

COUNTY COURT EAGLE COUNTY, COLORADO 885 E. Chambers Road P.O. Box 597 Eagle, Colorado 81631	FILED IN THE COMBINED CLERKS OFFICE OCT 02 2003 EAGLE COUNTY, COLORADO BY <u>MB</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 PRELIMINARY HEARING MATTERS	

I.

Defendant's Request for an Evidentiary Hearing and the People's Request for District Court Determination Regarding the Issue of Waiver of Physician-Patient Privilege by Jane Doe.¹ The Court has reviewed the motions, Defendant's response to the People's motion and Jane Doe's response to Defendant's motion.

This matter concerns several *subpoenas duces tecum* issued by Defendant's counsel for Jane Doe's medical records. Jane Doe, the District Attorney and North Colorado Medical Center/North Colorado PsychCare/Family Recovery Center each filed a motion to quash the *subpoenas*. The motions to quash center on Jane Doe's assertion of the physician-patient privilege pursuant to C.R.S. § 13-90-107(1)(d) and the protection afforded by the privacy provisions of the Health Insurance and Portability and Accountability Act of 1996 ("HIPPA"). Defendant requests an evidentiary hearing on the issue of whether the privilege has been waived. The District Attorney contends the issue of waiver should be heard by the District Court after the preliminary hearing. Thus, the present motions address the issue of whether Defendant is entitled to a hearing on the waiver issue prior to the preliminary hearing.

The District Attorney's argument is premised on *People v. Adams County Court*, 767 P.2d 802 (Colo. App. 1988) and Crim. P. 16 which pertains to discovery. The District Attorney contends that disclosure of the medical records is not mandatory, but arguably discretionary and thus, subject to disclosure at this time only if they are relevant to the issue of probable cause.

¹ Jane Doe is the name used to reference the alleged victim in this matter.

Citing *Hunter v. District Court*, 543 P.2d 1265 (Colo. 1975), the District Attorney further contends that production of the records is not necessary in that the credibility of Jane Doe is relevant only if Jane Doe's testimony is implausible or incredible as a matter of law.

Defendant asserts that the "records are sought prior to the preliminary hearing because it is believed, based on law enforcement reports and other information in the possession of the defense, that the records will contain information important to the Court's assessment of the accuser's credibility." Defendant contends Jane Doe's credibility is central to a probable cause determination as she is the only eyewitness to the events other than Defendant. Defendant notes a lack of relevant case law specifically pertaining to County Court jurisdiction to enforce a *subpoena duces tecum* prior to a preliminary hearing and concedes that the issue is a discretionary one without clear precedent.

The purpose of a preliminary hearing is 'to determine if there is probable cause to believe that an offense has been committed and that the person charged committed it.' [C.R.S.] § 16-1-104(14)... Probable cause must be established as to each element of the crime charged.

...

The judge presiding at a preliminary hearing is required to apply the law to the prosecution's case. '[I]t is not for the trial judge at a preliminary hearing to accept the defendant's version of the facts over the legitimate inferences which can be drawn from the People's evidence.' *People v. Fisher*, 759 P.2d 33, 36 (Colo. 1988)(citations omitted).

A defendant has no constitutional right to unrestricted confrontation of witnesses and to introduce evidence at a preliminary hearing. By rule, defendants have the right to a preliminary hearing under certain circumstances, and pursuant to the rule a defendant 'may cross-examine witnesses against him and may introduce evidence in his own behalf.' [Crim. P. 5(a)(4)(II)]. However, the preliminary hearing is not intended to be a mini-trial or to afford the defendant an opportunity to effect discovery. Its purpose is to screen out cases in which prosecution is unwarranted by allowing an impartial judge to determine whether there is probable cause to believe that the crime charged may have been committed by the defendant.

In view of this restricted purpose, the preliminary hearing judge 'may temper the rules of evidence in the exercise of sound judicial discretion.' [Crim. P. 5(a)(4)(II)]. The right to cross-examine and to introduce evidence may be curtailed by the presiding judge consistent with the screening purpose of the preliminary hearing. *Rex v. Sullivan*, 575 P.2d 408, 410 (Colo. 1978)(citations omitted).

