

COUNTY COURT EAGLE COUNTY, COLORADO 885 E. Chambers Road P.O. Box 597 Eagle, Colorado 81631	FILED IN THE COMBINED CLERKS OFFICE AUG 21 2003 EAGLE COUNTY, COLORADO BY <u>MS</u> σ COURT USE ONLY σ
Plaintiff: PEOPLE OF THE STATE OF COLORADO. Defendant: KOBE BEAN BRYANT.	
	Case Number: 03 CR 204 Div: 1
ORDER RE MOTION TO SEAL AND APPLICATION TO UNSEAL COURT FILE	

THIS MATTER comes before the Court on the Motion to Seal filed by the District Attorney and the Application to Unseal Court File ("Application") filed by The Denver Post Corporation and NBC Subsidiary (KNBC-TV), Inc. (collectively "Media Applicants"). National Broadcasting Company, Inc., the Los Angeles Times, Cable News Network, LP, LLLP, Freedom Communications, Inc. d/b/a the Orange County Register and Colorado Mountain News Media Co d/b/a the Vail Daily joined as a co-applicants. Defendant filed a response in opposition to the Application. A hearing was held on the motions on July 31, 2003. The District Attorney was represented by Deputy District Attorney Gregory Crittenden. Defendant was represented by Harold A. Haddon and Pamela Robillard Mackey. Rohn Robbins represented the Vail Daily and the remainder of the Media Applicants were represented by Steven D. Zansberg and Christopher P. Beall. The Court has reviewed the briefs filed in support of and in opposition to the motions, has heard the argument and has reviewed the evidence presented at the hearing as well as the videotape filed the day after the hearing. The Court has also reviewed the affidavits *in camera*. Being fully advised, the Court finds and concludes as follows.

Findings of Fact

1. On July 1, 2003, a Search Warrant and Affidavit in Support of a Search Warrant bearing the original signature of Judge Russell H. Granger were filed. The Search Warrant was submitted by the Eagle County Sheriff's Office ("ECSO") and was authorized by Judge Granger who also granted the District Attorney's Motion to Seal Affidavit. The Order stated that "[a]ll affidavits are sealed until further order of court." No findings of fact or conclusions of law were stated in the Order. The Motion to Seal Affidavit alleged that the information contained in the

affidavit was part of an ongoing investigation. No affidavits were presented in support of the motion.

2. On July 3, 2003, a Warrant for Arrest Upon Affidavit and Affidavit in Support of an Arrest Warrant bearing the original signature of Judge Granger were filed. The warrant was submitted by the ECSO and authorized by Judge Granger. The warrant does not indicate District Attorney approval. Also on July 3, 2003, an Affidavit & Petition for Nontestimonial Identification Order with a facsimile copy of the signed Petition were filed. The Petition was submitted by ECSO and authorized by Judge Granger. The Return of an Order for Non-Testimonial Identification Pursuant to Rule 41.1, Criminal Procedure bearing the affiant's original signature was also filed. The Return and Inventory as to the search warrant bearing the affiant's original signature was also filed. Defendant was arrested on July 4, 2003 and released on bond.

3. On July 7, 2003, the Affidavit & Petition for Nontestimonial Identification Order bearing the original signatures of Judge Granger was filed. Also filed was a copy of the arrest warrant with a completed Return of Service bearing the original signature of the police officer, a copy of the previous document, a copy of the arrest warrant with Judge Granger's signature and a blank Return of Service, and a copy of the arrest warrant prior to Judge Granger's authorization. A copy of the Affidavit in Support of an Arrest Warrant was again filed. The District Attorney filed a Motion to Seal all Affidavits and asserted in a conclusory fashion that the release of the affidavits could compromise the integrity of the investigation and any future possible prosecution. No affidavits were submitted. On July 8, 2003, the District Attorney filed a Supplement in Support of Motion to Seal Warrant and File in which the District Attorney indicated that Defendant's counsel had no objection to the motion.

4. On July 8, 2003, the Application was filed. On July 9, 2003, the Court's Order Re Briefing and Hearing on Motion to Seal and Application to Unseal Court File was entered by which the Court established an expedited briefing and hearing schedule. The Court also sealed the contents of the file except for the pleadings relating to the motion and application pending resolution of the motions. By separate order, the District Attorney's response brief was redacted before it was released.

5. On July 18, 2003, a single count Complaint/Information was filed by which Defendant was alleged to have violated C.R.S. § 18-3-402(1)(a), 4(a), Sexual Assault-Overcome Victim's Will (F3). The Complaint was released after redaction of the alleged victim's initials.

