undisturbed and several valuables that were readily viewable were not moved or tampered with. The house was in order and very clean. First impressions

of the scene by several experienced investigators, including your affiant, and crime scene technicians seemed to suggest the scene was "staged." There is no evidence of struggle between the killer/abductor and victim(s).

19. Dr. Robert Kurtzman, Forensic Pathologist and Coroner with Mesa County came to the scene and viewed the amount of blood on the bed and floor. Dr. Kurtzman's opinion was that the amount of blood found at the scene could amount to serious bodily injury or death to a small six-year-old girl and could amount to serious bodily injury or death to an adult if not treated in an appropriate amount of time.

20. Investigator Norcross with the Mesa County Sheriff's Office spoke to Marilyn Conway, mother of Jennifer Blagg. Marylyn Conway lives in Haltom City, Texas. Marilyn Conway said she last spoke to her daughter Jennifer on 11/12/01, in the evening hours. Marilynn Conway stated expected a phone call prior to about 0800 hrs. on 111301, due to Ms. Conway having a significant doctor's appointment concerning Ms. Conway's ongoing cancer treatment later that date. Ms. Conway said it was common practice for Jennifer Blagg to call her prior to doctor's appointments so they could pray together. Marilynn Conway stated she did not receive a phone call from Jennifer on 11/13/01, prior to 0900 hours Texas time, which was very unusual prior to a doctor's appointment. Ms. Conway said Jennifer Blagg knew Ms. Conway was having lunch with a cousin and Ms. Conway was also surprised when she returned home in the afternoon of 111301 and there was no phone message from Ms. Blagg.

21. Investigator Jim Hebenstreit spoke to Dianna Shirley who stated she spoke twice to Jennifer on 11/12/01, and then tried to call Jennifer Blagg twice at home on 11/13/01, the first time at approximately 0845 hours but did not get any answer. Sgt. R. Rosales interviewed Helen West, a neighbor across the street from the Blagg's, who stated she spoke to Jennifer Blagg on 11/12/01, at around 2000 hours.

22. Your affiant contacted Judy Currie who is another neighbor of the Blaggs'. Judy Currie stated between 1500 hours and 1530 hours on 11/13/01, she saw a Maroon/beige minivan driving toward 2253 Pine Terrace Court from Greenbelt. Ms. Currie stated she was sitting in her sewing room and saw the maroon van drive past the window she was sitting at, toward the Blaggs' residence on Pine Terrace Court. Ms. Currie stated she did not see who was in the van on this particular date, however, she did recognize the van as being the Blaggs', of which she often sees driving into the neighborhood at around that time. Ms. Currie states that the mother normally drives the van and she often sees the mother and her small daughter in the van.

23. Sergeant Rusty Callow interviewed Judy Currie again on 01/12/02. Ms. Currie told Sergeant Callow that she had seen Michael Blagg's van drive past the front of her residence on Pine Terrace Court during the early afternoon hours of 01/12/02. She stated that she thought Michael Blagg was riding in the passenger seat of the van, which was driven by a female. Ms. Currie asked Sergeant Callow if the van had been released to Michael Blagg. Sergeant Callow informed her the van was still being held as evidence. Ms. Currie repeated that the van she saw looked just like the Blagg's van and the person in the passenger seat looked like Michael Blagg. Based on surveillance conducted by members of the Mesa County Sheriff's Office on 01/12/02, Sergeant Callow determined that Michael Blagg was not in the area of Pine Terrace Court on that date.

24. On 11/16/01 and 11/17/01, Investigator Jim Hebenstreit interviewed Louella Cross. Louella Cross stated she use to work for Colorado Legal Services up to 11/09/01. Louella Cross stated around the beginning of November 2001, a woman and young girl came into Colorado Legal Services. The woman was frightened. The woman made mention "she couldn't handle it anymore ... I can't take anymore of this abuse." Louella Cross asked the woman if there was domestic violence; the woman said yes. The woman asked to see an attorney. Louella Cross advised her that she needed to fill out an intake sheet and the attorneys would review it. The woman became upset that she couldn't see an attorney and did not want to fill out any paperwork. Louella Cross stated she remembered the woman said she was from South Carolina and lived in the Redlands now. Louella Cross stated the woman was "scared to death." Louella Cross described the woman as being approximately 5'4" to 5'5", somewhat slender build, and her hair was kind of a brown color. She could not remember what the woman was wearing. Louella Cross stated the little girl was approximately 5 to 6 years old, wearing bib overalls, a blouse with puffy sleeves, white in color, with some stripes. Louella Cross stated she read the article in the newspaper and saw the picture of the missing mother and child and believed these were the two that were in her office approximately two weeks ago. Louella Cross states that what stuck in her mind was that the woman was from South Carolina. Investigator Jim Hebenstreit showed two photographs of Jennifer Blagg and Abby Blagg to Louella Cross. Louella Cross immediately stated the picture of the little girl was the same little girl that came into her office with her mother looking for an attorney. Ms. Cross stated she was almost positive that the photograph of Jennifer Blagg was the mother who came into her office.

25. On 11/17/01, your affiant checked our in-house Sheriff's Department computer records and learned that the telephone number #970-245-4649 is listed to Michael Blagg DOB: 02/18/63, residing at 2253 Pine Terrace Court, Grand Junction. At approximately 1320 hours, Sgt. R. Rosales dialed #970-245-4649 from his office at the Sheriff's Department. Sgt. Rosales heard a recorded message saying this is the "Blagg" residence. In addition, Investigator Ehlers who was at 2253 Pine Terrace Court, Grand Junction, during the phone call, heard Sgt. Rosales on the Blagg residence answer machine. The answering machine was taken into evidence, however, we replaced the answering machine. As of this date, no calls of ransom demands or calls from Jennifer or Abby Blagg have been made to the Blagg's residence.

26. On 11/20/01, Investigator Beverly Jarrell interviewed Vona and Gary Murphy of 2261 Pine Terrace Court. The Murphy's stated on 11/13/01, between 0700 hours and 0715 hours they were leaving to go on vacation in Las Vegas, Nevada. While pulling out of the subdivision they saw a white female, between 5'2" and 5'4", stocky build wearing a coat and stocking cap which covered her hair walking across Pine Terrace Court from Greenbelt. According to the Murphy's, the female had an "intense, deranged, cranky, angry" look on her face. The Murphy's stated they viewed a photo of Jennifer Blagg and were 98 to 99 % sure this was the same woman they saw in the early morning of 11/13/01.

27. On 11/26/01, your affiant spoke to Mr. Blagg. Mr. Blagg asked your affiant about the DNA results. Your affiant told Mr. Blagg that we had not received them. Mr. Blagg stated his hope was that the blood came back to someone other than Jennifer or Abby. Your affiant told Mr. Blagg we were looking for other items in the home in which we could get DNA samples for Jennifer and Abby. Mr. Blagg responded "Jennifer's retainer case." Your affiant asked what he meant. Mr. Blagg stated Jennifer wears a retainer for her teeth at

nighttime only. Mr. Blagg stated the case is in the bathroom on the counter. Mr. Blagg then added the retainer and case should be there. Mr. Blagg stated Jennifer wears the retainer every night and takes it off in the morning when she gets up. Mr. Blagg again stated we might be able to get DNA off the retainer or case. Investigator King told your affiant that Michael Blagg told him that Jennifer would always remove the retainer from her mouth and place the retainer into the retainer case in the morning before she did anything else. The retainer was not found in the retainer case, nor was the retainer located in the residence during the extensive search of the residence pursuant to a search warrant. The absence of the retainer indicates that Jennifer was harmed or incapacitated in her bedroom before getting out of bed. Mr. Blagg then went on to suggest Jennifer's makeup, lipstick, sheets and clothing in the laundry room as other sources of Jennifer's DNA. Your affiant asked Mr. Blagg what his degree was in from Georgia Tech. Mr. Blagg stated Nuclear Engineering. Your affiant stated he (Mr. Blagg) knew a lot about DNA. Mr. Blagg stated he took a lot of chemistry classes.

28. During the search of the residence, a computer was seized with the permission of Michael Blagg. Investigator Piechota of the Mesa County Sheriff's Office and Detective Julie Stogsdill of the Grand Junction Police Department have searched the computer harddrive and temporary files They have found in the deleted temporary files numerous adult pornography images. Investigator Piechota stated he has still over 13,000 images and files to go through. Investigator Piechota has found in excess of a thousand pornographic images and files and 91 adult hardcore pornography and approximately 250 adult pornography references. Numerous pornographic images and files were found on his labtop and work computer. Earlier Michael Blagg had mentioned to Investigator King that it was embarrassing for him to talk about, but we would probably find some sexually-oriented websites on his computer. Mr. Blagg stated that he and his wife Jennifer were having difficulty having intercourse due to her hysterectomy from a vaginal disease so they were researching oral sex.

29. Michael Blagg's work computer was searched based on consent from Michael Blagg and Ametek-Dixson. Found on this harddrive was an email written to Jennifer however not sent. This email was typed 11/13/02 at 1558 hours. The email stated "Jennifer, I love you! I am sorry that we have ruined this day and the opportunity to spend our lunch time together. I don't know what went wrong. My intent was to spend a wonderful time with you and coincidentally get some Christmas shopping done. That obviously went horribly astray. The Lord tells me to not let the sun go down on my anger and so I won.t. You are the light of my life. I ask your forgiveness for any wrongs I have done to you and I also forgive the wrongs I have perceived against me. I do not want us to waste a weekend being angry with one another. I would love to take some time today to talk through the problems we are having. I will send this as an e-mail and also I will bring it home to you. After Paul says to not let the sun go down on our anger, he says,. Do not give the devil a foothold.. Eph 4: 27. I am sorry if I have given the devil a foothold. I will always love you".

30. The Mesa County Sheriff's Office received an anonymous tip that stated Michael Blagg visited a local escort service in Grand Junction, Colorado. Detective Kevin Imbriaco with the Grand Junction Police Department was able to identify who the caller was. The tip came from Julie House, DOB 01/20/74. Julie House was interviewed on 12/07/01 by Detective Kevin Imbriaco. Julie House stated she saw the photo of Michael Blagg on TV and believed it was a person who visited her escort service several times. Julie House stated this person said his name was Steve or Steven. Julie House was shown two photo lineups, the first without Michael Blagg in it and a second one with him in it. Julie House did not pick out anyone of photo lineup #1. In photo lineup # 2, she immediately picked out the photo of Michael Blagg. Julie House stated Michael Blagg visited her escort service on several

occasions between December 2000 and April 2001. Julie House said this person visited her service approximately 2 to 3 times a month. He would usually visit between 1100 hours and 1400 hours wearing business attire. He would get a topless massage and would ask for the girls to give him a "hand job." Julie House stated she saw him twice and possibly four other girls saw him during that time period. It was Julie House's opinion that he was shopping around for a girl who would do illegal things to him. Julie House stated she only gave him a topless massage. Julie House stated she saw him at the Motel 6 and her residence of 3242 Main Street #3 in Clifton, Colorado. Julie House stated this person would usually give her $60.00 for a session. Julie House stated she remembered that this person talked about having a daughter with an old fashioned name that ended in a "Y" or "IE." One of the last times he came in, Julie House remembers this person being upset with his spouse over a shoebox he found in the closet. The shoebox had either receipts or letters in it. Julie House thought this person drove a truck of some sort.