The probable cause standard requires 'evidence sufficient to induce a person of ordinary prudence and caution conscientiously to entertain a reasonable belief' that an accused person committed a particular crime. This language 'reflects our consistently expressed view that the prosecution's case should not be judged too

strictly at this early stage in the proceedings.’ At the preliminary hearing stage, the evidence must be viewed in the light most favorable to the prosecution. It is not necessary at this stage in the proceedings that the prosecution show beyond a reasonable doubt that the defendant committed the crime; nor is it even necessary to show the probability of the defendant’s conviction. *People v. Jensen*, 765 P.2d 1028, 1030 (Colo. 1988)(citations omitted).

We have often stated that a preliminary hearing is not a mini-trial and is not to be used as a discovery device by either side. Nonetheless, we have stressed that a preliminary hearing is a critical stage in the prosecution of a defendant and should not be conducted in a ‘perfunctory fashion.’ *McDonald v. District Court*, 576 P.2d 169, 171 (Colo. 1978).

The test is whether the prosecution’s evidence, taken alone and in a light most favorable to the prosecution, is sufficient to induce a reasonable belief that the defendant committed the crime with which she has been charged. *Fisher*, 759 P.2d at 36.

In *Adams*, the court addressed the issue of county court jurisdiction to address discovery matters under amended Crim. P. 16 which distinguishes between mandatory and discretionary disclosures. “[A]lthough the rule no longer limits discovery based upon its relevance to hearing issues, the restricted statutory authority given to county courts imposes similar limitations on the availability of discretionary disclosures before a preliminary hearing.” *Adams*, 767 P.2d at 803.

The statutory authority given to county courts is as follows.

(1) The county court shall have concurrent original jurisdiction with the district court in the following criminal matters:

...

(b) The issuance of warrants, the conduct of preliminary examinations, the conduct of dispositional hearings pursuant to section 16-5-301(1), C.R.S., and section 18-1-404(1), C.R.S., the issuance of bindover orders, and the admission to bail in felonies and misdemeanors. C.R.S. § 13-6-106.

In order to rule on the discoverability of [discretionary] materials, the county court must have jurisdiction.

If we assume that § 13-6-106 ... is constitutional, then that statute has extended to the county courts limited jurisdiction in felony cases, including the power to conduct preliminary hearings. The jurisdictional limitation circumscribes the county court’s authority to order disclosure under Crim. P. 16 in felony cases.

The county court may only require disclosure of materials, pursuant to Crim. P. 16 Part I(d) [discretionary disclosures] if those materials are relevant to the preliminary hearing. The sole issue at the preliminary hearing is whether probable cause exists to believe that the defendant committed the crime charged.

Thus, before the preliminary hearing, the county court may order discovery of discretionary materials only insofar as they are relevant to that issue. *Adams*, 767 P.2d at 804.

In Colorado ... the preliminary hearing is not a 'mini-trial,' and the judge in such a role is not a trier of fact. Rather, his function is solely to determine the existence or absence of probable cause.

We hold that a judge in a preliminary hearing has jurisdiction to consider the credibility of witnesses only when, as a matter of law, the testimony is implausible or incredible. When there is a mere conflict in the testimony, a question of fact exists for the jury, and the judge must draw the inference favorable to the prosecution. *Hunter*, 543 P.2d at 1268 (Colo. 1975).

Crim. P. 17(c) which pertains to *subpoenas* provides as follows.

For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, photographs, or other objects designated therein. ... The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents, photographs, or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents, photographs, or objects or portions thereof to be inspected by the parties and their attorneys.

See C.R.S. § 16-9-101 *et seq.* Although none of the parties have cited any Colorado case law pertaining to the use of *subpoenas*, comment on Fed. R. Crim. P. 17 has consistently maintained that Rule 17 is not to be used as a discovery device. *See* Charles Alan Wright *et al.*, Federal Practice & Procedure, Federal Rules of Criminal Procedure § 271 (3rd ed. 2000).

Notwithstanding that the documents are requested by subpoena rather than Crim P. 16, all of the parties have addressed the jurisdictional issue in the context of whether *Adams* permits or compels a county court determination. As set forth above, *Adams* limits county court jurisdiction to those matters that are relevant to the determination of probable cause. Furthermore, as set forth in *Rex*, a court may curtail the introduction of evidence consistent with the screening purpose of a preliminary hearing. Finally, a preliminary hearing may not be used as a discovery device.

