District Court, Chaffee County, COLORADO 142 Crestone P.O. Box 279 Salida, Colorado 81201 (719) 539-2561	DATE FILED: June 4, 2021 2:32 PM
Plaintiff(s): THE PEOPLE OF THE STATE OF COLORADO, v. **Defendant(s): MORPHEW, BARRY LEE**	**▲COURT USE ONLY▲** Case No.: 2021CR78 Division: 2
ORDER ON MOTION TO LIMIT PUBLIC ACCESS TO ARREST WARRANT AFFIDAVIT FILED MAY 5, 2021 (D-7)	

This matter is before the Court on Defendant Barry Morphew's Motion to Limit Public Access to Arrest Warrant Affidavit Filed May 5, 2021 (D-7). The People filed a Response as did non-party Media Consortium (the Media). The Court is not required to hold a hearing on the Motion[1]. The Court has reviewed the filings and issues the following Order.

Rule of Law

Court records in criminal cases are presumed accessible to the public but access may be denied pursuant to Crim. P. Rule 55.1(a)(6). If the Court grants a request to limit public access to a court record the Court must issue a written order in which the Court:

(I) Specifically identifies one or more substantial interests served by making the court record inaccessible to the public (or by allowing only a redacted copy of it to be accessible to the public;

(II) finds that no less restrictive means other than making the record inaccessible to the public or allowing only a redacted copy of it to be accessible to the public exists to achieve or protect any substantial interests identified; and

(III) concludes that any substantial interests identified override the presumptive public access to the court record or to an unredacted copy of it.

Additionally, court records may be made inaccessible to the public pursuant to other "state, rule, regulation or Chief Justice Directive…" Crim. P. 55.1(a). "The CCJRA [Colorado Criminal Justice Records Act], a part of the Public Records Act, addresses access to and disclosure of criminal

[1] Crim. P. Rule 55.1(a)(5)

justice records." *People v. Thompson*, 181 P.3d 1143, 1145 (Colo. 2008). "Section 24–72–304(1) provides that *except for records of official actions* which must be maintained and released pursuant to [the CCJRA], *all criminal justice records, at the discretion* of the official custodian, *may be open* for inspection by any person at reasonable times, *except as provided in [the CCJRA]* or as *otherwise provided by law....*" *Thompson* at 1146. (Emphasis in original.) "[T]he official custodian of any such records may make such rules and regulations...as are reasonably necessary for the protection of such records and the prevention of unnecessary interference with the regular discharge of the duties of the custodian or his office." C.R.S. §24-72-304(1). To "consider and balance the public and private interests relevant to the inspection request..." (*Harris v. Denver Post Corp.*, 123 P.3d 1166, 1174 (Colo. 2005)) "the pertinent factors...include the privacy interests of individuals who may be impacted by a decision to allow inspection; the agency's interest in keeping confidential information confidential; the agency's interest in pursuing ongoing investigations without compromising them; the public purpose to be served in allowing inspection; and any other pertinent consideration relevant to the circumstances of the particular request. *Harris* at 1175.

The custodian of criminal justice records may also deny inspection for any of the reasons stated in §24-72-305(1); that such inspection would be contrary to any state statute or that inspection is prohibited by rules promulgated by the supreme court or by the order of any court. Finally, access may be denied to "records of investigations conducted by...any sheriff, district attorney, or police department or any criminal justice investigatory files compiled for any other law enforcement purpose" if disclosure would be contrary to the public interest. §24-72-305(5)

In *People v. Holmes*, 2012 WL 4466553, the court found that "[u]nder the CCJRA, affidavits of probable cause would not be records of official actions which must be disclosed..." but that they "constitute records of investigations conducted by a sheriff, district attorney, or police department [rendering denial appropriate under §24-72-305(5), and if not]...they are nonetheless criminal justice records subject to discretionary disclosure." *Id.* at (III)(B).

Analysis

The Defendant argues several substantial interests exist which support limiting access to the Arrest Warrant Affidavit (Affidavit). These substantial interests are; preventing the release of inflammatory information contained in the Affidavit, protection of the alleged victims, the Morphew

daughters, not impeding the ongoing defense investigation, preventing a potential violation of Colo. R. Prof. Cond. 3.8 (f) and preserving Mr. Morphew's right to a fair trial by impartial jurors from the surrounding community.

