

DISTRICT COURT, BOULDER COUNTY, COLORADO 1777 Sixth Street Boulder, CO 80302	DATE FILED: May 24, 2024 4:39 PM
<b>PEOPLE OF THE STATE OF COLORADO</b> v.  <b>AHMAD AL ALIWI ALISSA</b> Defendant	▲ <b>COURT USE ONLY</b> ▲
Michael T. Dougherty, District Attorney 1777 Sixth Street Boulder, CO 80302  Phone Number: (303)441-3700 FAX Number: (303)441-4703 E-mail: mdougherty@bouldercounty.org Atty. Reg. #41831	Case No. 21CR497  Div.: 13
<b>Response to [Defendant's] Motion for Closed Voir Dire (D-0[52])</b>	

On April 26, 2024, Ahmad Al Aliwi Alissa (the “Defendant”) Motion for a Closed Voir Dire (D-0[52]) (the “Motion”). This Court should deny his request. In support of this response, the People further state as follows:

**BACKGROUND**

On March 22, 2021, Defendant drove to the Table Mesa King Soopers store in Boulder armed with a semi-automatic Ruger AR-556 pistol (often referred to and described as an assault rifle), other guns, large capacity magazines, and a large amount of ammunition. Soon after he arrived at the store, he began shooting victims in the parking lot before continuing into the store and shooting other victims. Ultimately, he murdered 10 people, and shot in the direction of many others.

Defendant is charged with ten counts of Murder in the First Degree (F1), forty-seven counts of Attempted Murder in the First Degree (F2), one count of Assault in the First Degree (F3), six counts of Possession of a Large-Capacity Magazine During the Commission of a Felony (F6), and

forty-seven counts of Crime of Violence with a Semiautomatic Assault Weapon as a Sentence Enhancer.

In his Motion, Defendant waives his right to a public trial during voir dire and requests that this Court close the courtroom to any individuals except for the parties. Defendant states this waiver and request to close the courtroom are based on concerns about the candor of prospective jurors, possible contact between victim families and prospective jurors, and any tainting of the jury by pretrial publicity or through influence from family members.

Defendant's Motion fails to provide any specific reasons in support of these concerns. Absent any specific information to justify the extraordinary step of closing the courtroom, this Court should deny the Motion in its entirety. Whether to open or close a courtroom to the public is not left solely to the discretion of a defendant. There are other considerations for the Court to weigh in evaluating Defendant's Motion, including the rights of the victims and community to an open courtroom and public trial.

### **LEGAL ANALYSIS**

The Sixth Amendment to the United States Constitution guarantees an accused the right to a public trial. This right serves four primary interests in our justice system: it allows the public to see that an accused is "fairly dealt with" and not unjustly condemned; it ensures that judges and prosecutors discharge their duties responsibly; it encourages witnesses to come forward; and it discourages perjury. *Waller v. Georgia*, 467 U.S. 39, 46, 104 S.Ct. 2210 (1984). Both the United States and Colorado Constitutions guarantee a criminal defendant the right to a public trial. U.S. Const. amends. VI, XIV; Colo. Const. art. II, § 16; *Waller*, 467 U.S. at 44; *People v. Jones*, 2020 CO 45, ¶ 15.

However, the public trial right is not absolute. *Waller*, 467 U.S. at 45. The right to a public trial may be outweighed, in rare circumstances, by other rights and interests. *Id.* Specifically, the

right to a public trial may yield to “an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” *Id.* (quoting *Press Enterprise Co. v. Superior Ct.*, 464 U.S. 501, 510 (1984)). These rights or interests may include, for example, a defendant's right to a fair trial or the prosecution's interest in protecting sensitive information. *Id.* However, the Supreme Court has observed that such circumstances "will be rare." *Id.*

The *Waller* court held that "[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Id.* at 510.

Defendant's motion relies, in part, on *Stackhouse v. People*, 386 P.3d 440, (Colo. 2015). At trial in *Stackhouse*, the court required members of the public to leave the courtroom during jury selection because of a large jury pool in limited courtroom space, which created a risk that family members and others would congregate with and potentially bias the jurors. After explaining his reasoning for the closure, the trial judge asked the attorneys if they had "anything further," and *Stackhouse* did not object to the closure at that point or at any point during trial. *Id.* The defendant brought an appeal based on the closure of the courtroom.

It is true that defendants in Colorado can affirmatively waive their right to a public trial by not objecting to closures by the Court. This case is different, in that the Court is not proposing to close the courtroom for a specific reason. Defendant is moving to close the courtroom, absent any specific reason or cause.

Defendant can waive his right and allow for a closure. But that is not the end of the analysis.

In order to protect Defendant’s right to a public trial, any nontrivial courtroom closure requires that four conditions be met: (1) the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced; (2) the closure must be no broader than necessary to protect that interest; (3) the trial court must consider reasonable alternatives; and (4) the trial court must make findings adequate to support the closure. *Waller*, 467 U.S. at 48.