6. No testimony was presented at the hearing. The exhibits attached to the District Attorney's response to the Application are the only evidence submitted by the District Attorney. Defendant did not present any evidence but requested the Court to take judicial notice of the contents of the affidavits. The evidence presented by the Media Applicants consisted of the exhibits attached to the Application and reply. The exhibits were categorized as (1) scope of information concerning case already in the public domain; (2) statements of parties; (3) historical experience of courts in Colorado with respect to public access to warrant materials; and (4) legal authorities not offered as evidence but presented for the convenience of the Court. The first category includes numerous news reports concerning the case "offered for purposes of notice,

not for the truth of the matters contained therein.” (Exhibits C, I-R). Defendant had no objection subject to the acknowledgement that the exhibits represented a small fraction of the actual media coverage.¹ The second group of exhibits includes (1) the Eagle County Sheriff’s Office press release by which the arrest was announced (stipulated as to authenticity only)(Exhibit A); (2) the July 6, 2003 statement by counsel for Defendant (stipulated as to authenticity only)(Exhibit B); (3) a “rough” transcript of the CNN broadcast of and comment following the District Attorney’s announcement that charges had been filed (acknowledged as potentially inaccurate; offered for public interest and waiver by Defendant)(Exhibit G); (4) a “rough” transcript of the CNN broadcast and comment following Defendant’s news conference on July 18, 2003 (acknowledged as potentially inaccurate and objected to by Defendant)(Exhibit H); (5) a Denver Post article containing comment by various parties (Exhibit I); (6) a Denver Post article containing comments of the Eagle County Sheriff concerning the arrest (Exhibit GG); (7) a videotape of the District Attorney’s July 18, 2003 news conference announcing the arrest(Exhibit KK); and (8) a videotape of the news conference of Defendant and Defendant’s counsel on July 18, 2003 (Exhibit LL). The third group of exhibits includes various court documents and news articles pertaining to requests to seal warrant materials in Colorado courts (Exhibits E, T-FF). Defendant objected to these exhibits as to lack of foundation, relevance and lack of opportunity to verify or research as the reply brief was filed two days prior to hearing. The Court additionally noted that the exhibits were not filed under seal and sustained the objection.

7. The initial order of July 1, 2003 included only the affidavits. The District Attorney’s Motion to Seal failed to identify any specific documents other than a reference to affidavits “including but not limited to the arrest warrant in this case” in the prayer. The Supplement in Support of Motion to Seal Warrant and File suggested by its title that the motion included the entire file. The brief filed by the District Attorney again failed to identify the specific documents they sought to seal but framed the issue as whether the media had a right of access to the court file including the warrants, petition and supporting affidavits. In response to the Court’s inquiry at the July 31, 2003 hearing as to the scope of the motion, the District Attorney identified the documents as (1) the arrest and search warrants and Rule 41.1 nontestimonial petition; (2) the affidavits filed in support of the warrants and petition; (3) any document or exhibit which contains victim identification information; and (4) any record which is not an official action. The last two categories clearly lack the requisite specificity in that the District Attorney failed to identify which documents contained alleged victim identification information and also failed to identify which records the District Attorney considered to be records that are not official action records. The arguments in this case have centered on the warrants, petition and affidavits and the Court will address those specific documents in this Order. The remainder of the Court file will be available to the media and the public.² Any future motions to seal records in the Court file

¹ The exhibit referenced as JJ was not attached to the reply brief.

² The specific documents which were sealed pursuant to the Court’s Order Re Briefing and Hearing on Motion to Seal and Application to Unseal Court File and which will be available to the public and the media upon execution of this Order are (1) the Appearance Bond filed on July 7, 2003; (2) the facsimile copy of Judge Granger’s Order of July 4, 2003 filed on July 7, 2003 whereby Defendant was granted permission to leave the state upon consent of surety; (3) the Consent of Surety filed on July 7, 2003; and (4) Judge Granger’s Order of July 4, 2003 filed on July 9, 2003 containing Judge Granger’s original signature. The Complaint/Information filed on July 18, 2003 will remain sealed as it contains the alleged victim’s initials. It was released in redacted form. The People’s Response to Media Application to Unseal Court File will remain sealed pursuant to the Court’s Order Re Motion to Seal People’s

shall specifically identify the records sought to be sealed and identify the legal basis upon which the motion is premised as to each record.

Conclusions of Law

I.

The parties have asserted and debated various legal authorities which they claim govern the public dissemination of court documents in Colorado. In the Court's view, the principal arguments center on (1) the Colorado Criminal Justice Records Act ("CJRA") found at C.R.S. § 24-72-301 *et seq.*; (2) the freedom of speech and press derived from the First Amendment to the Constitution of the United States and Article II, § 10 of the Constitution of Colorado; and (3) the right to a fair trial derived from the Sixth Amendment to the Constitution of the United States and Article II, § 16 of the Constitution of Colorado. The Court, as a criminal justice agency under the CJRA, has a responsibility to maintain certain records and to assure open access unless closure is permitted or compelled. The District Attorney and Defendant contend the documents should be sealed as their disclosure would be contrary to the public interest under the CJRA on several grounds including Defendant's right to a fair trial by an impartial jury. The Media Applicants assert a right of access based on the First Amendment qualified right of access and a common law right of access. The parties' respective motions are granted in part and denied in part.