"Since probable cause is the sole issue at a preliminary hearing, it is incumbent on counsel to explain the relevance to probable cause of the testimony he intends to elicit." *McDonald*, 576 P.2d at 171 n.1. The Defendant has not made an offer of proof of what evidence the documents contain. Defendant alleges only that the records, upon belief, contain information as to Jane Doe's credibility. Although Defendant asserts that belief is based upon law enforcement reports and "other information," Defendant has not provided or referenced any

specific documents, evidence or factual information which underlie that belief in the form of an offer of proof. In the absence of any factual basis as to the content of the *subpoena* documents, the Court cannot determine whether the evidence pertains to credibility or is relevant to a probable cause determination. Furthermore, pursuant to the case law cited above, the relevance of credibility evidence is severely limited, as it may not be considered unless the testimony is implausible or incredible as a matter of law, and the People's evidence, taken alone, must be viewed in the light most favorable to the People.

Upon review of the standards for a preliminary hearing and the lack of any factual information, the Court concludes that Defendant has failed to sufficiently explain the relevance to probable cause to compel this Court to make the determination as to waiver of physician-patient privilege prior to the preliminary hearing. The Court, therefore, defers that determination to the District Court in the event the matter is bound over for further proceedings. The Defendant's Request for an Evidentiary Hearing is **deferred** to District Court. The People's Request for District Court Determination Regarding the Issue of Waiver of Physician-Patient Privilege by Jane Doe is **granted**.

II.

The People's Motion to Quash Subpoena Upon Jane Doe and Request for Forthwith Ruling Before October 9, 2003 Preliminary Hearing and Jane Doe's Motion to Quash Subpoena for Preliminary Hearing and Request for Hearing Forthwith Prior to the Preliminary Hearing. The Court has reviewed the motions, the People's Offer of Proof and Defendant's responses.

Defendant issued a *subpoena* to Jane Doe to compel her appearance at the preliminary hearing. Counsel for Jane Doe accepted service on her behalf. The People and Jane Doe move the Court to quash the *subpoena*. The People assert that Jane Doe's appearance would cause a hardship without legal justification in that her appearance would necessitate one-half day of travel and require her to miss work for one or two days. The People further assert that (1) Jane Doe's testimony is unnecessary to establish probable cause; (2) serves only the purpose of obtaining discovery; and (3) will result in causing anxiety and intimidation to Jane Doe. Jane Doe asserts in her offer of proof that (1) she does not wish to testify at the preliminary hearing; (2) she will not be present in the Fifth Judicial District unless compelled pursuant to *subpoena*; (3) she expects to be *subpoenaed* to testify at trial and will honor that *subpoena*; and (4) her testimony at trial or otherwise would be similar to the taped statement which has been provided to Defendant.

"Hearsay and other incompetent evidence may properly comprise the bulk of the evidence at a preliminary hearing." *Fisher*, 759 P.2d at 36 (citation omitted). *See* Crim P. 5(a)(4)(II)(judge may temper rules of evidence); C.R.E. 1101(d)(3)(rules of evidence inapplicable in preliminary examinations in criminal cases).

[A] defendant is not entitled to compel the victim of an alleged offense to testify at a preliminary hearing." *Harris v. District Court*, 843 P.2d 1316, 1319 (Colo. 1993), *citing Blevins v. Tihonovich*, 728 P.2d 732, 734 (Colo. 1986); *Rex*, 575 P.2d at 411.

In *Rex*, the defendant sought to compel the seven-year old alleged victim to testify at the preliminary hearing. The trial court quashed the *subpoena* and on appeal, the order was upheld upon a finding that the trial court did not abuse its discretion. The evidence presented at the preliminary hearing was described as follows.

As its sole witness at the hearing, the prosecution produced Detective Teeple, the investigating officer in the case. He testified about what the child had told him and other people. He also testified about his own investigation, including admissions made to him by the petitioner and the results of the execution of a search warrant at petitioner's home. *Rex*, 575 P.2d at 409-10.