31. On 12/07/01, Colorado Bureau of Investigation's preliminary DNA results have come back to the Mesa County Sheriff's Office. Your affiant read these reports and spoke to one of the serologist who conducted some of the tests. The results show that blood from the bed sheet in the master bedroom, carpet in the master bedroom and several swabs from the Maroon Ford Windstar matched the samples of DNA collected from Jennifer Blagg's hairbrush and toothbrush found in the master bedroom. There were some samples collected that could not be matched or were of an insufficient quantity to test. A control sample of Abby Blagg's blood has not been found as of this date and more items that could be used for controls are being sent to CBI.

32. Captain Bill Gardner and your affiant spoke to retired FBI agent Ron Walker over the phone on 11/21/01 and 12/11/01. Ron Walker is retired from the FBI and now is employed as a Senior Analyst for Threat Assessment Group Inc. and Park Deitz & Associates, Inc., as a Criminologist. Prior to this, he worked for the FBI from 1980 to 2000. From 1983 to 1989, Agent Walker worked as a Senior Criminal Investigative Profiler, Investigator Criminal Personality Research Project and Special Agent in Charge of the National Center for the Analysis of Violent Crime at the FBI Academy in Quantico, Virginia. From 1989 to 2000, Agent Walker was the Special Agent in Charge of the Denver Field Office, supervisor of the Evidence Response Team, Coordinator for the National Center for the Analysis of Violent Crime, and Supervisor of the Violent Crimes/Fugitive Task Force. Retired Agent Walker has a Master of Arts in Counseling, Psychology and has had thousand of hours of training in Profiling, Violent Crimes. Retired Agent Walker continues to train professionals in violent crimes, profiling and other disciplines. Retired Agent Walker has provided expertise and consultations in many violent crimes throughout the world. Retired Agent Walker has been qualified as an expert witness in several Colorado and California Courts in Behavioral Crime Analysis, Kidnapping, Sex Crimes, Signature analysis and Pattern/Signature analysis for prior similar transactions. See attachment B, 7 pages, for additional details.

33. Captain Gardner gave a brief summary of the case to Retired Agent Walker including the crime scene and some of the statements of witnesses. In addition Retired Agent Walker watched and read some of the news media involving this case. Retired Agent Walker also saw a news conference of Michael Blagg. Retired Agent Ron Walker stated from the first time he saw Michael Blagg on television and learned details of the crime, "I saw red flags waving around Mr. Blagg." Mr. Walker stated based upon his training, education and experience analyzing homicides from a behavioral science

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perspective, Retired Agent Walker believes law enforcement should focus much of their investigative analysis on Michael Blagg even though Michael Blagg is declaring this crime is a "whodunit." Retired Agent Walker stated he is 99% certain this crime is not a "random killing." Retired Agent Walker's basis for this theory is that; the execution, crime scene clean up and body removal took time. Stranger intruders are not normally comfortable with long periods of time in a dwelling. Retired Agent Walker asked who would be comfortable meticulously cleaning up after the murders? Secondly, burglars and rapists do not move and transport bodies; their perception of risk is increased with removal of a body. The neighborhood is a relatively crime-free subdivision. The type of crimes in these types of neighborhoods are likely to be property crimes, not violent crimes. When violent crimes of this nature occur in such neighborhoods, investigators may assume the victim(s) are "targeted."

34. Retired Agent Walker continued saying the question becomes "why these victims and why here and now?" Retired Agent Walker stated Jennifer and Abby Blagg are "low-risk victims." Low-risk victims are targeted victims. Retired Agent Walker stated these victims are a result of a personalized attack. Retired Agent Walker told us that victims in these types of environments (upper middle class) and killed in their own home/bedroom equate to an "intimate partner killer." Retired Agent Walker believes this crime "is the result of intertwined intimate relationships." Retired Agent Walker said in this type of killing "almost always the intimate partner has done the killing." Retired Agent Walker answered the question as to whether it could be a "hired killer theory." Retired Agent Walker stated if it were a professional hit, then the suspect would at least want Jennifer's body found possibly with a ransom note. The hired killer would not want both bodies missing.

35. Retired Agent Walker stated the next question to answer is what the crime scene is telling us. Retired Agent Walker advised that the blood found is in the most intimate place in the home, on the victim's side of the bed and this was not a coincidence. The crime took a lot of time to commit and cover up. Whoever committed this crime had a high level of comfort in the house. The pooling of blood, lack of high velocity blood spatter told Retired Agent Walker the following; the victim was asleep when she was killed, there is no signs of struggle; the blood evidence is consistent with the execution being performed while Jennifer is asleep with the covers pulled up to her neck as evident with the blood staining on the covers which had been pulled to the bottom of the bed; the location makes it most likely Jennifer was killed first; a likely scenario would be that one of the two missing pillows was held over the head and the throat was slit or a shot with a handgun at close range. The blood flow is not consistent with a blunt force trauma execution because there is no cast off and the pillows are missing, and finally, the victim(s) were non-resistive. Retired Agent Walker concluded the crime was not a spontaneous event; it was planned and meticulously executed. Retired Agent Walker stated, "The crime scene is staged." Retired Agent Walker stated this is the classic case of "ineffectual staging." Non-criminals do not know what a burglary scene looks like. Thus, the jewelry box/emptied purse contents and meticulous house are strong indicators of a staged crime scene. Retired Agent Walker stated staged crime scenes in the criminal's own home generally reflect a desire to protect one's own property and not destroying property belonging to him. Retired Agent Walker said this crime scene is an anomaly-it represents the perpetrator's own home. Retired Agent Walker stated additionally while stranger burglars turned killers will not remove bodies, they would canvas the entire home, looking for valuables.

36. Retired Agent Walker stated that the body(s) removal mean most likely Michael Blagg committed the crime. The body removable took time, the bodies had to be "bagged." The blood

evidence in the van indicates incidental transfer evidence the killer did not see. The water droplets at the front foyer are remnants of the killer's thorough cleaning effort. He wiped and mopped the house clean. Retired Agent Walker stated that if the blood in the bed is identified as the mother's, then Abby may have been murdered in a different way.

37. Retired Agent Walker concluded that behavioral scientist's "rule of thumb", is body removal indicates intimate relationship between the killer and the victim(s). The crime took a long time to accomplish, the total lack of blood evidence from the bed to the van and then not found in the van's back seat indicates the bodies were bagged and sealed. This is an intimate crime scene. Jennifer was the target and Abby was most likely an "ancillary victim." The crime is premeditated. Once again Retired Agent Walker reiterated that 99% of the time when the bodies are removed, it is an intimate partner who does the killing. Retired Agent Walker stated Michael Blagg set up a good alibi wanting to prove his innocence by calling home, leaving messages and being seen at work as much as he was.

38. On December 14, 2001, at approximately 1120 hours Investigator King and Sergeant Callow went to the Mesa County Sheriff's Office Impound Lot to determine how much fuel would be needed to fill the gas tank of Blagg's Ford Van (331-BCM), which was secured in the Impound Lot after it was seized at the Blagg's residence. Investigator King started the vehicle and provided Sergeant Callow with the odometer reading (8,619.5) prior to driving the van to the gas station at N. 1st Street and Grand. Sergeant Callow followed Investigator King to the gas station in another vehicle. Investigator King told Sergeant Callow that the odometer reading on the van upon arrival at the gas station was 8,619.8. Sergeant Callow filled the gas tank of the Blagg van. The pump reading showed that it took 7.0 gallons of gas to fill the tank. Investigator King told Sergeant Callow that he checked the on-board computer system in the van before the gas tank was filled. Investigator King told Sergeant Callow that the computer reading showed that the van was getting an average of 17.9 miles per gallon. Sergeant Callow concluded that the Blagg van traveled approximately 125 miles since the last time that the fuel tank was filled.

39. Investigator King told Sergeant Callow that he was able to determine that Jennifer Blagg fueled the van on November 9, 2001. This determination was based on statements made to him by Michael Blagg and a review of Blagg's credit card records. Investigator King spoke with Michael Blagg and was able to determine that either Michael or Jennifer Blagg drove the van to several known locations between the time that the gas tank was filled on November 9, 2001 and when Michael discovered Jennifer and Abby missing on November 13, 2001. Investigator King checked the distance for each of the known trips that were made after the van was fueled. Investigator King gave the mileage information to Sergeant Callow. Sergeant Callow determined that the known trips would have accounted for approximately 34 miles. Sergeant Callow estimated that the van traveled a total of 125 miles after being filled with fuel on November 9, 2001. Subtracting the known trip miles (34) from the estimated total miles (125) leaves approximately 91 miles of unaccounted for travel. Sergeant Callow determined that since the van was seized at the residence the unaccounted mileage would represent a round trip, or trips, that could not have exceeded 45.5 miles.

40. On December 18, 2001, Sergeant Callow spoke with FBI Special Agent Gerard Downes who is currently the Supervising Agent of the FBI's Critical Incident Response Group, which is affiliated, with the National Center for the Analysis of Violent Crime. (See attachment C for Downes

resume") The conversation was held via speakerphone from a conference room at the Mesa County Sheriff's Office. FBI Special Agent Ron Baker, who is assigned to the Grand Junction FBI Office, Lieutenant Richard Dillon, Mesa County Sheriff's Office, and Captain Bill Gardner, Mesa County Sheriff's Office, were also present during the phone conference. Sergeant Callow told your affiant that Special Agent Baker briefed Supervising Special Agent Downes on the circumstances surrounding the disappearance of Jennifer and Abby Blagg prior to the conference call. Special Agent Downes stated this case is highly suspicious and much of the focus needs to be placed on Michael Blagg.

41. CBI findings dated 12/10/01 state DNA profiles from several items of blood found in master bedroom and the van match the DNA profile of Jennifer Blagg. CBI results dated 3/20/02 of latents found on the jewelry box and assorted items from the purse lying on the master bedroom floor indicated that latent fingerprints matched Michael Blagg. Latent Fingerprints matching Michael Blagg were also found on the contents of assorted items from that purse. As of this date no blood has been located which would match the DNA profile of Abby Blagg.

42. During the week of 01/11/02 while conducting surveillance of Michael Blagg, investigators observed Michael Blagg removing office furniture and property (paper shredder) from his place of employment at Ametek-Dixson at 287 27 Road, Grand Junction, Colorado. Investigators spoke to management of Ametek-Dixson who stated Michael Blagg did not have permission to have these items and reported the items stolen at that time. On 02/05/02 and 02/08/02 Investigators conducted two search warrants of Michael Blagg's new residence of 4330 North Club Court #B, Grand Junction, Colorado and recovered every item reported stolen from Ametek-Dixson.

43. On 02/05/02, Investigators requested Michael Blagg come in for another interview and polygraph. Michael Blagg agreed. The interview lasted approximately 10 hours. The interview was conducted by Agent Bill Irwin with the FBI, Investigators George Barley, Steven King and your affiant. During the interview Michael Blagg continually denied knowing what happened to his wife Jennifer and his daughter Abby. Michael Blagg surmised that this act was a robbery that had gone bad or that a family or people who wanted children took Abby. Michael Blagg was confronted with the thefts from Ametek-Dixson. Michael Blagg denied for several hours that he ever stole anything saying that he took the items, which he believed were being sold in a company yard sale. When confronted with the overwhelming evidence of people seeing him take all the items, Michael Blagg finally admitted that he stole the office furniture and paper shredder. Michael Blagg was confronted with the fact that over 1800 items of pornography were on his personal computers and work computers. Michael Blagg denied for a moment he was doing viewing the pornography to this extreme. When hundreds of the pictures were displayed to Michael Blagg he admitted to viewing the pornography however his wife, Jennifer would often join him in viewing the pornographic pictures. After several hours, Michael Blagg said his wife did confront him once about 4 or 5 months ago about viewing the pornography. Michael Blagg said he would view the pornography in the evening's between 2000 hours and 2200 hours.