CJRA and other state legal authority

It is undisputed that the warrants, petition and affidavits are criminal justice records. Such records are governed by the CJRA. "[T]he General Assembly has clearly made certain portions of criminal case files available to the public, has reserved to the official custodian discretion as to other portions of criminal case files, and has barred the release of other portions." *Office of State Court Adm'r v. Background Info. Servs., Inc.*, 994 P.2d 420, 427 (Colo. 1999).

"[R]ecords of official actions shall be maintained by the particular criminal justice agency which took the action and shall be open for inspection by any person at reasonable times, except as provided in this part 3 or otherwise provided by law." C.R.S. § 24-72-303(1)(2002). "'Criminal justice agency' means any court with criminal jurisdiction...." C.R.S. § 24-72-303(3)(2002). "'Official action' means an arrest; indictment, charging by information; disposition; pretrial or posttrial release from custody...." C.R.S. § 24-72-303(7)(2002). "Except for records of official actions which must be maintained and released pursuant to this part 3, all criminal justice records, at the discretion of the official custodian, may be open for inspection by any person at reasonable times, except as otherwise provided by law...." C.R.S. § 24-72-304(1)(2002). "The name of any victim of sexual assault or of alleged sexual assault shall be deleted from any criminal justice record prior to the release of such record...." C.R.S. § 24-72-304(4)(a)(2002).

Brief in Case # 03-CR-204 and Motion to Immediately Unseal the People's Brief entered on August 4, 2003. The response was also released in redacted form.

(1) The custodian of criminal justice records may allow any person to inspect such records or any portion thereof except on the basis of any one of the following grounds or as provided in subsection (5) of this section:

...

(5) On the ground that disclosure would be contrary to the public interest...
C.R.S. § 24-72-305 (2002).

In addition to the CJRA, other legal authorities in Colorado which address the issue of access to court records include: the right of privacy derived from the due process guarantees of the Fourteenth Amendment to the Constitution of the United States as set forth in *Martinelli v. District Court*, 612 P.2d 1083, 1091 (Colo. 1980) and as applicable to the Colorado Open Records Act pursuant to *In re Board of County Comm'rs of County of Arapahoe*, 2003 WL 21664844, at 4 (Colo. App. July 17, 2003); C.R.S. § 30-10-101(1)(a) (2002) ("no person, except parties in interest, or their attorneys, shall have the right to examine pleadings or other papers filed in any cause pending in such court"); *Times-Call Publ'g Co. v. Wingfield*, 410 P.2d 511, 513 (Colo. 1966)(§ 30-10-101(1)(a) "does not mean that judges and clerks of courts of record are prohibited from allowing persons other than parties in interest or their attorneys to examine the pleadings or other papers on file in such courts"); Crim. P. 57(b) (where no procedure specified in the Colorado Rules of Criminal Procedure, court may proceed in a manner consistent with any Supreme Court directive and shall look to the Rules of Civil Procedure); Chief Justice Directive 98-05 (1998)(court files are open to the public except documents that are "declared to be private or confidential by statute or specific order of court;" court may order that records shall not be made available "for good cause shown"); C.R.C.P. 121, § 1-5(2) ("An order limiting access shall not be granted except upon a finding that the harm to the privacy of a person in interest outweighs the public interest."); *Anderson v. Home Ins. Co.*, 924 P.2d 1123 1127 (Colo. App. 1996)(citations omitted)(claims that court file contains "extremely personal, private and confidential matter is generally insufficient" to establish privacy interest under C.R.C.P. 121, § 1-5; "under the common law, a heightened expectation of privacy or confidentiality in court records has been found to exist only in those limited instances in which an accusation of sexual assault has been made, or in which trade secrets, potentially defamatory material, or threats to national security may be implicated"); C.R.S. § 24-4.1-302.5(1)(a) (2002)(crime victims shall have the "right to be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process"); and *Johnson v. Dept. of Corrections*, 972 P.2d 692, 695 (Colo. App. 1998)(disclosure may be contrary to public interest where disclosure subjects reporting parties and witnesses to harassment and intimidation). The application of each of these authorities ultimately results in a balancing test of the respective interests.