Defense counsel contended that the intended purpose of the *subpoena* was to negate probable cause by showing that the alleged victim had never identified the defendant and to demonstrate that none of the charged crimes had been committed. The trial court concluded that the alleged victim's testimony would be of limited relevance to those issues or the probable cause issues. In affirming the decision, the Court of Appeals held that "a defendant has no constitutional right to unrestricted confrontation of witnesses and to introduce evidence at a preliminary hearing" and that a defendant's right to introduce evidence may be curtailed consistent with the screening purpose of a preliminary hearing. *Rex*, 575 P.2d at 410. Although a trial court may not completely curtail inquiry into matters relevant to probable cause, the rule pertaining to preliminary hearings "does not require, or favor, the practice of calling all witnesses that are endorsed on the information." *Rex*, 575 P.2d at 410 (citation omitted).

In *Blevins*, the prosecution presented the testimony of one of two alleged victims. The defendant cross-examined an alleged victim and then sought to call the second alleged victim to testify. The prosecution objected and claimed that the sought testimony would go the credibility of the alleged victim who had testified and not to the establishment of probable cause. The prosecution's objection was sustained and subsequently affirmed on appeal.

The petitioner claims the hearing judge abused his discretion in prohibiting the testimony of Raeann Johnson because the testimony of Jersin on the assault of Raeann Johnson was hearsay. Jersin and Johnson were in the same car at the time of the shooting incident, and Jersin's testimony as to what happened was based on direct observation; therefore, the majority of his testimony was not hearsay. Moreover, hearsay evidence, and other evidence, which would be incompetent if offered at trial, may well comprise the bulk of the evidence offered at a preliminary hearing. It is not required that the prosecution produce all or even the best witnesses at a preliminary hearing, although the process is best served when at least one witness is called whose direct perception of the criminal episode is subject to evaluation by the judge at the preliminary hearing. In the present case, Blevins has an opportunity to cross-examine Jersin, who testified as to his direct perception of the criminal episode in question. Therefore, the prosecution was not relying on hearsay testimony, and it was not an abuse of discretion to prohibit the defense from calling Raeann Johnson to testify. *Blevins*, 728 P.2d at 734 (citation omitted).

This Court reads *Blevins* as standing not for the proposition that the Defendant is not entitled to compel the victim of an alleged offense to testify at a preliminary hearing, as inferred by *Harris*, but rather, that the Defendant is not entitled to compel all victims (or by analogy, all eyewitnesses to an alleged offense) to testify at a preliminary hearing.

In *Maestas v. District Court*, 541 P.2d 889 (Colo. 1975), the prosecution sought to establish probable cause by second-hand hearsay. "Neither the key witness in this case nor the arresting officers were produced at the hearing. Instead, the sole testimony of a nonperceiving witness relating second-hand information was relied upon to establish probable cause." *Maestas*, 541 P.2d at 446. On appeal, the evidence was deemed insufficient to establish probable cause and the defendant was granted a new preliminary hearing.

We do not require that the prosecution produce all, or even the best, witnesses at a preliminary hearing. But the evidence presented at the preliminary hearing, must have some semblance of a factual foundation and must show probable cause. The process is best served when at least one witness is called whose direct perception of the criminal episode is subject to evaluation by the judge at the preliminary hearing. Establishing probable cause on the basis of hearsay alone should only be resorted to when the testimony of a perceiving witness is **unavailable** or when **'it is demonstrably inconvenient to summon witnesses able to testify to facts from personal knowledge.'** Better prosecutorial practice entails the presentation of a residuum of competent, non-hearsay evidence at the preliminary hearing to support probable cause. *Maestas*, 541 P.2d at 447 (citations omitted)(emphasis added).

In *McDonald*, the prosecution sought to establish probable cause by the testimony of two police officers. The alleged victim was present at the counsel table. The defense sought to compel the alleged victim's testimony in part to challenge the identification which had been established by a police officer's testimony as to the alleged victim's identification from a group of photographs. On appeal, it was held that denial of the defendant's request was error. "We hold that where an eyewitness is available in court during a preliminary hearing, and where the prosecution is relying almost completely on hearsay testimony, it is an abuse of discretion to prohibit the defense from calling the witness." *McDonald*, 576 P.2d at 170 (citations omitted). *See also Jensen* (lack of a perceiving witness in failure to call alleged victim not fatal to prosecution's case where mother of alleged victim and social worker testified as to the child's circumstances and statements).