44. Your affiant confronted Michael Blagg about seeing a prostitute. Michael Blagg denied ever seeing a prostitute. Michael Blagg was confronted about a fight he and his wife had the Friday.

before her disappearance. Michael Blagg denied that they fought and then once again later in the interview admitted that he and his wife did fight that Friday about an employment opportunity in Longmont. Michael Blagg said it was not a major fight just a disagreement. Michael Blagg said his wife never expressed anything to him about wanting a divorce or anything about him doing something to Abby inappropriately. Your affiant and Agent Irwin spoke to Michael Blagg about the email he wrote to Jennifer on his work computer. Michael Blagg admitted writing the e-mail but said it was referring to a disagreement about relocating for another job.

45. Towards the end of the interview your affiant confronted Michael Blagg telling him that I knew he harmed his wife and what I didn't know was why. Michael Blagg broke down sobbing lightly. Your affiant told Michael Blagg to tell me the truth about what happened to Jennifer. Michael while sobbing, his head lowered and his lips quivering replied "I can't." Your affiant repeated several times to Michael Blagg to tell me the truth. Michael Blagg kept responding I can't tell you." Your affiant then told Michael Blagg to at least tell me where Jennifer and Abby were at. Michael Blagg raised his head, looked straight into your affiant's eyes and said calmly, " I really don't know where they are at." Your affiant asked if they were in the river. Michael Blagg nodded no and stated "I really don't know." Michael Blagg gained his composure and again denied knowing what happened to Jennifer and Abby Blagg. A while later in the interview Michael Blagg asked what were the consequences and differences in the types of murders. After talking for a few more minutes Michael Blagg began sobbing some more with his head slumped and lips quivering. Your affiant told Michael again to tell me the truth and to get rid of the guilt he was carrying. Michael Blagg asked to pray for a moment. After praying Michael Blagg stated he wanted to tell the truth but he wanted to have a lawyer tell him what the truth is going to mean. Michael Blagg repeated that he would tell us the truth after speaking to an attorney. The interview was ended.

46. On 02/06/02 Investigator Barley went over to Michael Blagg's residence at 4330 North Club Court, unit B, to pick up the rest of the stolen items Michael Blagg admitted taking. Upon arrival Michael Blagg did not answer the door. Based on concern for Michael Blagg's safety, forced entry was made. Michael Blagg was found naked in a bathtub with both of his wrists slit. Concerned that Michael Blagg was going to die I attempted to obtain a dying declaration. Michael Blagg denied doing anything to his wife and daughter. Michael Blagg did leave a suicide note saying he did not harm his wife and daughter and that things would be said about him that were not true. Michael Blagg recovered from his wounds while at St. Mary's Hospital.

47. On 02/21/02 Special Agent Jeffrey Newton with the FBI interviewed Edith Gail Melson, DOB 01/11/62 in Simpsonville, South Carolina. Edith Melson stated she met the Blaggs in 1998 and remained friends with Jennifer Blagg until now. Edith Melson stated that she last spoke to Jennifer Blagg approximately 10 days prior to her disappearance. Melson said Jennifer Blagg told her two things that have haunted her since learning of Jennifer's disappearance. Edith Melson stated the first thing was that Jennifer asked her to pray for her concerning a problem she is having. Ms. Melson said that Jennifer added that she has something to tell her, but she couldn't tell her at that time. Melson said that Jennifer told her that what she had to say would be very upsetting.

1-0013

48. Ms. Melson said Jennifer then told her that she and Abby were planning to come to South Carolina soon for a visit. Melson said this statement upset her more than her earlier prayer request. Ms. Melson explained that it would be highly unusual and uncharacteristic for Michael Blagg to allow Jennifer and Abby to travel to South Carolina without him. Melson stated that while she was very excited at seeing her best friend again, she was scared about the implications behind the visit. Ms. Melson stated she feared this may be a sign of serious marital problems between Jennifer and Michael, and this may have been the reason for the visit.

49. On 05/13/02, as a result of the ongoing investigation, a search was begun of the Mesa County Landfill. On 05/15/02, two days after the search of the landfill began Michael Blagg left Grand Junction, Colorado and moved to Warner Robbins, Georgia. The landfill staff was able to determine an area likely to contain refuse from November of 2001. An excavator was used to remove refuse from the area on to a flat area and then several investigators would rake through what came out of the bucket. While in this area several newspapers and papers were found with the date of 11/13/02. Several articles with the name of Ametek-Dixson were also found in this general area. On the 17th day of the search, 06/04/02 at approximately 1015 hours, the excavator pulled a bucket of refuse out of the hole and a right leg with foot was seen dangling from the bucket by Investigator Henry Stoffel. All operations were immediately halted. The leg was attached to something else covered in a nylon type of material. No further digging was done and a forensic team consisting of Mesa County Sheriff's Officers, FBI and CBI agents were called in to complete the search. Dr. Robert Kurtzman, Mesa County Coroner responded to the scene and confirmed that the right leg was that of an adult female. The search is ongoing at the time of this writing of the affidavit.

50. On 06/05/02, a decomposing Caucasian female body, minus the left leg, was collected at the scene. The upper torso was wrapped inside what was later identified as a black and red tent. This body was taken to the Mesa County Coroner's Office. Later the left leg was found in the hole in approximately the same area where the first bucket with the body was found. Also found in the same area were what would be described as multiple plastic gauge punch outs consistent to what is produced at Ametec-Dixson. Approximately two backhoe buckets after the left leg was pulled out, the above described plastic punch outs were discovered. These items were removed from the same area as the body and the leg.

51. On 06/05/02 Investigator Norcross and Investigator Hebenstreit attended a post-mortem examination of the decomposed body found at the Mesa County Landfill. The post –mortem was done by Doctor Dean Havlik at Community Hospital morgue with Doctor Robert Kurtzman assisting. Also in attendance were CBI Agent Kevin Humphreys and FBI Agent Arnold Bellmer.

52. Investigator Hebenstreit took with him a dental x-ray of Jennifer Blagg, which he obtained from the evidence section at the Mesa County Sheriff's Office. The x-ray was inside a red folder that was seized during a search warrant at the former Blagg residence, 2253 Pine Terrace Court. A label attached to the x-ray indicated it was taken in 1990 prior to Jennifer's marriage to Michael Blagg and is under her maiden name, Jennifer Loman. The dental x-ray of Jennifer Blagg, AKA Jennifer Loman, was given to John Bull, D.D.S., and he compared it to head x-rays of the body taken during the post-mortem exam. At about 12:00 noon, Dr. Bull positively identified the body as that of Jennifer Blagg, based on

the dental x-rays. A retainer was found inside the mouth of Jennifer Blagg and identified as a lower retainer by Doctor Bull.

53. During the post-mortem examination, Dr. Havlik, a Forensic Pathologist, removed a bullet and bullet fragments from the brain. Dr. Havlik stated the entry wound was to the left eye. CBI Special Agent in Charge, Kevin Humphrey's did a brief examination of the bullet and indicated it was, in all likelihood, fired from a handgun. He said the caliber of the bullet was probably a 9-millimeter or similar size. At about 12:20 p.m. on 06/05/02, Dr. Havlik ruled that the cause of death was a gunshot wound to the head and the manner of death was homicide.

BASED ON THE FOREGOING, there is probable cause to believe that on or about **November 12 and *November 13, 2001***, in the County of Mesa and State of Colorado, ***Michael Francis Blagg, DOB: 02/18/63***, committed one count of the crime of ***Murder in the first degree***, in violation of CRS ***18-3-102***, a class 1 felony. It is therefore respectfully requested that a warrant be issued for the arrest of said defendant.

Sergeant Wayne Weyler

The foregoing was subscribed and sworn to before me on this 5th day of *June*, 2002

by Wayne Weyler

Notary

County/District Court Judge

_____ COURT, MESA COUNTY, COLORADO

Criminal Action No. 01SW 118

AFFIDAVIT IN SUPPORT OF A SEARCH WARRANT FOR 2253 PINE TERRACE COURT, GRAND JUNCTION, MESA COUNTY, COLORADO, WHICH IS A SINGLE FAMILY DWELLING THAT IS FURTHER DESCRIBED AS A TWO STORY WHITE IN COLOR RESIDENCE WITH LIGHT COLORED GRAY TRIM WITH ATTACHED GARAGE. THE NUMBERS "2253" ARE LOCATED ON THE RIGHT SIDE OF THE GARAGE AS YOU ARE FACING THE RESIDENCE. ALSO TO INCLUDE ANY OUTER BUILDINGS INCLUDING STORAGE SHEDS AND/OR OTHER GARAGES OR VEHICLES LOCATED ON THE PREMESIS. ALSO TO INCLUDE A WHITE COLORED DODGE STRATUS BEARING COLORADO LICENSE PLATE NUMBER #356BCM THAT IS CURRENTLY PARKED IN FRONT OF THE RESIDENCE ON THE STREET.

COMES NOW *INVESTIGATOR SCOTT EHLERS*, being of lawful age and first duly sworn upon his oath and states and alleges in support of this affidavit as follows:

1. Your affiant is a duly employed law enforcement officer with the Mesa County Sheriff's Office, Grand Junction, Colorado and was so employed at all times relevant to this affidavit. The information contained in this affidavit was compiled by me in the course of a criminal investigation by speaking to fellow law enforcement officers, citizen informants, personal observations, and reviewing official law enforcement reports. All locations referred to are in Mesa County, Colorado, unless specifically noted otherwise.

2. At about 1637 hrs. on 111301 Mesa County Sheriff's Office Deputies Tim Orr and Jeff Doty were dispatched by 911 to 2253 Pine Terrace Court reference an unknown problem. While en route dispatch advised the responding deputies that the reporting person said his 34-year-old wife and 6-year-old daughter were missing, there was blood on a bed, items scattered around the house, and the back door was open. The reporting person advised dispatch he had left for work at 0600 hrs. on 111301. While on the phone with a dispatcher, the reporting person advised he checked his daughter's room and found her bed was unmade and his daughter's school clothes were still laid out as if she never got dressed.

3. Upon arrival Deputies Orr and Doty contacted the reporting person, Mr. Michael Blagg, DOB 021863, in the front yard. The deputies asked Mr. Blagg how he was doing and he stated "not so well" and then he handed them the keys to the residence stating the home was locked. Deputies Orr and Doty used the keys to open the front door and they entered the residence. The first room they observed was the living room, then a dining room, then kitchen. The deputies observed the back door to the residence was standing open. Deputies Orr and Doty then walked down a hallway and into the master bedroom. Upon entry into the bedroom, Deputies Orr and Doty observed a bed with the bed covers pulled down. Deputies Orr and Doty said on the bed sheets they saw a puddle of red liquid substance, which they believe to be blood. Deputies Orr and Doty observed the red liquid ran off the bed and onto the floor where a puddle of red liquid had formed. Deputies Orr and Doty briefly looked around the bedroom and observed a jewelry box was laying in disarray on the floor and money was also laying on the floor.