In sum, we conclude that access to court-maintained files involves a fragile balance between the interests of the public and the protection of individuals who are parties to cases in court. Court files can contain very private emotional, financial, and psychological documents, as well as identifying information such as drivers license numbers, social security numbers, and addresses of many of the people who are party or witness to a civil or criminal case.

When the General Assembly wishes to address and resolve that balance, its specific intent clearly governs—as evidenced by mandates such as the requirement that the court registry of actions, the judgment record, and records of official actions in criminal cases be made public, and the proscription against release of juvenile records.

When the General Assembly has not chosen to act with specificity, court rules and procedures govern, and it rests with the court either on a generalized or a specific basis to balance the competing interests. *Background Info.*, 994 P.2d at 429.

Upon review of these additional legal authorities, the Court concludes that disclosure of the documents at issue in this case is principally governed by CJRA which requires a determination of whether disclosure is contrary to the public interest. As the public interest exception applies to all criminal justice records, it is not necessary for the Court to determine which of the requested criminal justice records are “official action” records.

The CJRA does not define “contrary to the public interest” or establish a standard by which such a finding may be made. The CJRA’s lack of specificity therefore compels an analysis of existing federal and state case law to determine the appropriate standard of review.

Competing Interests

A. Sixth Amendment right to a fair trial

The Sixth Amendment to the United States Constitution provides that “[i]n all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed....” Article II, § 16 of the Constitution of Colorado provides that a defendant has the right to “a speedy public trial by an **impartial** jury of the county or district in which the offense is alleged to have been committed.” (Emphasis added.) “We have always held that the atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs.” *Estes v. Texas*, 381 U.S. 532, 540 (1965). “Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by ‘impartial’ jurors....” *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075 (1991). “The outcome of a criminal trial is to be decided by impartial jurors, who know as little as possible of the case, based on material admitted into evidence before them in a court proceeding.” *Gentile*, 501 U.S. at 1070.

A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. This Court has, therefore, been unwilling to place any direct limitations on the freedom traditionally exercised by the news media for ‘(w)hat transpires in the court room is public property.’ ... But it must not be allowed to divert the trial from the ‘very purpose of a court

system *** to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures.’ Among these ‘legal procedures’ is the requirement that the jury’s verdict be based on evidence received in open court, not from outside sources. *Sheppard v. Maxwell*, 384 U.S. 333, 350-51 (1966)(citations omitted).

B. First Amendment right of access

The First Amendment to the United States Constitution provides that “Congress shall make no law ... abridging the freedom of speech, or of the press...” Article II, § 10 of the Constitution of Colorado provides that “[n]o law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject....”

We recognize that constitutional guarantees are not always absolute and that full exercise thereof is not always entirely possible. On occasion, one right must necessarily be subordinated to another. The interest of the accused, whose life and liberty are in jeopardy, to a fair trial by an impartial jury is paramount, and may require, depending on the circumstances of the case, limitations upon the exercise of the right of free speech and of the press. The problem is one of balancing of interests so that irreconcilable conflict need not necessarily result from the simultaneous exercise of those constitutional rights. Whether in a particular case there has been an actual accommodation in the simultaneous exercise of the two rights, depends upon the circumstances of the case. *Stapleton v. District Court*, 499 P.2d 310, 312 (Colo. 1972)(citations omitted).

[The First Amendment] has been interpreted by the Supreme Court as conferring upon the media a qualified right to attend criminal trials and other court proceedings when ‘the place and process have historically been open to the press and general public,’ and where ‘public access plays a significant positive role in the functioning of the particular process in question.’ *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986)(conferring qualified right to attend preliminary hearings)[hereinafter *Press-Enterprise II*]; see also *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980)(conferring qualified right to attend criminal trials); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984)(no relation to *Press-Enterprise II*) (conferring qualified right to attend voir dire proceedings).

The right of access must be balanced against and may be outweighed by competing rights or societal interests. However, a First Amendment right of access may be overcome only when the restriction ‘is essential to preserve higher values and is narrowly tailored to serve that interest.’ *U.S. v. Cianci*, 175 F. Supp. 2d 194, 199 (D.C. R.I. 2001)(citations omitted).

Press-Enterprise II requires a two-part analysis. The initial inquiry, the “experience and logic” considerations, requires a court to determine whether (1) the “place and process have

historically been open to the press and general public;” and (2) “whether public access plays a significant positive role in the functioning of the particular process in question.” *Press-Enterprise II*, 478 U.S. at 8-9. “If the particular proceeding in question passes these tests of experience and logic, a qualified First Amendment right of public access attaches. But even when a right of access attaches, it is not absolute.” *Press Enterprise II*, 478 U.S. at 9.

If the interest asserted is the right of the accused to a fair trial, the preliminary hearing shall be closed only if specific findings are made demonstrating that, first, there is a substantial probability that the defendant’s right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant’s fair trial rights. *Press-Enterprise II*, 478 U.S. at 14 (citations omitted)(emphasis added).