A review of the above cited authorities indicates the following. Defendant's right of cross-examination does not "per se" establish an inherent right of confrontation as to the alleged victim. The People are not required to offer the testimony of the alleged victim, but rather are required to present some competent, nonhearsay evidence. The necessity for testimony of a direct perceiver of the alleged criminal conduct is enhanced when the prosecution relies exclusively or almost exclusively on hearsay testimony. Finally, exclusive reliance on second hand hearsay testimony is insufficient to establish probable cause. The only case which compelled the testimony of the alleged victim was *McDonald*, in which the prosecution relied

almost completely on hearsay testimony and in which the prosecution chose to have the alleged victim present in the courtroom at counsel's table.

Here, Defendant has been charged with sexual assault (F3) pursuant to C.R.S. § 18-3-402(1)(a) and (4)(a) which requires that "[t]he actor causes submission of the victim by means of sufficient consequence reasonably calculated to cause submission against the victim's will" and "[t]he actor causes submission of the victim through the actual application of physical force or physical violence." Defendant contends the vital issue is that of submission against will and that Jane Doe, as the only witness with direct perception of the alleged assault, should be compelled to testify. Defendant further contends that failure to require her testimony is tantamount to a wholesale curtailment of cross-examination on that vital issue.

The People made two offers of proof, one under seal; the second not. Examined together, these offers of proof proffer (1) the testimony of Detective Winters, and (2) photographs of the alleged injuries which were taken during the medical examination of the alleged victim.² Detective Winters was an investigating officer who obtained the statements from Jane Doe and Defendant. Detective Winters is also expected to testify as to the significance of the injuries as provided by the coordinator of the Colorado SANE program. The particulars of the photographs and Detective Winters' testimony were provided in the offer of proof submitted under seal.

The People assert that the photographs, Defendant's statement and Detective Winters' direct observations of the victim's demeanor are not hearsay evidence. The People further assert that much of Defendant's statement will corroborate Jane Doe's statement, and together will provide direct evidence toward one or more of the elements of the charged offense. As Defendant will have the opportunity to cross-examine Detective Winters, the People contend that preclusion of the alleged victim's testimony will not constitute a complete curtailment of Defendant's right of cross-examination.

The Court is not persuaded that the burden of being compelled to testify at a preliminary hearing, alone, justifies Jane Doe's nonappearance at the preliminary hearing. Her travel time and lost time at work is a minimally acceptable intrusion. Further, the People's allegation that compelling her attendance at the preliminary hearing would cause her anxiety and intimidation is unsupported by any evidence and appears somewhat contradicted by Jane Doe's assertion that she does not "wish" to appear. There may be other reasons, not disclosed to the Court, which would argue persuasively for Jane Doe not being available to testify at the preliminary hearing.

The Court is persuaded by its review of the People's offers of proof, most particularly, that filed under seal, that the People intend to offer at the preliminary hearing minimally sufficient nonhearsay evidence on the elements of sexual assault, (through the proffered testimony of Detective Winters), which precludes compelling the testimony of Jane Doe under the authority cited herein above.

While this Court would prefer that the People provide more than just the minimally necessary evidence, hearsay or not, such preference is not a mandate for compliance. This Court

² See part III as to the videotape of Jane Doe's interview and the electronically enhanced interview of Defendant.

notes that all of the authority cited herein above involve hearings in which the court permitted hearsay (first, second or third generation) evidence, only to find that such evidence comprised the bulk, or the entirety, of the People's evidence. That factor, as noted in such appellate review, made determination of probable cause more problematic than necessary. Further, much of the authority cited herein above also noted, in either the majority opinion or dissenting opinion, that presentation of direct, eyewitness testimony in support of probable cause would be preferable to the alternative of hearsay material. The Court shares the opinion of Justice Carrigan in dissent in *People ex rel. VanMeveren v. District Court In and For Larimer County*, 575 P.2d 405 (Colo. 1978), that the statutory purpose of a preliminary hearing, i.e., "a meaningful screening process for determination of probable cause," has been reduced to a one act play starring a non-eyewitness perceiver as to all, or most, of the elements of the offense charged. Hardly the meaningful screening process anticipated by the authors of that enabling legislation.

Accordingly, the People and Jane Doe's motions to quash the subpoena for Jane Doe are **granted**. The subpoena to Jane Doe is **quashed**.

III.