EXHIBIT W

4. Mr. Blagg responded to the Sheriff's Office on 111301 and spoke with Investigator Steven King. Inv. King advises Mr. Blagg said he last saw his wife, Jennifer Blagg, DOB 010867, and his daughter, Abbey Blagg, DOB 032195, on 111301 prior to leaving the home for work. Mr. Blagg said he has no idea where his wife and daughter are located or why the home is in disarray. Mesa County Sheriff's Office Sgt. Weyler has contacted both St. Mary's Hospital and Community Hospital and found neither Jennifer nor Abbey Blagg are there receiving medical treatment.

5. On 111301 Deputy Orr contacted Mesa County Deputy District Attorney Eret, who lives near Mr. Blagg's residence. DDA Eret stated she observed Mr. Blagg arrive at his home at about 1620 hrs. on 111301 driving the white colored Dodge Stratus bearing Colorado License Plate #356BCM that is currently parked in the street in front of 2253 Pine Terrace Court. An NCIC/CCIC check of Colorado license plate #356BCM shows registered to a 1998 Dodge Stratus, VIN #1B3EJ46XXWN212268.

BASED UPON THE FOREGOING, there is probable cause to believe that on or about ***111301***, in the County of Mesa, State of Colorado, the crimes of ***SECOND DEGREE KIDNAPPING, as defined by CRS 18-3-302, and ASSAULT IN THE SECOND DEGREE, as defined by CRS 18-3-203,*** were committed. Further, your affiant believes that evidence relating to said crime(s) may be found at ***2253 PINE TERRACE COURT, GRAND JUNCTION, MESA COUNTY, COLORADO.*** The following items would be of material aid in a subsequent criminal prosecution: ***HUMAN BODIES OR BODY PARTS, PHOTOGRAPHS, MEASUREMENTS, LATENT PRINTS, BLOOD, HAIR, FIBERS, BODILY FLUIDS, INDICATION OF OCCUPANCY TO ESTABLISH OWNERSHIP OR CONTROL OF SAID PREMISES, ANY WEAPONS OR ITEMS THAT MAY CAUSE DEATH OR INJURY,*** , . It is therefore respectfully requested a search warrant be granted for the above.

Scott Ehlers

Investigator Scott Ehlers
Mesa County Sheriff's Department

STATE OF COLORADO)
)
COUNTY OF MESA) ss.

The foregoing was subscribed and sworn to before me this ***13TH*** day of ***NOVEMBER, 2001,*** by INVESTIGATOR SCOTT EHLERS.

COURT JUDGE

Full Text Colorado State Newspaper Package

The Denver Post

June 18, 2002

Details of Blagg case revealed Family man not as he appears, warrants imply

Author: Nancy Lofholm Denver Post Western Slope Bureau

Edition: TUE
Section: A
Page: A-01

Index Terms:
murder
investigations

Estimated printed pages: 3

Article Text:

GRAND JUNCTION - Michael **Blagg** portrayed himself as a deeply religious family man in the wake of his wife and daughter's disappearance. But he allegedly received massages from topless women, regularly surfed Internet pornography and may have been abusive to his wife before he meticulously planned her murder, according to court documents unsealed Monday.

The arrest warrant for the 39-year-old **Blagg reveals** the **details** of why Michael **Blagg**, grieving husband and father, quickly became Michael **Blagg**, murder suspect, when investigators delved into the particulars of his life after Jennifer and Abby **Blagg** disappeared Nov. 13.

Blagg was arrested two weeks ago after Jennifer's body was found in the Mesa County landfill in trash that came from an industrial compactor outside **Blagg**'s former place of business. **Blagg**, who maintains he is innocent, made his first appearance in district court in Grand Junction Monday to be advised of the first-degree murder charge against him. He briefly smiled at his mother and sister when he entered the heavily guarded courtroom but sat tensely forward in his chair after officers removed his handcuffs.

During the hearing, Mesa District Judge David Bottger unsealed the arrest warrant, four search warrants and Jennifer's autopsy report. Those documents outline the basis of a **case** that has grown to more than 16,000 pages of investigative materials.

The materials show a different Michael **Blagg** from the man who handed out hundreds of "Hope: Jennifer and Abby" pins and asked the community for prayers after the two disappeared.

That Michael **Blagg** said he came home from work to find them missing and a large pool of blood in the master bedroom. He said he had left them sleeping that morning when he went to work. He said he was bewildered. He said they had a perfectly happy family life. He said he trusted that God would return his

wife and daughter to him. He insisted on always speaking of them in the present tense.

The documents show that **Blagg** appeared to come close to a confession in early February after investigators questioned him for 10 hours about Jennifer and Abby's disappearance and about office furniture and supplies investigators say they observed him taking from his employer.

The affidavit said **Blagg** broke down and sobbed after an investigator said he knew **Blagg** had harmed his wife and just wanted to know why.

The affidavit said **Blagg** asked about penalties for different categories of murder. He asked to pray for a moment, then said he wanted to tell the truth but first needed a lawyer to tell him what that would mean. **Blagg** did not speak to investigators again. The next morning he attempted suicide by slitting his wrists.

The 53 points in the warrant to support **Blagg**'s arrest include:

The owner of an escort service said **Blagg** came on his lunch breaks two to three times a month for topless massages.

More

than 1,800 pornographic items were found on **Blagg**'s home and work computers. The affidavit said **Blagg** told an investigator he was doing research because he and Jennifer were having sexual problems.

On Nov. 9, a woman and girl fitting Jennifer and Abby's description went to Colorado Legal Services for help. A legal-services worker described Jennifer as "scared to death" and told investigators that she said, "I can't take any more of this abuse." Jennifer became upset when she couldn't see an attorney immediately and left.

Employees at Ametek Dixson, the manufacturing plant where Michael **Blagg** worked, said that on the day he reported Jennifer and Abby missing, **Blagg** spent an unusual amount of time around the loading dock where the trash compactor is located. One employee saw **Blagg** pushing a pallet jack with two large cardboard boxes on it and asked if he could help. The employee reported **Blagg** uncharacteristically replied in a stern voice "Nope, just get away."

Investigators who searched the **Blagg** house found signs that someone had mopped and cleaned up blood in the home. The family's minivan, which was in the garage when **Blagg** reported Jennifer and Abby missing, had trace amounts of blood on the steering wheel, brake pedal and driver's-side door handle and along the frame of the sliding door.

He said Jennifer most likely was killed while she slept.

Jennifer was shot in the left eye at close range. The autopsy report lends credence to that. Jennifer wore a dental retainer while she slept, and the retainer was discovered in the remains.

Retired FBI agent Ron Walker, who works as a private criminologist, assessed the case for the Mesa County Sheriff's Office and said in his report that he suspects Abby was an "ancillary" victim. He concluded that Jennifer's killing was planned and meticulously executed.

Blagg is being held in the Mesa County Jail on $1 million bail. He is scheduled to appear in court again July 18.

Caption:
PHOTO: **Blagg** PHOTO: Denver Post file photo Jennifer and Abby **Blagg**

Record Number: 1103398

THE ASPEN TIMES

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Papers win access to rape affidavits

By Jennifer Davoren
Aspen Times Staff Writer

Two sealed affidavits containing information about the July 18 rape of an Aspen woman and the arrest of the suspect will be made public, a judge ruled Monday.

District Court Judge J.E. DeVilbiss agreed to release the affidavits after The Aspen Times and the Aspen Daily News petitioned for the information.

The suspect, Marcos Garcia-Flores, 21, was present at the hearing. He was formerly charged with sexual assault and first-degree assault.

Public defender Jim Conway and a court translator helped Garcia-Flores follow the proceedings as DeVilbiss reviewed a petition filed by the newspapers. Both publications requested that two affidavits, supporting a search warrant and an arrest warrant used in the case, be released to the public.

DeVilbiss agreed that information contained in the affidavits should be released, but stressed that the victim should remain anonymous. The judge said he would cut all references to the woman from the documents before copies are made public.

"I will order that information in both affidavits will be redacted so the name does not appear," the judge said.

Prosecutor Lawson Wills also suggested the trimming of "violent paragraphs" in the affidavits that describe the crime in question. DeVilbiss said he would review Wills' request this morning before distributing copies of the documents.

Representatives of the district attorney's office said they opposed the release of the affidavits due to a possible impact on the continuing investigation and the privacy rights of the victim. The sheer detail of the affidavits — both covering almost 20 pages of material — could also be enough to sway potential jurors, Wills said.

"Our concern at this point is more about the impact on the potential jury pool," he said.

Attorney Steven Zansberg, legal representation for both the Times and Daily News, said the prosecutor's fears regarding jurors weren't probable cause for the sealing of the court documents.

"That has never been a sufficient basis for withholding information from the public,"

he said. "They [both papers] appear really as members of the public and the public's right to inspect judicial records."

Amended versions of both documents are expected to be released to the public by 3 p.m. today.

While DeVilbiss agreed to release the affidavit information, he declined a request made by the Daily News to use a photographer during court proceedings. However, DeVilbiss said he would keep the News' request on file if circumstances changed as the case progressed.

Garcia-Flores, who also faces an additional crime of violence charge, will return to court on Sept. 10.

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Posted: Tuesday, July 31, 2001

Tuesday, July 31, 2001

Aspen Daily News

"If you don't want it printed, don't let it happen."

517 E. HOPKINS * ASPEN, COLORADO 81611 * PHONE: (970) 925-2220

Next Article

Judge rules rape documents to be unsealed

By Rick Carroll/Aspen Daily News Staff Writer

A district court judge ruled Monday in favor of two Aspen newspapers seeking to unseal documents relating to a downtown rape.

Last week, the Aspen Daily News and The Aspen Times jointly filed a motion to have two affidavits unsealed. One supported a warrantless arrest and the other a search warrant.

Assistant District Attorney Lawson Wills had requested the documents be sealed when he filed them with the court, after the rape defendant, now known as Marco Garcia-Flores, was arrested two weeks ago on accusations of sexual assault and first-degree assault. The court then granted the motion.

But in Monday's hearing Judge J.E. DeVilbiss said the documents will not remain sealed.

Through attorney Steven Zansberg of Denver law firm Faegre & Benson, the Daily News and the Times claimed that sealing the records breached their First Amendment rights.

The First Amendment to the U.S. Constitution protects a free press. Zansberg also argued that Wills needed to offer "compelling" reasons to keep the documents sealed.

"I just don't see how we can" keep the affidavits sealed, DeVilbiss said.

The judge asked Wills to prepare a suggested redacted or "blacked out" version of the documents and present it to him this morning at 9 a.m. The judge will review those redacted documents and is expected to release them to the media by noon.

Wills said there are certain parts of the documents so graphic in nature that he asked they be kept confidential.

The rape victim's name will be removed from the documents, as state law prohibits naming sexual assault victims in public records. The Daily News also has a policy not to reveal names in sexual assault cases.

Wills worried aloud that the documents with portions "blacked out," would be subject to "misinterpretation."

"You've got misinformation and the media with misinformation putting it on the front page," he told the court. Wills was saying that extensive redaction of some sentences could render them meaningless.

His chief argument was that unsealing the documents would taint the jury pool with pretrial publicity, making it difficult to have a fair trial here.

"What I'm trying to get is 12 or 13 jurors that haven't gotten that misinformation," he said.