The Media Applicants contend the Court should apply the higher standard of “clear and present danger” based on *Star Journal Publ’g, Corp. v. County Court*, 591 P.2d 1028 (Colo. 1979) which concerned the closure of a pretrial hearing. This Court disagrees. The court in *Star Journal* adopted Standard 8-3.2 of the 2nd edition of the ABA Standards for Criminal Justice Relating to Fair Trial and Free Press³ which provided as follows.

The presiding officer may close a preliminary hearing, bail hearing, or any other pretrial proceeding, including a motion to suppress, and may seal the record only if:

- (a) the dissemination of information from the pretrial proceeding and its record would create a clear and present danger to the fairness of the trial, and
- (b) the prejudicial effect of such information on trial fairness cannot be avoided by any reasonable alternative means. Standard 8-3.2, ABA Stands for Criminal Justice, Fair Trial and Free Press (2nd Ed., 1986 Supplement).

The clear and present danger standard was also applied to criminal contempt proceedings in *P.R. v. District Court*, 637 P.2d 346, 352 (Colo. 1981) upon citation to *Star Journal* and Standard 8-3.2. In *Stapleton*, a 1972 decision, a substantial likelihood standard was applied to a hearing on pretrial motions to suppress statements and evidence upon citation to Standard 3.1 which pertained to pretrial hearings. Thus, in each of these cases, the Colorado Supreme Court adopted the existing ABA standard.

Standard 8-3.2 was redrafted in response to *Richmond Newspapers* which recognized a First Amendment right of access to the judicial branch. Standard 8-3.2 was broadened in scope to include all judicial proceedings, documents and exhibits and incorporated the substantial probability standard of *Press-Enterprise II*.

- (a) In any criminal case, all judicial proceedings and related documents and exhibits, and any record made thereof, not otherwise required to remain confidential, should be accessible to the public, except as provided in section (b).

³ Any further reference to a Standard is that of the ABA Standards for Criminal Justice, Fair Trial and Free Press.

(b)(1) A court may issue a closure order to deny access to the public to specified portions of a judicial proceeding or related document or exhibit only after reasonable notice of an opportunity to be heard on such proposed order has been provided to the parties and the public and the court thereafter enters findings that:

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

(B) the proposed order will effectively prevent the aforesaid harm; and

(C) there is no less restrictive alternative reasonably available to prevent the aforesaid harm.

(2) A proceeding to determine whether a closure order should issue may itself be closed only upon a prima facie showing of the findings required by Section b(1). In making the determination as to whether such a prima facie showing exists, the court should not require public disclosure of or access to the matter which is the subject of the closure proceeding itself and the court should accept submissions under seal, in camera or in any other manner designed to permit a party to make a prima facie showing without public disclosure of said matter.

(c) While a court may impose reasonable time, place and manner limitations on public access, such limitations should not operate as the functional equivalent of a closure order.

(d) For purposes of this Standard, the following definitions shall apply:

(1) 'criminal case' shall include the period beginning with the filing of an accusatory instrument against an accused and all appellate and collateral proceedings;

(2) 'judicial proceeding' shall include all legal events that involve the exercise of judicial authority and materially affect the substantive or procedural interests of the parties, including courtroom proceedings, application, motion, plea-acceptances, correspondence, arguments, hearings, trials and similar matters, but shall not include bench conferences or conferences on matters customarily conducted in chambers;

(3) 'related documents and exhibits' shall include all writings, reports and objects, to which both sides have access, relevant to any judicial proceeding in the case which are made a matter of record in the proceeding.

(4) 'public' shall include private individuals as well as representatives of the news media;

(5) 'access' shall mean the most direct and immediate opportunity as is reasonably available to observe and examine for purposes of gathering and disseminating information;

(6) 'closure order' shall mean any judicial order which denies public access. Standard 8-3.2, ABA Standards for Criminal Justice, Fair Trial and Free Press (3rd ed. 1992).

The Court concludes, upon consideration of the decisions of the Supreme Court of the United States which have been issued subsequent to *Star Journal* and upon which the revised Standard 8-3.2 was based, that the clear and present danger standard is no longer viable. The

issue remains, however, as to whether *Press-Enterprise II* compels a finding of a qualified constitutional right of access to warrant materials.