Defendant's Motion to Close the Preliminary Hearing to the Public. The Court has reviewed the motion, the responses of the Media and the People, and Defendant's reply.

The parties again dispute the appropriate standard to be applied in a determination of whether to close a preliminary hearing, as earlier challenged in their respective motions to seal/unseal the warrants and affidavits. The Court's prior analysis differs from the instant matter, in that the Colorado Supreme Court and the Supreme Court of the United States had not addressed the issue of what appropriate standard should be applied to the sealing of court records. In this matter, both the Colorado Supreme Court and the Supreme Court of the United States have specifically addressed the standard to be applied to closure of preliminary hearings.

In 1972, the Colorado Supreme Court decided *Stapleton v. District Court*, 499 P.2d 310 (Colo. 1972), which addressed closure of pretrial hearings on pretrial motions to suppress statements and evidence. Defendant's arguments were based on the federal and state constitutional right to a fair trial by an impartial jury and due process of law. The Colorado Supreme Court adopted the then current ABA Standard 3.1³, which applied to pretrial hearings *including preliminary hearings* and which permitted closure upon a showing of a substantial likelihood of interference with fair trial rights. "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." *Stapleton*, 499 P.2d at 312. "The trial court has considerable discretion and, as suggested in the court's findings, it is permissible and eminently proper to convene closed pretrial hearings when there is a substantial likelihood of prejudicial interference with a defendant's right to a fair trial by an impartial jury." *Stapleton*, 499 P.2d at 312-13.

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

In 1979, the Colorado Supreme Court decided *Star Journal Publ'g Corp. v. County Court*, 591 P.2d 1028 (Colo. 1979) which addressed the closure of a preliminary hearing. "This case presents a clash between constitutional provisions: the First Amendment right to freedom of speech and of the press, and the Sixth amendment interest in a public trial versus the Sixth Amendment right of the accused to trial by an impartial jury." *Star Journal*, 591 P.2d at 1029. Although *Stapleton* was cited in the decision, the standard was heightened to "clear and present danger" upon citation to the then current ABA Standard 8-3.2. Comments to that Standard indicate Standard 8-3.2 was the original Standard 3.1, but adopted a more "rigorous" test than the "substantial likelihood of interference" test based on the *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), test pertaining to prior restraints which required a showing of "clear and present danger."⁴

A judge may close a pretrial hearing only if (1) the dissemination of information would create a clear and present danger to the fairness of the trial; and (2) the prejudicial effect of such information on trial fairness cannot be avoided by any reasonable alternative means. See Section 8-3.2 of the ABA Standards for Criminal Justice Relating to Fair Trial and Free Press (2d Ed. 1978). *Star Journal*, 591 P.2d at 1030 (emphasis added).

In 1981, the Colorado Supreme Court decided *P.R. v. District Court*, 637 P.2d 346 (Colo. 1981) which addressed the closure of an evidentiary contempt hearing based on a witness' refusal to testify before a grand jury. The witness sought to open the hearing based on her right to due process of law.⁵ Closure had been requested by the attorney general based on statutory provisions pertaining to closure of grand jury proceedings and opposed by the media based on the First Amendment. The clear and present danger test was applied upon citation to *Star Journal* and Standard 8-3.2. "There is no demonstrable reason for imposing a less stringent standard in this case."

In this case the respondent court's total closure of the evidentiary phase of the contempt hearing, without a finding of compelling necessity, impaired the due process interest of P.R. in a public hearing, U.S. Const. Amend. XIV; Colo. Const. Art. II, Sec. 25, as well as the constitutional interest of the public and the media in attending a judicial proceeding which is the substantial equivalent of a trial, U.S. Const. Amend. I; Colo. Const. Art. II, Sect. 10. *P.R.* 637 P.2d at 354.

In 1986, the Supreme Court of the United States decided *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) ("*Press-Enterprise II*") which addressed the closure of preliminary hearings and required 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 14 (citations omitted). "If the particular proceeding in question passes

⁴ See ABA Standard 8-3.1 which retains the clear and present danger test for prior restraints.

⁵ The Sixth Amendment and Art II, § 16 of the Colorado Constitution were deemed not to apply to contempt proceedings.

these tests of experience and logic, a qualified First Amendment right of public access attaches. But even 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).