DeVilbiss saw it differently.

"I am convinced we will be able to get a jury," he said.

Wills also argued that sealing the records would hamper the investigation. But Zansberg countered that, for all practical purposes, the investigation is complete.

The judge did say unsealing the documents could make getting a jury "more time consuming and difficult," and said the Times could very well print stories about the rape in its sister publications the Glenwood Springs Post-Independent and the Valley Journal in Carbondale.

DeVilbiss also served up a pot shot in jest to the press.

"Who knows? They might get it right."

Garcia-Flores' lawyer, public-appointed James Conway, did not contest the newspapers' request.

Zansberg argued that even if a jury trial is held and the pretrial publicity is so great that a jury cannot be selected here, the trial could be postponed or moved to another county.

After the hearing, Wills said he understood the judge's decision and the media's effort to have the documents unsealed. He maintained it would be difficult to find a jury here with the records released.

"I'll see you in Meeker," he told Daily News editor Andrew Stiny after the hearing. Wills was referring to the possibility that if the case comes to trial and is moved from Aspen it could end up in Meeker, in rural Rio Blanco County. Meeker, about 60 miles north of Rifle, is also in the 9th Judicial District.

Zansberg said he didn't see how unsealing the documents would taint the jury. He added that during juror selection, it would be emphasized that they can use only evidence and testimony presented in court -- not newspaper

articles -- when reaching their verdict.

Next Article

AFFIDAVIT IN SUPPORT OF WARRANTLESS ARREST

AGENCY CASE NO:
O1A001087

ARRESTING AGENCY: Aspen Police Department

DATE OF ARREST: July 19th, 2001

DEFENDANT: Erbey Manuel Ochoa

DATE OF BIRTH: January 16th, 1980

	Crime	Statute Number	Class
1	Sexual Assault	18-3-402 4(a)(b)	3F
2	Criminal Attempt Murder in the first Degree	18-3-102 1 (b)	2F
3			
4			
5			
6			

I James P. Crowley, being duly sworn upon oath says that there is probable cause for the warrantless arrest of the aforementioned defendant for the charges stated above, and that the following facts are true and correct to the best of his knowledge, information, and belief and support the arrest of the defendant; to wit:

1) My name is James P. Crowley and I am employed as a police officer for the City of Aspen, County of Pitkin, State of Colorado, and have been so employed at all times pertinent to this affidavit.

2) On July 18, 2001, 0229 hours, Pitkin County Combined Communications received a report of a woman who had been sexually assaulted. The woman was calling from the area of the Wienerstube restaurant located at 633 E. Hyman Avenue, Aspen, Colorado. Aspen Police Officer Roderick O'Connor was the first to arrive on the scene. Your Affiant reviewed Officer O'Connor's reports and learned the following.

   a) O'Connor was met on scene by Natalie Todd ,Tom McElroy Grace de la Sala and [redacted] McElroy said that McElroy was two blocks away at St. Mary's Church when McElroy heard screaming. McElroy followed the screams, which lead McElroy to [redacted] who was in front of the Wienerstube.

   b) McElroy said that [redacted] was screaming and crying and that [redacted] said that [redacted] had been sexually assaulted. McElroy then called 911 to report the incident to police.

c) O'Connor asked [redacted] what had happened. [redacted] said that [redacted] had been raped and the man who raped her had hit her "10 times in the face". [redacted] had a noticeable bruise on her face. [redacted] said the man that raped her was "Mexican" and was wearing a red and white shirt. [redacted] also added the man was riding a red and white bicycle. [redacted] was transported by ambulance to Aspen Valley Hospital.

d) Todd and De la Sala said that Todd and De la Sala had been walking by the parking lot adjacent to Zo's Sports bar at 521 E. Hyman Avenue when Todd and De la Sala heard a woman crying for help. The woman [redacted] came at Todd and De la Sala from across the parking lot from the direction of the alley behind Zo's. [redacted] told Todd and De la Sala that [redacted] had been raped. The three women walked towards the wienerstube searching for a telephone to call for help. It was then Todd, De la Sala, and [redacted] ran into Mr. McElroy who called for help from McElroy's cellular phone.

e) O'Connor then left the scene and went to Aspen Valley Hospital to meet with [redacted] said that [redacted] left Little Annie's with [redacted] friends, outside the bar [redacted] said good night and started walking home [redacted] said a "Mexican " on a bicycle began following [redacted] and was calling [redacted] by name [redacted] said she did not know the man, however did recall seeing the man earlier in the night. [redacted] described the man as 5'3" tall, 150 lbs. Dark skin, dark brown hair, the man had a small nose and a rounded face. The man barely spoke English and when he did it was with a strong accent.

f) [redacted] said the man said he wanted to" have sex with me or die". The man then forced [redacted] into the alley. The man told [redacted] to lay down because "I'm going to fuck you". [redacted] said the man was very aggressive and began punching [redacted] in the face "10 times" [redacted] resisted the best she could, however the man continued to threaten to kill [redacted] if she did not comply. [redacted] said the man then "rammed her head against the ground". The man instructed [redacted] to take off her clothes, threatening [redacted] if she did not do so. The man then tore off [redacted] said she was afraid the man was going to kill her. At one point the man put his hand around [redacted] throat and started choking her. [redacted] then kicked the man several times in the groin. [redacted] said the man then tried to put his penis in [redacted] mouth. [redacted] said the man then told her "I want it in you or you are going to die". [redacted] said the man was very mean and the man punched [redacted] in the face again. [redacted] was not sure if the man had [redacted] then got away .

3) On July 18th, 2001, at approximately 0300 hours, your Affiant was contacted regarding the sexual assault that had occurred. Your Affiant met with Sgt. Fabrocini and learned that a woman [redacted] had been sexually assaulted and beaten in the alley behind Little Annie's restaurant which is located at 517 East Hyman Avenue, City of Aspen, County of Pitkin, in the state of Colorado.

4) On July 18th, 2001at approximately 0700 hours your Affiant was advised that [redacted] had completed a rape kit at Aspen Valley Hospital and had been released. Your Affiant contacted [redacted] and set up a re-interview of [redacted] On July 18, 2001, at approximately 0900 hours your Affiant met with [redacted] at the Pitkin County Courthouse. Your Affiant told [redacted] that your Affiant needed to speak with [redacted] about the assault. [redacted] told Your Affiant the following:

   a) Your Affiant asked [redacted] could explain why, when leaving Little Annie's Restaurant, [redacted] went east instead of west [redacted] said that [redacted] was not sure but that it may have been because [redacted] was being followed.

   b) Your Affiant asked [redacted] had ever seen the person who was following her before and [redacted] said that [redacted] had never seen the person before last night.

   c) Your Affiant asked [redacted] to describe the person who followed and assaulted [redacted] described the person as a Hispanic male, who was about five feet, five inches tall, with a stocky build and a round face with no facial hair and a small nose and lips. [redacted] said that this person was wearing a baseball hat, a red and white shirt, "almost like a sports jersey", blue jeans and white sneakers.

   d) Your Affiant asked [redacted] knew if the person who assaulted [redacted] had been in Little Annie's Restaurant at the same time [redacted] was that evening [redacted] responded by saying "I'm almost positive".

5) Your Affiant asked [redacted] to explain exactly what had happened July 18, 2001, and [redacted] told your Affiant the following:

   a) [redacted] told your Affiant that [redacted] went out with friends, July 18, 2001.

   b) [redacted] told your Affiant that [redacted] and her friends started at The Cantina and then went to Little Annie's and then went to Shooters and finally back to Little Annie's.

c) [redacted] told your Affiant that [redacted] was with the following people: Tracy O'Reilly, Brad Kennington, Trent Eldridge, Iris Block and Dave Boudreaux.

d) Your Affiant asked [redacted] if all of the above listed friends were with [redacted] all night on July 18, 2001. [redacted] responded by saying that a number of [redacted] friends left while [redacted] was at Little Annie's the second time.

e) [redacted] told your Affiant that [redacted] left Little Annie's alone and was almost immediately followed by the Hispanic male that [redacted] previously described to Your Affiant.

f) Your Affiant asked [redacted] if this person was riding a bicycle and [redacted] said that the person who assaulted [redacted] was riding a bicycle and that the bicycle may have been a red ten-speed-type bicycle.

g) Your Affiant asked [redacted] could describe where [redacted] was assaulted. [redacted] said that [redacted] believed the assault happened somewhere in the alley behind Little Annie's.

h) Your Affiant asked [redacted] if the person riding the bicycle was saying anything to [redacted] said that the person said, "I want to fuck you" and made a number of other statements that [redacted] could not remember.

i) [redacted] told your Affiant that [redacted] started to get scared and began to run across the dirt parking lot, which is located adjacent to Zo's bar.

j) [redacted] told your Affiant that [redacted] wound up on [redacted] back in the alley with no clothes on and the person who was following [redacted] was on top of [redacted]

k) Your Affiant asked [redacted] attempted to fight off the person who was attacking [redacted] told your Affiant that [redacted] punched the person in the face and kicked the person in the crotch numerous times.

l) Your Affiant asked [redacted] if the person who assaulted [redacted] hurt [redacted] in any way. [redacted] said that the person who assaulted her tried to choke [redacted] with two hands, punched [redacted] in the face with this person's left hand, and banged [redacted] head on the asphalt numerous times.

m) Your Affiant asked [redacted] to explain what happened when the assault ended and [redacted] said that the person who assaulted [redacted] rode a bicycle in the direction of the Popcorn Wagon and [redacted] laid in the alley and cried for a while, put [redacted] clothes on and started calling for help.

6) Your Affiant asked [redacted] could describe exactly where the assault occurred. [redacted] asked your Affiant to take [redacted] to the alley behind Little Annie's. Your Affiant drove [redacted] to the alley behind Little Annie's and asked [redacted] to explain where the assault occurred. [redacted] told your Affiant the following:

a) [redacted] told your Affiant that [redacted] remembered the assault occurred in an alcove in the alley but not in a doorway.

b) [redacted] told your Affiant that [redacted] remembered a yellow light behind the person who assaulted [redacted]

c) [redacted] told your Affiant that [redacted] remembered seeing the silver walk-in cooler, which is located behind Little Annie's Restaurant.

d) [redacted] told your Affiant that [redacted] was almost certain that the assault happened on the south side of the alley in the covered parking area approximately thirty feet east of the back door to Cooper Street Pier.

7) Your Affiant told [redacted] that Officer O'Connor's police report indicated that [redacted] was torn off of [redacted] during the assault. Your Affiant asked [redacted] knew where [redacted] was now and [redacted] told your Affiant that [redacted] never wears [redacted] and did not have [redacted] on during the time of the assault.

8) Your Affiant asked [redacted] to describe the purse that [redacted] left at the scene at the time of the assault. [redacted] told your Affiant that the brand name of the purse is Liz Claiborne and the purse was a backpack-style purse made from brown leather.

9) Your Affiant told [redacted] that Officer O'Connor's police report indicated that the person who assaulted [redacted] knew [redacted] name. Your Affiant asked [redacted] could explain how the person knew [redacted] name and [redacted] said that this person must have been at Little Annie's and heard someone call [redacted] by name.