None of the parties have cited any cases from the United States Supreme Court or the Colorado appellate courts concerning the right of public and media access to warrants and affidavits in a pending criminal case. The lower federal courts that have addressed this issue generally consider whether the common law or the First Amendment provides a right of access to warrant materials.⁴

The *Press-Enterprise II* First Amendment analysis is that most often used in the lower federal courts but the conclusions differ. *Cianci*, 175 F. Supp. 2d at 200. The common law right may be restricted upon the discretion of the court, generally defined as “one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case.” At least one federal court applied the additional *Press-Enterprise II* requirement that the restriction “is essential to preserve higher values and is narrowly tailored to serve that interest” as the measure of that discretion. See Lynn B. Oberlander, *A First Amendment Right of Access to Affidavits in Support of Search Warrants*, 90 Colum. L. Rev 2216, 2221-25 (1990)(Media Applicants’ Exhibit II); *U.S. v. McVeigh*, 918 F. Supp. 1452, 1463 (W.D. Okla. 1996)(citation omitted).

The experience prong of *Press-Enterprise II* requires a finding that the place or process has historically been open to the general public and press. In *Cianci*, the court reviewed the decisions in *Baltimore Sun Co. v. Goetz*, 886 F.2d 60 (4th Cir. 1989), *Times Mirror Co. v. Copley Press, Inc.*, 873 F.2d 1210 (9th Cir. 1989) and *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569 (8th Cir. 1988) and concluded that “[i]n each case, the court determined that the first prong of the *Press-Enterprise II* test had not been satisfied because, historically proceedings to obtain search warrants have been conducted *ex parte* and have not been open to the public.” *Cianci*, 175 F. Supp. 2d 194. The experience in this Court is consistent with that conclusion in *Cianci*, in that that warrants are issued *ex parte* and the process by which warrants are obtained or executed has not historically been open to the public or the media.

Where the lower federal court First Amendment conclusions differed was the finding in *Gunn* that a First Amendment right of access nonetheless attached to warrant documents because they are routinely filed as public records. The court in *Cianci* did not find that reasoning persuasive.

The analysis in *Cianci* is supported by the Section (d) Commentary to Standard 8-3.2.

Paragraph (d)(1) defines a ‘criminal case.’ It identifies the point at which a right of access attaches, namely, the filing of an accusatory proceeding. The filing is what triggers the exercise of judicial authority over a case or controversy and the consequent right of the public to review the exercise of that authority. This

⁴ As will be discussed *infra*, the common law right of access is codified in Colorado.

definition therefore excludes from the scope of paragraph (a) all pre-charge investigative proceedings.

This is not intended to suggest that there is no legal basis to access prior to a case filing. Indeed, the courts have recognized claims to access in a variety of pre-charge circumstances. The point is that pre-charge access stands on a different footing than the *Richmond* right of access to criminal proceedings. The former must be separately grounded in a common-law rule or statute.

The Court agrees with the analysis in *Cianci*. The fact that warrant documents are filed with the clerk of a court pursuant to rule or statute does not render the process “historically” open or establish a First Amendment qualified right of access but rather, creates a common law or statutory right of access pursuant to that jurisdiction’s laws pertaining to open records. Thus, the Court concludes that the experience prong of *Enterprise-Press II* is not satisfied.

C. Common law right of access

The common law right of access in Colorado has been codified in the Colorado Open Records Act initially enacted in 1968. The CJRA component was subsequently enacted in 1977.

We turn next to an examination of the legislative direction concerning open access to records in Colorado. This policy is grounded in fundamental principles honoring open discussion of matters of public concern. Indeed, as a means of furthering that interest, “[i]t is clear that the courts of this country recognize a general right to inspect and copy public records.” *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 591, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1987).

This general philosophy of open access to government and to government records is codified in Colorado, and it is that law to which we look for guidance.... *Pierce v. St. Vrain Valley School Dist RE-1J*, 981 P.2d 600, 605 (Colo. 1999)(citations omitted).

Crim. P. 41(f) pertains to search warrants and provides that “[t]he judge who has issued a warrant shall attach to the warrant a copy of the return, inventory, and all other papers in connection therewith and shall file them with the clerk of the district court for the county of origin.” Crim P. 41.1(f)(6) pertains to nontestimonial identification and requires that a return be made to the issuing judge indicating whether the named person has been detained, released or arrested. Under the CJRA, as set forth above, records of official actions shall be disclosed. C.R.S. § 24-72-303(1)(2002)(emphasis added). All other criminal justice records may be open for inspection at the discretion of the official custodian. C.R.S. § 24-72-304(1)(2002). However, disclosure of any criminal justice record is precluded if disclosure is contrary to the public interest pursuant to C.R.S. § 24-72-305(5)(2002).