In 1991, the ABA House of Delegates approved amendments to the ABA Standards which were published in 1992. Standard 8.3-2 was redrafted in response to *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) 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 test of *Press-Enterprise II*.⁶

“The United States Supreme Court decisions interpreting the scope of the First Amendment’s protections are binding upon this court.” *People v. Berger*, 521 P.2d 1244, 1245 (Colo. 1974).

The Supreme Court [of the United States] ... is the final judicial interpreter of the federal Constitution.

...

As such, a state court is bound by Supreme Court precedent interpreting the federal Constitution and cannot impose greater limitations or afford more protections under the federal Constitution than the Supreme Court has in its decisions. *People v. Cisneros*, 855 P.2d 822, 831 (1995)(Erickson, J., specially concurring)(citations omitted).

Although the [federal constitution] creates rights which cannot be restricted or infringed by the constitution or laws of Colorado, we are free to construe the Colorado Constitution to afford greater protections than those recognized by the United States Constitution. Indeed, it is our responsibility to consider whether our own state constitution requires more extensive protections than those mandated by the [federal constitution]. Even so, we must remain mindful that federal interpretations of federal statutory and constitutional provisions are helpful in construing similar state laws. *Millis v. Board of County Comm’rs of Larimer County*, 626 P.2d 652, 657 (Colo. 1981)(citations omitted).

In *Stapleton, Star Journal* and *P.R.*, the Colorado Supreme Court, consistent with *Cisneros*, adopted or referenced the existing ABA standard which reflected the decisions of the Supreme Court of the United States at that time. The existing standard, as decided by the

⁶ The full text of the revised Standard 8-3.2 is set forth in the Court’s Order Re Motion to Seal and Application to Unseal Court File entered on August 21, 2003.

Supreme Court of the United States, and as reflected in the current ABA Standard 8-3.2, is that of substantial probability as to rights invoked under the federal constitution. Pursuant to *Cisneros*, this Court cannot impose a more stringent standard. There is also no indication in the Colorado cases that the Colorado Supreme Court imposed or would impose a more stringent standard under the state constitution. Colo. Const. Art. II, § 10.

The Media cite *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044 (Colo. 2002) and *Bock v. Westminster Mall Co.*, 819 P.2d 55 (Colo. 1991) for the proposition that the state constitution affords greater protection for free speech than the federal constitution. However, neither of these cases concerned the “clash” between free speech rights and fair trial rights. In that context, the Colorado Supreme Court described the right to a fair trial as “paramount.” *Stapleton*, 499 P.2d at 312. Consequently, the Court concludes that the appropriate constitutional standard is that of substantial probability enunciated in *Press-Enterprise II*.

None of the parties have challenged the “experience and logic” inquiry which confers a qualified right of access on the Media. The Court’s analysis is therefore directed to the “substantial probability” prong of the *Press-Enterprise II* analysis.

Additionally, the Colorado legislature has also provided for closed preliminary or other hearings.

(2) If a person is accused of an unlawful sexual offense classified as a felony, upon the request of any party to the proceeding, the court may exclude from the preliminary hearing any member of the general public. In making a ruling for exclusion, the court shall:

(a) Set forth sufficient findings of fact and conclusions of law to support the order; and

(b) Make its order sufficiently narrow to protect the requesting party’s compelling interest considering any reasonable alternative to exclusion from the entire hearing of all members of the general public.... C.R.S. § 16-5-301(2)(2002).

Although this statute does not contain a specific standard, such as “substantial probability,” closure is at the court’s discretion upon a sufficiently narrow finding which protects the requesting party’s compelling interest. The People have opposed closure of the preliminary hearing. Thus, the only asserted “compelling interest” is that of Defendant’s right to a fair trial. The Court, therefore, finds it appropriate to exercise its discretion under the substantial probability test of *Press-Enterprise II*.

There is no dispute that this case is the subject of intense public and media scrutiny, and that any evidence presented at the preliminary hearing will be broadly disseminated, analyzed and debated. The central issue is whether the evidence on any or all of the elements of the charged offense presented at an open preliminary hearing would prejudice Defendant’s right to a fair trial by an impartial jury.

There should also be no dispute that a decision to close the preliminary hearing, in part or in whole, would similarly result in intense public and media scrutiny and further result in speculation as to what evidence might have been presented in a closed hearing. Such speculation may be more damaging to Defendant's fair trial rights than narrowly tailored evidence presented in an open hearing.