10) On July 18, 2001, at approximately 1100 hours, Your Affiant contacted Brad Kennington by phone. Your Affiant spoke with Brad Kennington and learned the following:

a) Your Affiant asked Kennington if Kennington was with the group of friends that included [redacted] last night and Kennington said that Kennington was with [redacted] on the night of July 17, 2001, and early morning hours of July 18, 2001.

b) Your Affiant asked Kennington to tell your Affiant which bars or restaurants this group of people went to and Kennington told your Affiant that the group started at The Cantina and went to Little Annie's, Shooters and then back to Little Annie's.

c) Your Affiant asked Kennington if [redacted] went to Shooters and Kennington said that [redacted] did.

d) Kennington told your Affiant that [redacted] was wearing clothing, which exposed [redacted] lower back, and that [redacted] lower back, which was visible.

e) Kennington told Your Affiant that a number of males were commenting on [redacted] and were making catcalls directed at [redacted] at Shooters and Little Annie's.

f) Kennington told your Affiant that at the end of the night when Kennington was leaving Little Annie's, Kennington was sitting on the steps of Little Annie's with [redacted] smoking a cigarette. Kennington told Your Affiant that there was a Hispanic male standing behind Kennington and [redacted] who Kennington asked for the time. Kennington later identified the Hispanic male as being the "guy" [redacted] was completed by Pitkin County Deputy Ron Ryan.

g) Kennington told your Affiant that Kennington left [redacted] in front of Little Annie's at approximately 0200 hours on July 18, 2001, and went to Ruby Park to catch a bus.

h) Your Affiant asked Kennington to tell your Affiant who was left at Little Annie's after Kennington left Little Annie's. Kennington told your Affiant that [redacted] Eldridge and the Hispanic male were still at Little Annie's.

i) Your Affiant asked Kennington if Kennington could describe the Hispanic male that was standing behind Kennington and [redacted] and Kennington said that Kennington could not be positive.

11) On July 18, 2001, at 1520 hours, your Affiant contacted Iris Block at The Cantina and asked Block to tell your Affiant anything Block may know about [redacted] assault. Block told your Affiant the following:

a) Block told your Affiant that Block did not go out with the group of people that included [redacted] on July 17, 2001, however, Block was at Shooters on July 17, 2001, and did see [redacted]

b) Block told your Affiant that Billy Williams was one of the doormen at Shooters on July 17, 2001 and that Williams ejected two people, one of them Hispanic, from Shooters for an altercation in the men's bathroom.

c) Your Affiant asked Block to describe the Hispanic male that Williams ejected from Shooters and Block told Your Affiant that it was a short Hispanic male wearing an athletic-type jersey.

d) Block told your Affiant that the Hispanic male who was ejected from Shooters left Shooters about the same time that [redacted] left Shooters.

12) On July 18, 2001, at 2300 hours, Your Affiant contacted Jorge Ceballos who had been in Shooters prior to the Hispanic male being ejected for the altercation in the bathroom at Shooters. Ceballos told your Affiant the following:

a) Ceballos told your Affiant that Ceballos was at Shooters on July 17, 2001, when Ceballos was contacted by the Hispanic male who had been ejected prior to the Hispanic male being ejected.

b) Ceballos told your Affiant that the Hispanic male pointed out a female, later identified as [redacted] to Ceballos and said "she really wants it, let's follow her".

c) Ceballos told your Affiant that Ceballos told the Hispanic male that Ceballos was not interested and Ceballos and the Hispanic male did not speak further in Shooters.

13) On July 18, 2001, Your Affiant learned that the Hispanic male who assaulted [redacted] may be employed by Labor Source, a temporary employment service, as a traffic flagger. Your Affiant contacted Paul Yahnke, the owner of Labor Source. Your Affiant spoke with Yahnke and learned the following:

a) Yahnke told your Affiant that Yahnke supplies all the flaggers currently working on the Highway 82 project from Sardy Field to Aspen.

b) Yahnke told your Affiant that Yahnke has approximately 29 flaggers working on the project.

c) Yahnke was given a description of the suspect in the assault [redacted]

d) Yahnke told your Affiant that the only flagger currently working for Yahnke that fit the description given to Yahnke was Erbey Ochoa.

14) On July 19, 2001, at approximately 1100 hours, your Affiant contacted Yahnke at Labor Source. Your Affiant asked Yahnke if any of Yahnke's flaggers failed to arrive at work today. Yahnke told your Affiant that Ochoa and Silverio Martinez failed to show up at work today. Your Affiant asked Yahnke for Martinez's and Ochoa's addresses and phone numbers. Yahnke gave Your Affiant an address of 48 Summit Loop #B-5, El Jebel, Colorado for Martinez, and 205 West Bleeker Street, #26, Aspen, Colorado, for Ochoa.

15) On July 19, 2001, at approximately 1130 hours, your Affiant and Drug Enforcement Administration Special Agent David Storm went to 205 West Bleeker Street, where your Affiant contacted the manager of the Tyrolean Lodge, who directed your Affiant and Agent Storm to Carmen Ochoa, a housekeeper at the Tyrolean Lodge. Carmen Ochoa took your Affiant and Agent Storm to Unit #26, 205 West Bleeker. Agent Storm and your Affiant spoke with Carmen Ochoa and learned the following: (Carmen Ochoa does not speak English and Agent Storm acted as a translator.)

a) Carmen Ochoa told your Affiant that Carmen Ochoa was Erbey Ochoa's girlfriend.

b) Carmen Ochoa told your Affiant that Carmen Ochoa and Erbey Ochoa had been fighting and Carmen Ochoa has not seen Erbey Ochoa since July 14, 2001.

c) Carmen Ochoa told your Affiant that Carmen Ochoa had seen Erbey Ochoa briefly on the morning of July 19, 2001, and that Carmen Ochoa and Erbey Ochoa got into an argument that resulted in Carmen Ochoa hitting Erbey Ochoa in the nose causing Erbey Ochoa's nose to bleed.

16) During your Affiant's interview with Carmen Ochoa, Erbey Ochoa arrived at Unit #26, 205 West Bleeker, Aspen, Colorado. Your Affiant immediately recognized Erbey Ochoa as being similar looking to a composite sketch previously completed by Pitkin County Deputy Ron Ryan [redacted] Your Affiant also observed that Erbey Ochoa matched the description given to Your Affiant b[redacted]

17) Your Affiant contacted Detective Schaffer and had Detective Schaffer bring Billy Williams, the doorman from Shooters, to 205 West Bleeker, Unit #26, to see if Williams could identify Erbey Ochoa. Your Affiant observed that Erbey Ochoa arrived at the Tyrolean Lodge on a blue mountain bike. Your Affiant asked Erbey Ochoa if the mountain bike belonged to Erbey Ochoa and Erbey Ochoa said that the mountain bike did belong to Erbey Ochoa. Your Affiant examined the mountain bike and found what appeared to be blood on the frame of the mountain bike.

18) On July 19, 2001, at approximately 1145 hours, Pitkin County Sheriff's Investigator Joe DiSalvo and Investigator Ron Ryan arrived at 205 West Bleeker with Billy Williams. Your Affiant directed Erbey Ochoa to stand outside of Unit #26 where Williams could observe Erbey Ochoa. Erbey Ochoa waived to Williams as Williams approached Erbey Ochoa. Your

Affiant later learned from Investigator DiSalvo that Williams had positively identified Erbey Ochoa as being the Hispanic male who Williams ejected from Shooters on July 17, 2001. Williams also identified the blue mountain bike that was outside of Unit #26 as being the bike that Erbey Ochoa was riding on the night of July 17, 2001.

19) On July 19, 2001, at approximately 1210 hours, Erbey Ochoa was placed under arrest by Detective Shaffer, who had arrived at the Tyrolean lodge at approximately 1145 hours, and transported to the Pitkin County Jail. Once at the jail Erbey Ochoa was advised of Erbey Ochoa's Miranda's Rights. Erbey Ochoa indicated that Erbey Ochoa understood Erbey Ochoa's Miranda's Rights and would be willing to waive those Rights and speak with Special Agent Storm and your Affiant. Erbey Ochoa signed a Miranda waiver, the waiver was written in Spanish (see attached exhibit "A"). When Erbey Ochoa signed the Miranda waiver Erbey Ochoa signed it "Manuel Ochoa", your Affiant asked Erbey Ochoa why he signed the Miranda waiver Manuel Ochoa and Erbey Ochoa said that Erbey Ochoa's name is Erbey Manuel Ochoa. Erbey Ochoa claimed to not be able to speak English. Your Affiant asked Erbey Ochoa questions, which Special Agent Storm, who is fluent in Spanish, translated. Your Affiant learned the following from Erbey Ochoa:

a) After Erbey Ochoa was advised of Erbey Ochoa's Rights, Erbey Ochoa asked to know what Erbey Ochoa was being charged with. Your Affiant advised Erbey Ochoa that Erbey Ochoa was being charged with sexual assault and your Affiant observed that Erbey Ochoa showed no reaction to the charges being filed against Erbey Ochoa.

b) Erbey Ochoa told your Affiant that Erbey Ochoa has a wife and "is not into rape".

c) Your Affiant asked Erbey Ochoa to tell your Affiant what Erbey Ochoa did on July 17, 2001. Erbey Ochoa told Your Affiant that Erbey Ochoa worked from 0830 to 1530, went home, changed clothes, and went to a disco, later identified as Shooters Saloon. Erbey Ochoa told your Affiant that Erbey Ochoa stayed at Shooters until 2300 hours and that Erbey Ochoa was alone.

d) Your Affiant asked Erbey Ochoa to tell your Affiant how much Erbey Ochoa had to drink on the night of July 17, 2001. Erbey Ochoa told your Affiant that Erbey Ochoa had two or three beers.

e) Your Affiant asked Erbey Ochoa to tell your Affiant what happened at Shooters and Erbey Ochoa told your Affiant that Erbey Ochoa was involved in a fight in the bathroom with a "white guy" and that everyone involved in the fight was kicked out of Shooters.

f) Erbey Ochoa told your Affiant that after Erbey Ochoa was kicked out of Shooters, Erbey Ochoa went home to the Tyrolean Lodge.

g) Your Affiant asked Erbey Ochoa if Erbey Ochoa knows Billy Williams, the doorman at Shooters, and Erbey Ochoa told your Affiant that Erbey Ochoa knows Billy Williams from Shooters and the grocery store at the Aspen Airport Business Center.

h) Your Affiant asked Erbey Ochoa if Erbey Ochoa rode a bike home or walked home after Erbey Ochoa was kicked out of Shooters and Erbey Ochoa said that Erbey Ochoa walked home.

i) Your Affiant asked Erbey Ochoa if, while in Shooters, Erbey Ochoa ever made the statement "she really wants it, let's follow her". Erbey Ochoa denied making the statement.

j) Your Affiant asked Erbey Ochoa if Erbey Ochoa spoke to any girls while Erbey Ochoa was at Shooters and Erbey Ochoa stated that Erbey Ochoa did not speak to any girls because Erbey Ochoa does not speak English.

k) Your Affiant asked Erbey Ochoa if Erbey Ochoa was at Little Annie's on July 17, 2001. Erbey Ochoa said that Erbey Ochoa was not.

l) Your Affiant told Erbey Ochoa that there were witnesses who would say that Erbey Ochoa was at Little Annie's and that Erbey Ochoa had shown Erbey Ochoa's identification to a bartender, Nathan Ota. Your Affiant told Erbey Ochoa that Ota had been unable to find Erbey Ochoa's date of birth on the identification and showed the identification to Jorge Ceballos. Erbey Ochoa told Your Affiant that Erbey Ochoa actually had been at Little Annie's and that Erbey Ochoa had given Erbey Ochoa's identification to Ota.