The final issue is what standard is to be applied in the determination of whether disclosure is contrary to the public interest upon Defendant’s assertion of his Sixth Amendment right to a fair trial. None of the parties have cited any Colorado authority which establishes a certain standard to be applied in Colorado in making the determination of whether disclosure is

contrary to the public interest. The Media Applicants contend the standard is that of *Press-Enterprise II*, while the Defendant and District Attorney contest the application of *Press-Enterprise II* and assert a lower standard. Arguably, the CJRA standard is a lesser standard than that imposed by *Press-Enterprise II*, however, a determination in that regard is immaterial as the facts of this case preclude disclosure under the even more stringent *Press-Enterprise II* standard.

II.

Substantial probability that Defendant's right to a fair trial will be prejudiced by publicity that closure would prevent

The documents pertaining to the arrest warrant include the warrant, affidavit and return of service. The arrest warrant and return recite the offenses for which Defendant was arrested, the amount of bail and the fact that Defendant was arrested on July 4, 2003 and thus, contain no information which would implicate Defendant's fair trial rights, and therefore shall be immediately released. The affidavit in support of the arrest warrant is addressed below.

The documents pertaining to the Rule 41.1 order include the order, the affidavit and the return. The Rule 41.1 petition identifies the general procedure sought but does not include any information or results specific to the evidence in this case and the return states only that Defendant was detained for such procedure on a date certain and was then released and thus, again these documents do not implicate Defendant's fair trial rights, and therefore shall be immediately released. The affidavit in support of the petition is addressed below.

The documents pertaining to the search warrant include the warrant, affidavit and return and inventory. The search warrant identifies specific evidence to be sought at a specific location and the return and inventory lists the specific items of property taken under the warrant and thus, the contents of these documents implicate Defendant's fair trial rights. The affidavits contain (1) substantial information that, contrary to the Media Applicants' speculation, is not in the public domain; (2) factual statements describing graphic details of the alleged sexual encounter between Defendant and the alleged victim; (3) statements of law enforcement based on multiple layers of hearsay which are likely not admissible at trial; (4) descriptions of medical tests which are subject to challenge; (5) the identification of and statements attributed to potential witnesses not included in the witness list attached to the Complaint and who may not even be aware they are identified in the affidavits; (6) descriptions of conduct which is likely to be either irrelevant or inadmissible at trial; (7) statements which are attributed to Defendant which may or may not be admissible if challenged by Defendant at trial; and (8) descriptions of items of evidence obtained after execution of the warrants and petition. The affidavits contain multiple statements which appear to bear little relevance to the issue of whether probable cause existed and are in part unnecessarily prejudicial and inflammatory. As discussed in *Cianci*, and as the Court concludes here, the probability of prejudice is greater with respect to the disclosure of search warrants. *Cianci*, 175 F. Supp. 2d at 202.

The Court also concludes that there is no doubt whatsoever that this case has been the subject of intense public and media scrutiny which extends nationwide as evidenced by the Media Applicants' exhibits which the parties stipulate represent only a fraction of the actual

coverage. The interest stems primarily from Defendant's status as a professional athlete and it is unlikely to subside at any time prior to the final resolution of this case. The publicity that surrounded the arrest and the advisement proceeding is a powerful indicator of what would follow if the documents were released at this time.

The California Court of Appeals, in an unpublished decision in *Peterson v. Superior Court*, a similar matter which has also been subjected to intense public and media interest, aptly describes what would follow the release of their warrant materials.

Release of the Materials would undoubtedly be followed by their widespread dissemination and dissection in every sort of media medium, including daily television with parades of 'experts' endlessly commenting about likely prosecution and defense strategies, opining about the strengths, weaknesses and admissibility of the various factual tidbits disclosed by the Materials, and venturing predictions about the probably outcome of the trial against petitioner. How a fair trial for both parties – and particularly how an untainted jury could be found anywhere—in the aftermath of such a frenzy escapes us. *Peterson*, at 7.⁵

The Court concludes that there is a substantial probability that Defendant's right to a fair trial would be prejudiced by disclosure of the affidavits and search warrant materials and that such prejudice could be prevented by nondisclosure.

Reasonable alternatives

The Court addresses this aspect with some reluctance in that a trial, if the case proceeds to trial, will not be conducted in this Court but rather, by the District Court. Redaction of the prejudicial information in the affidavits is not a viable alternative. The information that is already in the public domain represents a very limited portion of the affidavits and the allegations are so intertwined that it would be impossible to effectively redact only those prejudicial segments. The alternative of reducing the prejudice by expanded *voir dire* is not persuasive where the publicity is routinely disseminated in local, state and national media and potentially would require the exclusion of a substantial number of potential jurors. "Such systematic exclusion of large numbers of these potential jurors who are most inclined to read newspapers and listen to news broadcasts would threaten the defendants' right to a jury comprised of a fair cross-section of the community." *Ciani*, 175 F. Supp. 2d at 204.