The People's initial offer of proof included the videotape of Jane Doe's statement and the enhanced audio version of Defendant's statements. The Court, at a status conference, expressed its concern that the unedited video and audio tapes would contain similar irrelevant and prejudicial material as was contained in the sealed affidavits. The People then indicated their intent to withdraw this evidence from their offer of proof, in the event the preliminary hearing remains open. Therefore, the remainder of this order addresses only the proffered photographs and Detective Winters' testimony.

Press-Enterprise II and C.R.S. § 16-5-301(2) require the Court to consider reasonable alternatives to closure. The Court, in its decision to seal the affidavits, concluded that redaction was not a feasible alternative as the prejudicial material was too intertwined with other less inflammatory material. This probable cause proceeding, however, presents different considerations as to reasonable alternatives, as the scope of the evidence presented may be curtailed to preclude or limit the introduction of prejudicial, irrelevant or inflammatory evidence. In *P.R.*, the court suggested several other alternatives to full closure in relation to the grand jury secrecy matter. These suggestions included in camera review of testimony prior to closure, prehearing stipulations of facts, prehearing stipulations restricting the extent of the testimony, or partial closure.

This Court has taken, in response to the constitutional mandate that the Court consider and attempt to fashion reasonable alternatives to protect Defendant's right to a fair trial, the cautionary step of advising the People and Defendant that the scope of the evidence presented at the preliminary hearing will be limited to that evidence which is both relevant and material to the elements of the charged offense. Those elements, as charged in the Complaint, include (1) that Defendant; (2) on or about June 30, 2003 in the County of Eagle, State of Colorado; (3) knowingly inflicted sexual intrusion or sexual penetration on a person; (4) caused submission of the person by means of sufficient consequence reasonably calculated to cause submission against the person's will; and (5) caused submission of the person through the application of physical force or physical violence. C.R.S. § 18-3-402.

This Court finds, upon review of the offer of proof filed under seal, that the proffered evidence includes testimony which may extend beyond the Court's desired limits of relevant and material evidence, and which may be unduly prejudicial to Defendant's fair trial rights. Therefore, in order to ensure compliance with the Court's direction in this regard and to fully determine whether partial closure may be appropriate, the Court will meet in chambers with the People and Defendant's counsel to review and discuss the specific content of the anticipated testimony and photographs. The conference in chambers shall commence at 12:15 on October 9, 2003. At that time, Defendant may make specific arguments pertaining to the anticipated evidence and the further necessity for closure. Accordingly, Defendant's motion to close the

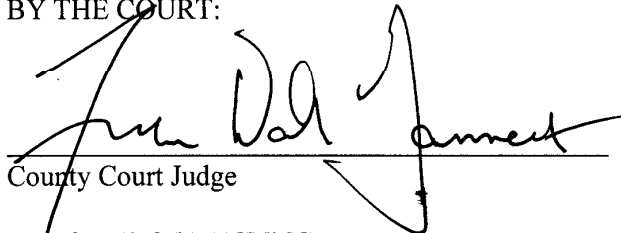
entire preliminary hearing is denied at this time. However, the Court reserves the right to close a portion, or all, of the preliminary hearing, upon conclusion of such discussion in chambers.

IV.

The Media's Motion to Authorize an Internal, Secure Audio and Video Transmission of the Preliminary Hearing to a "Spill Over" Courtroom. The Court has considered the motion, the responses of the People and Defendant and the replies. Upon review of the respective arguments, the Court **grants** the motion as to audio relay and **denies** the motion as to video transmission. All provisions of the Decorum Order shall apply to the spillover courtroom. The audio relay shall not be recorded in any manner and shall not be distributed in any manner except to the spillover courtroom.

DATED THIS 2 DAY OF October, 2003.

BY THE COURT:


County Court Judge

CERTIFICATE OF MAILING

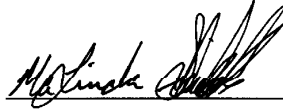
I hereby certify that I have, on this 2nd day of October, 2003, mailed and/or faxed a true and correct copy of the foregoing ORDER by U.S. Mail, postage prepaid, to the following:

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Fifth Judicial District
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Order re Preliminary Hearing Matters
03 CR 204
People v. Bryant

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