m) Your Affiant asked Erbey Ochoa to tell your Affiant where Erbey Ochoa had been on the night of July 17, 2001, and Erbey Ochoa told your Affiant that Erbey Ochoa had been at Shooters, New York Pizza and Little Annies.

n) Erbey Ochoa told your Affiant that Erbey Ochoa believed that Erbey Ochoa was home at the Tyrolean Lodge by 2330 hours on July 17, 2001.

o) Your Affiant asked Erbey Ochoa to tell your Affiant what Erbey Ochoa was wearing on the night of July 17, 2001. Erbey Ochoa told Your Affiant that Erbey Ochoa was wearing a black t-shirt, black shorts with cargo pockets, a white baseball hat and white tennis shoes.

p) Your Affiant asked Erbey Ochoa to tell your Affiant how the blood got onto Erbey Ochoa's bike. Erbey Ochoa told your Affiant that Erbey Ochoa was in a bike accident on July 19, 2001, at 1100 hours, on the bike path between Clark's Market and the Post Office. Officer Rushing later checked the area described by Erbey Ochoa and found no blood and no sign of a bicycle accident.

q) Your Affiant asked Erbey Ochoa to tell your Affiant what Erbey Ochoa hit Erbey Ochoa's nose on that caused Erbey Ochoa's nose to bleed. Erbey Ochoa told your Affiant that when Erbey Ochoa crashed, Erbey Ochoa hit Erbey Ochoa's nose on the bicycle handlebars.

r) Your Affiant observed no dried blood immediately inside or around Erbey Ochoa's nose, nor did your Affiant observe any swelling, redness, or abrasions on the outside of Erbey Ochoa's nose.

s) Your Affiant observed an approximately six inch long scratch on the inside of Erbey Ochoa's left forearm. Your Affiant asked Erbey Ochoa how Erbey Ochoa got the scratch and Erbey Ochoa said that Erbey Ochoa received the scratch in the bicycle accident.

t) Your Affiant observed that the scratch on Erbey Ochoa's forearm appears to have healed for more than an hour and a half.

u) Your Affiant asked Erbey Ochoa why Erbey Ochoa did not go to work on July 19, 2001 and Erbey Ochoa said that Erbey Ochoa did not want to.

20) Your Affiant told Erbey Ochoa that your Affiant did not believe that Erbey Ochoa was being truthful with your Affiant and that your Affiant believed that Erbey Ochoa had, in fact, assaulted [redacted] Erbey Ochoa told your Affiant the following:

a) Erbey Ochoa told your Affiant that after Erbey Ochoa left New York Pizza a white female approached Erbey Ochoa and hugged Erbey Ochoa.

b) Erbey Ochoa told your Affiant that the white female asked Erbey Ochoa to sell the white female cocaine.

c) Erbey Ochoa told your Affiant that Erbey Ochoa told the white female that Erbey Ochoa did not sell cocaine and upon hearing that the white female said "you fucking Mexican" and pushed Erbey Ochoa away.

d) Erbey Ochoa told your Affiant that when the white female pushed Erbey Ochoa away the white female fell to the ground another Hispanic male picked the white female up off the ground.

e) Erbey Ochoa told your Affiant that the other Hispanic male who picked the white female up off the ground walked with the white female toward Ruby Park.

f) Your Affiant asked Erbey Ochoa to describe the Hispanic male who helped the white female and Erbey Ochoa described the Hispanic male as being 5'10", with a crew-cut-type hair cut, no front teeth, a bald spot and a dark complexion.

g) Your Affiant asked Erbey Ochoa to tell your Affiant what the Hispanic male that Erbey Ochoa just described was wearing and the only thing that Erbey Ochoa could confirm was that the Hispanic male was not wearing a hat.

21) On July 18, 2001 at 10:00 Aspen Police Detective Glenn Schaffer spoke with Aspen Valley Hospital Doctor Steve Ayers. Detective Schaffer asked Dr. Ayers about Dr. Ayer's treatment of [redacted] earlier in the morning. Dr. Ayers told Detective Schaffer the following:

a) Dr. Ayers stated that the injuries sustained by [redacted] were "100 percent consistent" with [redacted] story regarding the assault.

b) Dr. Ayers confirmed that the sexual assault examination on [redacted] indicated that there was in fact [redacted] penetration on [redacted] based on semen and sperm found in those locations.

c) Dr. Ayers stated that [redacted] made the following statements to Dr. Ayers during [redacted] treatment:

i) "I thought I was going to die."

ii) "I begged the guy, what can I do not to die?"

iii) "I saw my family and friends flash before me."

d) Dr. Ayers then provided Detective Schaffer with medical records relating to the treatment of [redacted] From those medical records Detective Schaffer learned the following:

e) [redacted] was admitted to Aspen Valley Hospital On July 18, 2001 at 02:54.

f) The medical report indicated [redacted] was suffering from tenderness of the neck and throat due to choking, [redacted] had difficulty swallowing, and [redacted] felt pain when opening her mouth fully.

g) [redacted] suffered scrapes and abrasions on [redacted] feet, a contusion on [redacted] upper right breast, and tenderness and abrasions on [redacted] upper back, lower back, and buttocks.

h) [redacted]

22) On July 18, 2001 Detective Schaffer spoke with Nathan Ota by phone. Nathan Ota is employed as a bartender for Little Annies Restaurant. Detective Schaffer told Nathan that the Aspen Police Department was investigating an assault on [redacted] which involved a short, Hispanic male. Nathan Ota stated to Detective Schaffer "Oh, Yea."

Detective Schaffer asked Nathan Ota why Ota stated "Oh, Yea" and Ota told Schaffer the following:

a) Nathan Ota was the bartender on duty at Little Annies on the night of July 17, 2001. Nathan Ota is an acquaintance of [redacted] and recalls [redacted] being in Little Annies on the evening of July 17, 2001 and early morning of July 18, 2001.

b) Nathan Ota stated that there was a Hispanic male, approximately 5 foot, three inches tall that came into Little Annies early on July 18, 2001. Nathan Ota described the Hispanic male as a "small guy" with a round face, small eyes, no beard, and having short dark hair, and wearing a red hat.

c) Nathan Ota stated that a Little Annies employee by the name of "Jorge" approached Ota, pointed to the Hispanic male and stated, "watch out for that guy."

d) Nathan Ota stated the Hispanic male walked into Little Annies at approximately 1:00 am by himself, and did not associate with any other person in the bar throughout the evening.

e) Nathan Ota stated that the last three people to leave the bar around the time of 2:00 am were [redacted] the Hispanic male, and a person named Trent who is employed at Syzygy.

23) On July 18, 2001 Detective Schaffer spoke with Traci Welsh who is employed as a bookkeeper for Little Annies. Traci Welsh told Schaffer that the employee named Jorge that Nathan Ota was referring to is Jorge Ceballos and Welsh provided Schaffer with Jorge Ceballos address and phone number.

24) Detective Schaffer later learned from Detective Joe DiSalvo that Victor Nerey is another employee of Little Annies that may have noticed the Hispanic male in the bar that evening.

25) On July 18, 2001 at about 14:00 Detective Schaffer spoke with Syzygy employee Trent Eldridge and learned the following:

a) Trent Eldridge was at Little Annies on July 18, 2001 at about 01:30. Eldridge stated that there were approximately six people in Little Annies including [redacted] and a Hispanic male whom Eldridge did not know.

b) Trent Eldridge described the Hispanic male as approximately 5 foot, 4 inches tall, with a medium build and short dark wavy hair. Eldridge stated that the Hispanic male had no facial hair, a medium to wide face, and was wearing a red ball cap with some kind of emblem on the hat.

c) Eldridge described the Hispanic males actions as "lurking in the back." Eldridge stated the Hispanic male was not drinking, and at one point in time "may have tried to talk to [redacted]

d) Eldridge stated that [redacted] left Little Annies at approximately 01:50 and that the Hispanic male followed [redacted] out of the bar. Eldridge stated that Eldridge remained in Little Annies with Nathan Ota for approximately ten more minutes and did not see which was [redacted] or the Hispanic male went after leaving the building.

26) On July 18, 2001 at 16:25 Detective Schaffer and Aspen Police Officer Linda Consuegra spoke with Victor Nerey at Little Annies Restaurant. Victor Nerey told Detective Schaffer the following:

a) Victor Nerey is employed at Little Annies and was on duty on the evening of July 17, 2001 and the morning of July 18, 2001.

b) Victor Nerey stated that while working at Little Annies on July 17, 2001 Nerey noticed a Hispanic male inside Little Annies who kept looking at a woman in the bar [redacted] Nerey stated that woman in the bar was fairly drunk, but the Hispanic male appeared very suspicious and kept coming into, and leaving the bar.

c) Nerey stated that the Hispanic male would stare at the female for long periods of time while the female was sitting on the front steps of Little Annies.

d) Nerey stated that Nerey then told Jorge Ceballos about the suspicious person in the bar. Jorge Ceballos told Nerey that Ceballos already noticed the suspicious Hispanic male and had told Nathan Ota to watch out for the Hispanic male.

e) Nerey stated that Nerey had previously met the Hispanic male about three months ago in the Cooper Street Pier bar, but did not know the Hispanic males name. Nerey described the Hispanic male as short with "Stuffy cheeks," light brown hair and fat. Nerey stated that the Hispanic male was wearing a red baseball cap, had no facial hair and at one point stayed with a bicycle outside, which was possibly red, but Nerey was not sure.

f) Nerey stated that Nerey and Ceballos spoke with the Hispanic male briefly, and the Hispanic male spoke about being kicked out of a bar because of a "bathroom incident."

g) Detective Schaffer showed Nerey a copy of a composite sketch developed by the Pitkin County Sheriff's Office [redacted] Nerey stated that the composite sketch looked just like the Hispanic male in Little Annies and Nerey "wouldn't change a thing" about the composite.

27) On July 18, 2001 Detective Schaffer and Officer Consuegra spoke with Jorge Ceballos at the Pitkin County Courthouse. Ceballos told Schaffer and Consuegra that the first time Ceballos saw the Hispanic male was at Little Annies on July 18, 2001 between 1:00 and 1:30am. Ceballos also told Schaffer and Consuegra the following:

a) Ceballos noticed the Hispanic male sitting by the entrance of Little Annies staring at a female who was sitting on the stairs smoking a cigarette. The female later came back into Little Annies and walked through the dining room to the restroom and was followed by the Hispanic male, who seemed to wait for the female while she was in the restroom. The female soon came out of the restroom and walked to the bar, where she sat and drank. The Hispanic male followed the female from the restroom and stood two to three feet behind the female, just staring at her.

b) Ceballos stated the female then moved towards the center of the bar, and the Hispanic male moved up to the bar and ordered a drink. It was about this time that Ceballos told Nathan Ota to watch out for the Hispanic male.

c) Ceballos stated that the Hispanic male ordered a beer from Ota, and Ota requested identification. Ceballos stated that Ota looked at the identification presented by the Hispanic male, and then handed the identification to Ceballos so Ceballos could help Ota find the where the date of birth was printed.

d) Ceballos stated that Ceballos looked at the picture on the identification and was "90% sure [redacted] Consuegra confirmed with Ceballos that Ceballos was talking about the composite sketch [redacted] which occurred in Pitkin County.

e) Ceballos stated that Ceballos recalled looking at the identification the Hispanic male presented and recalls May 5, 1980 as a possible birth date. Ceballos described the Hispanic male as wearing a red baseball cap and looking like the composite sketch.