For the reasons that follow, the Court finds the nature of the Affidavit and protection of the Morphew daughters each serve as a substantial interest in justifying the continued sealing of the Affidavit under Rule 55.1.

First, the Court has concerns about the amount of information contained in the 130-page Affidavit. The Affidavit is, by far, the lengthiest and most detailed affidavit the Court has ever seen in almost 30 years of experience with criminal cases. A significant portion of the information in the Affidavit was not relevant to the Court's finding of probable cause and possibly not admissible at trial under the Colorado Rules of Evidence. [redacted] This is not an exhaustive list of the type of information in the Affidavit for which the Court has concerns. Release of this information, prior to input on redaction from the parties and prior to the defense beginning their investigation could hamper Mr. Morphew's ability to effectively prepare his case.

A second substantial interest is the prevention of harassment, abuse or intimidation of the victims, Mallory and Macy Morphew, and their right to be treated with fairness, respect and dignity *see* C.R.S. §24-4.1-302.5(1)(a). These young women are in an unimaginable situation and should be given time to process what has occurred and the time to review, or decide not to review, the evidence alleged against their father [redacted]. A general release of the Affidavit at this early time would not give them the opportunity to make their decisions and process what they learn—especially considering the youngest daughter still resides in the small community of Salida.

Second, no less restrictive means exists other than to keep the Affidavit suppressed in its entirety. Redaction of a 130-page document will be a time-consuming process and one the Court cannot meaningfully complete without the input and involvement of both parties, who are currently involved in the early stages of these proceedings and conducting initial interviews. *See: People v. Holmes*, No. 12CR1522, 2012 WL 4466553, at (III)(B) (Arapahoe Cty. Dist. Ct. Aug 13, 2012)(finding it in the public's interest that law enforcement officials continue to conduct a complete investigation thoroughly and efficiently and that privacy and confidentiality concerns not be compromised).

Third, allowing the parties time to review and understand the amount of information in the case overrides the public's presumptive access currently. Entering accurate redactions is critical. Also critical is each side conducting its review of the evidence and conducting its initial investigatory efforts during the early phases of this case. These factors also affect the ability to ensure protection for the Morphew daughters (and other witnesses).

Therefore, under Rule 55.1, public access to the Affidavit filed in this case is denied. The Court also denies access to the document as a record under the CCJCA. The Affidavit is not a record of an official action but is a criminal justice record subject to discretionary disclosure. *Holmes* at (III)(B). The Court exercises the discretion granted to it by the CCJCA and notes this decision is consistent with consideration of the pertinent factors discussed in *Harris*; the privacy interests of the Morphew daughters-particularly as they first learn of Mr. Morphew's alleged involvement-and the parties (and the public's) interests in pursuing ongoing investigation without compromise. *Harris* at 1175.

Finally, the Court finds the Affidavit is a record of investigation conducted by law enforcement as contemplated by §24-72-305(5). As such it can be suppressed from public view if done in the public's interest. While the investigation in this matter has been ongoing for a little over a year now, it consists of numerous witnesses and circumstantial evidence. Thus, witness credibility will be at a premium. "The risk of such harassment and intimidation, coupled with the preliminary nature of the investigatory report" support suppression so as to maintain the integrity and efficiency of the investigation during these early stages of the proceedings." *Johnson v. Colorado Department of Corrections*, 972 P.2d 692, 695 (Colo. App. 1998).