A broad, generalized concern that victims and/or members of the public might make inappropriate comments cannot justify a closure because it would essentially allow a court to exclude the public as “a matter of course.” *Presley v. Georgia*, 558 U.S. 209, 215 (2010) (suggesting that “[t]he generic risk of jurors overhearing prejudicial remarks, unsubstantiated by any specific threat or incident,” is not an overriding interest capable of supporting a closure). *People v. Bialas*, 2023 COA 50, ¶¶ 5, 13, 15 (cert. granted Mar. 11, 2024). The United States Supreme Court has recognized that, in certain circumstances, the risk of jurors “overhearing prejudicial remarks” or having “improper communications” with observers can justify limiting public access to a proceeding so long as the trial court makes sufficient findings. *Presley*, 558 U.S. at 214-15.

In the instant case, Defendant has failed to advance an overriding interest absent mere speculation that prospective jurors will decline to be candid, the possibility of contact between victim families and prospective jurors, and any tainting of the jury by pretrial publicity or through influence from family members. Without specific cause or reason provided, Defendant fails to satisfy the first condition under *Waller*. It is important to note that Defendant has not sufficiently explained why the closure of the courtroom should apply to voir dire. Defendant has failed to advance an overriding interest that is *likely* to be prejudiced.

Additionally, the *Waller* test requires that the closure be no broader than necessary. Defendant has not suggested or proposed anything short of a complete closure of the courtroom

during voir dire. The Court can take steps, as in any trial, to encourage and ensure the candid discussion with prospective jurors. The Court has previously granted Defendant's motions to use questionnaires for this jury pool, as well as provide the names of prospective jurors in advance of trial. In addition to the use of questionnaires, the Court can utilize bench conferences or discussions in chambers if prospective jurors raise particularly difficult or sensitive issues. The closure requested by Defendant is far broader than necessary. The Court should consider reasonable alternatives, such as bench conferences, should issues arise with jurors. Similarly, Defendant's Motion points to the possibility of interactions between family members and prospective jurors. In the three (3) plus years that this case has been pending, there has never been an outburst or problem with any of the victims' family members in court. Defendant cannot point to a specific example to support the contention that the family members may have inappropriate contact with potential jurors. Again, the Court can take steps to address that concern in advance and, of course, if and when any problem was to arise.

Under *Waller*, this Court must make findings adequate to support any closure. *Id.*, 467 U.S. at 48. On its face, Defendant's Motion does not provide a sufficient basis for the Court to make such findings.

Additionally, this Court should consider the rights of the victims and the public in deciding whether to close the courtroom. Colorado's Constitution was amended, effective January 14, 1993, in part to provide crime victims the right to be present at all critical stages of the criminal justice process. Article II, Section 16a of the Colorado Constitution. The legislation implementing that amendment specifically states that a victim of a criminal act or surviving immediate family members if such person is deceased, shall have the right to be . . . *present* at all critical stages of the criminal justice process. C.R.S. 24-4.1-302.5. That includes, of course, trial. C.R.S. § 24-4.1-302(g). This Court should effectuate the legislative intent in § 24-4.1-302.5(1)(b),

as well as the will of the voters in adopting the constitutional amendment.

A number of victims intend to attend the entire trial, including voir dire. The Colorado Constitution grants victims an unqualified right to be present at all critical stages of the judicial process, including the trial. While it cannot be enforced at the expense to Defendant's right to a fair trial, the record in this case does not support the conclusion that excluding the victims from voir dire is necessary to protect Defendant's constitutional right to a fair trial. C.R.S. § 24-4.1-303(6)(a) established procedures for a court or the district attorney to determine that exclusion of the victim is necessary to protect the defendant's right to a fair trial. The record before this Court does not support the conclusions that the victims must be excluded from voir dire in order to protect Defendant's right to a fair trial. Defendant has not provided any basis to believe that the presence of the victims will interfere with the constitutional right to a fair trial.

Finally, community members and the public should be permitted access to the courtroom. There are many individuals who were impacted by the shooting, including some present in and around the store, who will not be called as witnesses in this matter. They should have the right to attend all of the proceedings, should they wish to do so. As in every trial, this Court should and will take steps to ensure that the jurors are not unduly exposed to victims, community members, or pretrial publicity. The Court can do so through the standard instructions. The drastic step of closing the courtroom is unwarranted at this point in time.

WHEREFORE, the People respectfully request this Court deny the Motion.

Respectfully submitted,

MICHAEL T. DOUGHERTY  
DISTRICT ATTORNEY

By:  
*s/Michael T. Dougherty*  
Michael T. Dougherty  
May 24, 2024

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CERTIFICATE OF SERVICE  
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I hereby certify that a true and correct copy of the above and foregoing served via the Colorado e-filing system/hand-delivered on May 24, 2024, and addressed as follows:

Kathryn Herold  
Sam Dunn  
Office of the Colorado State Public Defender – Boulder  
2555 55th Street Suite. D-200  
Boulder, CO 80301

*s/Adam D. Kendall*  
Adam D. Kendall