28) On July 19, 2001 Detective Schaffer responded to the Tyrolean Lodge, unit number 26 at the request of Detective your Affiant. When Schaffer arrived your Affiant stated that your Affiant contacted Erbey Ochoa as a resident of the Tyrolean Lodge. Your Affiant told Detective Schaffer that Billy Williams positively identified Erbey Ochoa as the person who Billy Williams had kicked out of Shooters Saloon previous to the sexual assault. Billy Williams also identified a blue bicycle outside of Ochoa's apartment, which Williams stated Williams saw Ochoa riding outside of Shooter's Saloon after kicking Ochoa out of the bar.

29) Your Affiant pointed out to Detective Schaffer a large amount of red material on the bicycle, which appeared to be blood.

30) Based on the information that Detective Schaffer, your Affiant and DiSalvo had in regards to Ochoa and witness statements, Detective Schaffer handcuffed Erbey Ochoa. Ochoa was then told that Ochoa was under arrest. Your Affiant noticed that Ochoa was wearing a pair of white tennis type shoes that had a red substance on them which appeared to be blood.

31) Detective Schaffer learned from your Affiant that Erbey Ochoa and Erbey's live-in girlfriend Carmen Ochoa both gave your Affiant permission for the police to search Ochoa's apartment. Detective Schaffer and Detective Joe DiSalvo conducted that search.

32) While searching Erbey Ochoa's apartment, Detective Schaffer discovered several forms of identification, which contained Erbey Ochoa's photograph. One of those identification cards was a card from Mexico. The identification card contained the name "Manual Ochoa" and the date of birth of January 16, 1980. The address on the identification card read "Calle 5 de Mayo #26-A" Two other identification cards listed Ochoa's name as "Erbey Ochoa."

33) On July 19, 2001 Pitkin County investigator Joe DiSalvo met with Erbey Ochoa in the Pitkin County jail. Erbey Ochoa claims to not speak English. Pitkin County Deputy Brad Gibson who is fluent in Spanish served as interpreter. The interview was tape-recorded. Your Affiant met with Disalvo who told your Affiant the following information.

a) Gibson read Erbey Ochoa, Erbay Ochoa's constitutional rights per Miranda in Spanish from a printed form. Erbey Ochoa said that Erbey Ochoa understood his rights then waived Ochoa's rights. Erbey Ochoa then signed the form. (see exhibit "B")

b) Erbey Ochoa stated that Erbey Ochoa was in Aspen on Tuesday night at a "disco". Erbey Ochoa said the disco was located below street level and he does not know its name. Erbey Ochoa said that Erbey Ochoa had four beers then walked home. As Erbey Ochoa walked past New York Pizza on Hyman Avenue where Erbey Ochoa met a woman. The woman began to hug Erbey Ochoa for no apparent reason. Erbey Ochoa said the woman was very "horny" and intoxicated.

c) Erbey Ochoa said the woman then removed her pants and began to rub up against Erbey Ochoa. The woman then asked Erbey Ochoa if she wanted to have sex with Erbey Ochoa. She asked if Erbey Ochoa had any money or cocaine. Erbey Ochoa at first declined, however the woman was persistent. Erbey Ochoa and the woman then went into the alley behind New York Pizza. Erbey Ochoa said that Erbey Ochoa had sex with the woman and ejaculated in the woman's vagina. Erbey Ochoa and the woman then got up and the woman said "thank you". The woman then lost her balance and fell hitting her face on the pavement. The woman then got up her eye was swollen. Erbey Ochoa said the woman said "thank you' again then walked off with another man. Erbey Ochoa did not know the other man and did not know where he came from. Erbey Ochoa did not give her any money or cocaine.

d) Erbey Ochoa said he did not see the woman prior to the encounter in front of New York Pizza. Erbey Ochoa described the woman as heavy, with hair that was dark and came to the middle of her chest.

e) Disalvo asked Erbey Ochoa if Erbey Ochoa had been in Little Annies before Erbey Ochoa met the woman. Erbey Ochoa was not sure where Little Annies was.

f) DiSalvo asked Erbey Ochoa if Erbey Ochoa recalled seeing a woman [redacted]. Erbey Ochoa said no.

g) DiSalvo asked Erbey Ochoa if he was sure the sexual encounter happened in the alley behind New York Pizza. Erbey Ochoa said he was not sure. DiSalvo asked if it could have been one block East in the alley behind the Cooper Street Pier. Erbey Ochoa said it was possible he had sex with the woman in that alley.

h) DiSalvo asked Erbey Ochoa if Erbey Ochoa had been riding Erbey Ochoa's bicycle on that night. Erbey Ochoa said Erbey Ochoa rode Erbey Ochoa's bicycle to the "disco" then took the bicycle back to Erbey Ochoa's house then walked back to the disco.

i) Erbey Ochoa told DiSalvo that when woman drink they all want to have sex. Recently Erbey Ochoa was walking in downtown Aspen when an intoxicated woman saw Erbey Ochoa. The woman pulled down her pants and exposed her private parts to Erbey Ochoa. The woman then said "do you like my pussy" then danced around a little for Erbey Ochoa. Erbey Ochoa said that Erbey Ochoa knew the woman was drunk, and Erbey Ochoa did not want to talk to her so Erbey Ochoa just kept walking. Erbey Ochoa said, "when women drink they get crazy".

34) On July 19th, 2001 2100 hours Pitkin County Sheriff's Investigator Ron Ryan told your Affiant that Investigator Ryan had completed a photo line-up. The line up consisted of six photographs. Located in position number four was Erbey Ochoa. The other photographs were of similar looking Hispanic males. Investigator Ryan related the following information regarding the photo line-up:

a) On July 19th,2001 at 1350 hours Investigator Ryan contacted Jorge Ceballos. Ryan read the "photo line-up admonition" to Ceballos. Ceballos said that Ceballos understood the admonition and singed the photo line-up folder. Ryan showed the line-up to Ceballos, who pointed to Erbey Ochoa and said, "that's him". Ryan asked Ceballos where Ceballos knew number four from and Ceballos said that Ceballos knew number four from Tuesday night (July 17,2001) at Little Annies when number four was watching "the girl".

b) On July 19th, 2001 at 1404 hours Investigator Ryan contacted Tracy O'Reilly. Ryan read the "photo line-up admonition" to O'Reilly. O'Reilly said that O'Reilly understood the admonition and signed the photo line-up folder. Ryan showed the line-up to O'Reilly,

pointed to Erbey Ochoa and said that number four looked familiar and that O'Reilly might know number four from Little Annies on July 17th, 2001.

c) On July 19th, 2001 at 1515 hours Investigator Ryan contacted [redacted] Ryan read the "photo line-up admonition" to [redacted] said that [redacted] understood the admonition and signed the photo line-up folder. Ryan showed the line-up to [redacted] who pointed Erbey Ochoa and said, "I think it's this one, he's the person who raped me, he tried to kill me.

d) On July 19th, 2001 at 1945 hours Investigator Ryan contacted Victor Nerey. Nerey does not speak English and Ryan had Officer Glidden translate the "photo line-up admonition" for Nerey. Nerey told Officer Glidden that Nerey understood the admonition and signed the line up folder. Ryan showed Nerey the line-up and Nerey immediately pointed to Erbey Ochoa and said that Nerey knows Erbey Ochoa from Tuesday night (July 17th, 2001) at Little Annies.

e) On July 19th, 2001 at 2010 hours Investigator Ryan contacted Nathan Ota. Ryan read the "photo line-up admonition" to Ota. Ota said that Ota understood the admonition and signed the line-up folder. Ryan showed the line-up to Ota and Ota pointed to Erbey Ochoa and said that this one looks familiar from Little Annies on Tuesday night (July 17th, 2001). Ota also said that Erbey Ochoa stood out "as the guy hanging around at the bar that Jorge and Victor pointed out".

f) On July 19th, 2001at 2032 hours Investigator Ryan contacted Trent Eldridge. Ryan read the "photo line-up admonition" to Eldridge . Eldridge said that Eldridge understood the admonition and signed the line-up folder. Ryan showed the line-up to Eldridge and Eldridge said that Eldridge was not sure because "it was mainly the guys size that he remembered"

_____
Affiant's Signature

Subscribed and Sworn to before me this ___ day of _____, _____.

_____
Notary Public

My Commission Expires on

Case#01A001087 Page #19

The undersigned Judge, having reviewed the attached affidavit, determines that there is sufficient probable cause to detain Erbey Manuel Ochoa; Date of Birth: January 16th, 1980

Judge

Date: 7-20-01 Time: 7:35 p.m.

The undersigned Judge, having reviewed the attached affidavit, determines that there is insufficient probable cause to detain Erbey Manuel Ochoa;Date of Birth January 16th, 1980

Judge

Date:_____Time:_____

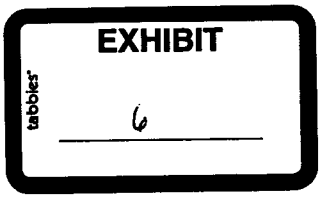
Certified to be a true and complete copy of original on file in the District Court of Pitkin County, Colorado.
Date 7/27/01
By

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

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

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

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



STANDING

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

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

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

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

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

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

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

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

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

RELEASE OF THE AFFIDAVIT

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

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

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

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

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

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

Supreme Court or by the order of any court; 3) release of results of biological testing pursuant to Sections 16-11-102.4 and 16-23-104; and 4) release of the records would be contrary to the public interest. See Section 24-72-305. If there is a denial of the release or inspection, the custodian of the records may be required to provide an explanation for said denial within 72 hours of the denial. See Section 24-72-305(6).

In applying these criteria to the case at hand the Court notes that release of the affidavit would not be contrary to any state statute or any rule promulgated by the Colorado Supreme Court. Furthermore, information obtained pursuant to Sections 16-11-102.4 and 16-23-104 is not contained within the affidavit. Therefore, the only basis for the continued sealing of these records is that it would be contrary to the public interest to release the affidavit.

In analyzing this public interest issue the Court is cognizant, as noted in previous paragraphs, there is a strong preference, both from the constitution and our statutes, to access to hearings and documents in the criminal justice system. Concerns about the potential harm to the right of the Defendant and the People to obtain a fair trial, should the affidavit be released, can be addressed through certain preventive measures taken during the trial process. Public policy weighs in favor of access to and the release of the record as opposed to the continued sealing of the document.

However, this access is not unfettered. Section 24-72-304(4)(a) directs that the name **and any other information that would identify any victim of sexual assault** ... shall be deleted from a criminal justice record prior to its release. Furthermore, while the Court has found that public policy favors access to records, the Court finds that it must take into consideration the following: the sensitive and private nature of a portion of the affidavit; the uncertain admissibility of this information; the harm to the privacy of the victim; and the potential harm to a fair trial. Therefore the Court will redact from the affidavit the following:

1. The victim's name, date of birth, place of employment
2. Personal information of the victim and limited medical information.

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

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

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

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

Dated and signed this 22 day of June, 2011.

BY THE COURT:

PAUL A. KING
District Court Judge

CERTIFICATE OF SERVICE

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

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