In their Response, the People defer to the Court on the ultimate determination of this Motion. To the extent the People argue that Crim. P. Rule 55.1 was not in effect when the May 5

Affidavit was filed (Resp. ¶4) it was in effect when Motion D-7 was filed. Thus, the rule governs. The Court declines to require Defendant submit a proposed redacted version of the Affidavit because Rule 55.1 requires that when "*only parts* of the subject court record..." are requested to be sealed. Rule 55(a)(2) (Emphasis added). Defendant seeks full sealing of the subject record. Mot. ¶30. Further, to the extent the People claim that all statements in the affidavit are appropriately contained in the affidavit (Resp. ¶7) or that it includes statements from Mr. Morphew that are potentially exculpatory and material and thus required to be included in the affidavit (*Id.* ¶11), the Court disagrees. The text of Crim. P. Rule 4.2, as noted by the People, doesn't govern what goes into an affidavit, only what is required as a bare minimum, which is enough factual information "sufficient to establish probable cause that an offense has been committed and probable cause that a particular person committed that offense." *Id.* This standard supports Defendant's argument that the affidavit in this case is unusual (Mot. II(A)) because it contains considerably more information than what would be sufficient to establish probable cause. To the extent the People argue that a probable cause affidavit does not need to conform to the rules of evidence, the Court agrees. But Defendant's argument that the affidavit contains excessive information is bolstered by the inadmissibility of that information under the rules of evidence. Thus, the Court's concern for its release at this time. Finally, the People offer no response to the argument that the Victim's Rights Act supports sealing the affidavit (Resp. ¶13). The Court does not find it improper for Defendant to raise it. It is the job of the prosecution and the court to assure victims and witnesses to crimes are not harassed, intimidated or abused. C.R.S. §24-4.1-302.5. The Court agrees that at this time keeping the Affidavit sealed serves a substantial interest-protection of the victims in this case.

With regard to the Media Consortium's Response, the Court will allow the Media to respond to this Order to the extent issues are raised that they did not address in their Response. To the extent they argue Mr. Morphew's right to a fair trial would not be compromised by release of the Affidavit, that is not the only ground relied upon in this Order denying public access. The Media also relies on *United States v. Blowers,* No. 3:05-CR0093, 2005 WL 3830634, 34 Media L. Rep. (BNA) 1235 (W.D.N.C. Oct 17, 2005) for its argument that the Affidavit should be released because doing so furthers the integrity of Fourth Amendment principals, but the Court finds the amount of information contained in this Affidavit changes that consideration. *Blowers* found tying the release of information to the public to an "admissibility standard" *(Id.* *2*)* to be inappropriate. But the lower court in *Blowers* "concluded that the search warrant materials in their entirety were not unduly

prejudicial..." *Id.* The amount of prejudice is relevant and it is more significant given the length and breadth of this Affidavit. The Media also refers to the availability of other options, as discussed in *People v. Botham,* 629 P.2d 589 (Colo. 1981), and argues that "[u]nless the Court is able to make the required judicial findings on the record that each of those alternative means is not adequate, there is no basis for blanket sealing." Mot. p. 6. *Botham* never mandated analysis of these factors. It cited the alternative as alternatives and then said, "[r]egardless of the means imposed by the trial judge to insure the accused's constitutional right to a fair trial by a panel of impartial jurors, the critical inquiry is whether the chosen means did in fact preserve the accused's right to a fair trial." *Id.* at 596. This Court believes it has appropriately balanced the concerns. These are not "boilerplate concerns" (Media Mot. 6) but are ongoing concerns based upon the current stage of the proceedings and various participants.

Conclusion

The Court orders the Arrest Warrant Affidavit, filed on May 5, 2021, to remain sealed and suppressed from public view. Pursuant to Crim. P. 55.1(a)(10), "only judges, court staff, parties to the case (and, if represented, their attorneys in that case), and other authorized Judicial Department staff shall have access to the original court record."

This Order shall expire 7 days after the conclusion of the Proof Evidence Presumption Great Hearing and Preliminary Hearing, which are currently scheduled to be completed August 24, 2021. Before the expiration of this Order the Court will consider further requests or argument as to why or why not this Order should continue and in what form.

Pursuant to Crim. P. 55.1(a)(8), an "order limiting public access to a court record or to any part of a court record pursuant to this rule shall be accessible to the public, except that any information deemed inaccessible to the public under this rule shall be redacted from the order." The Court will issue a suppressed version of this Order, accessible only to the individuals listed in Rule 55.1(a)(10). It will simultaneously issue a redacted version for public access.

IT IS SO ORDERED.

By the court, this 4th day of June, 2021.

/s/ *Patrick W. Murphy*, District Court Judge