The extensive publicity also diminishes the remedy of a change of venue. Furthermore, as noted in *Cianci*, postponement or change of venue requires a defendant to sacrifice the right to a speedy trial or a trial in the district where the offense was committed to preserve the right to a fair trial before an impartial jury. *Cianci*, 175 F. Supp. 2d at 204. The Court does not find it reasonable to compel Defendant to submit to a change of venue in order to preserve his right to an impartial jury.

⁵ The Court recognizes that the decision is unpublished and does not rely on the opinion as authority for the conclusions contained therein. However, the Court finds the description of the media response to release of evidentiary materials in high profile matters to be germane.

The Court finds that no reasonable alternative exists which will ameliorate the possible prejudice of disclosure of the search warrant materials and the arrest warrant and Rule 41.1 petition affidavits. Accordingly, the Court concludes that disclosure of these documents is contrary to the public interest.

Extent of the fair trial right

“Both the Supreme Court and First Circuit have recognized that delaying the release of documents is one method of striking an appropriate balance between a defendant’s right to a fair trial and the media’s right of access.” *Cianci*, 175 F. Supp. 2d at 205. The Court recognizes that the media serves an important societal function in subjecting law enforcement, prosecutors and the judiciary to public review and comment. In this matter, the arrest warrant was executed on July 4, 2003 without review and/or approval by the District Attorney. While no suggestion has been made that such actions constitutes a violation of the law, counsel for Defendant asserted that (1) they were assured by the District Attorney on July 3, 2003 that no action would be taken prior to July 7, 2003; (2) they were advised there was insufficient information to issue a warrant or file charges; (3) the Eagle County Sheriff’s Office had been notified by the District Attorney that no action was to be taken over the holiday weekend and nonetheless proceeded to arrest Defendant contrary to the instruction of the District Attorney’s office; and (4) the actions of the Eagle County Sheriff’s Office were biased and unfair. (Media Applicants’ Exhibit B). See Media Applicants’ Exhibit GG which is entitled “Sheriff defends quick arrest of Bryant.”

The propriety of the arrest is rightfully a matter of public and media concern. The contents of the affidavits are obviously relevant as to the issue of whether the arrest was valid, and thus, disclosure of the affidavits is appropriate at some future time. Furthermore, “[i]f there is evidence to support the allegations, opinions and conclusions set forth in the affidavit, such evidence presumably will be presented by the government at trial in open court where it will be accessible to all. Moreover, whether or not such evidence is presented, there would be no reason to keep the affidavit under seal once the threat to the defendants’ right to a fair trial has passed.” *Cianci*, 175 F. Supp. 2d at 205.

However, Defendant may be able to request at some future time that the records be sealed under C.R.S. § 24-72-308 and the right to privacy may be asserted by one or more persons named in the affidavits. Thus, the Court concludes that the search warrant materials and the arrest warrant and Rule 41.1 petition affidavits shall be sealed until the entry of judgment of dismissal, acquittal or conviction in this matter. However, any interested party shall be allowed 15 days after entry of judgment in which to motion the Court to further preclude disclosure.

Other grounds

C.R.S. §24-4.1-302.5(1)(a)(2002) affords alleged victims the right to be free from intimidation, harassment or abuse. Exhibit 5 (redacted) to the District Attorney’s response brief details the intimidation, harassment and abuse that has taken place to date. The Court finds that disclosure of the documents would subject her to further intimidation, harassment and abuse and disclosure is therefore contrary to the public interest and also warrants closure until judgment is

entered. *See also Johnson* as to reporting parties and witnesses. The District Attorney has consistently asserted that disclosure of the requested documents would interfere with an ongoing investigation but has failed to offer any testimony, affidavits or other evidence in support of that assertion and the record is inadequate in that regard. As the Court has determined that disclosure is precluded by Defendant's right to a fair trial, it is not necessary to address his right to privacy at this time. However, Defendant is not precluded by this Order from asserting his right to privacy at some future time.

IT IS THEREFORE ORDERED,

1. The District Attorney's Motion to Seal is granted in part and denied in part.
2. The Media Applicants' Application to Unseal Court File is granted in part and denied in part.
3. The arrest warrant and return of service, and the Rule 41.1 petition and return shall be unsealed.
4. The arrest warrant affidavit, the Rule 41.1 affidavit, and the search warrant, return and inventory, and affidavit shall remain sealed until judgment is entered. At that time, any interested party may motion the Court to further preclude disclosure within 15 days of the date of entry of judgment.
5. Upon the request of the parties, execution of this Order is stayed for 10 days in order to allow the parties sufficient time to exercise any appeal rights.

DATED THIS 21 DAY OF August, 2003.

BY THE COURT:



County Court Judge

CERTIFICATE OF MAILING

I hereby certify that I have, on this 21st day of August, 2003, 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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