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STATE OF MINNESOTA

DISTRICT COURT

HENNEPIN COUNTY

FOURTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

vs.

Mohamed Noor,

Defendant.

File No. 27-CR-18-6859
The Honorable Kathryn L. Quaintance

AFFIDAVIT OF LEITA WALKER IN SUPPORT OF MEDIA COALITION'S MOTION OBJECTING TO ORDERS THAT INTERFERE WITH FIRST AMENDMENT NEWSGATHERING AND REPORTING ACTIVITIES

STATE OF MINNESOTA)

) ss.

COUNTY OF HENNEPIN)

Leita Walker, being first duly sworn and under oath states as follows:

1. I am an attorney for Star Tribune Media Company LLC, CBS Broadcasting Inc., Minnesota Public Radio, TEGNA Inc., and Fox/UTV Holdings, LLC (collectively, the "Media Coalition") in the above-captioned matter.

2. I am fully familiar with the facts and circumstances set forth herein, and the facts stated herein are true and based upon my personal knowledge. I would be competent to testify to these facts if called as a witness at trial.

3. True and correct copies of the cases cited in the memorandum of law which

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accompanies this memorandum that are not available on Westlaw are attached hereto as **Exhibit 1**.

Dated this 2nd day of April, 2019.

By: Leita Walker
Leita Walker

Subscribed and sworn to before me, this 2nd day of April, 2019.

Dawn A Solfield
Notary Public
My Commission Expires: 1-31-23

DAWN A. SOLFIELD
Notary Public
Minnesota
My Commission Expires January 31, 2023

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Exhibit 1

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Majority Opinion >

Minnesota Supreme Court

KTTC TELEVISION, INC., and SUZAN WIESE, individually and as President of Radio and Television News Directors Association, Minnesota Chapter, and NORTHWEST BROADCAST NEWS ASSOCIATION, Intervening Petitioners, v. HONORABLE DANIEL F. FOLEY, Judge of the District Court for the Third District, JOHN KIRSH, and STATE OF MINNESOTA, Respondents

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No. 81-43

February 5, 1981

Television station seeks writ of prohibition, challenging trial court's order, entered at request of murder defendant, forbidding station's sketch artist from sketching defendant while on witness stand.

Application for writ denied as untimely in view of completion of trial.

Robert Suk, Rochester, Minn., and Patricia A. Hirl, St. Paul, Minn., for petitioners.

D.P. Mattson, county attorney, Jeffrey D. Thompson, and Julius Gernes, Rochester, for respondents.

By the Court:

Full Text of Order

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition for writ of prohibition filed on behalf of KTTC Television, Inc., et al be, and the same is, hereby denied as untimely.

MEMORANDUM

Although the application for relief is not timely, it is our view that sketching should be allowed absent extraordinary circumstances where to do so would disrupt the proceedings or distract the participants. In such an unusual case, the trial court in the exercise of discretion could define procedures to minimize or eliminate the disruptive effect. All such discussions should be made a part of the record of the case.

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STATE OF MINNESOTA	DISTRICT COURT
COUNTY OF HENNEPIN	FOURTH JUDICIAL DISTRICT

In Re the Matter of:

Manuela Nelson, *Now Known As* Manuela Testolini,

Petitioner,

and

Bremer Trust, N.A., on behalf of Prince Roger Nelson, *deceased*,

Respondent.

Court File No. 27-FA-06-3597

ORDER UNSEALING COURT FILE

On August 4, 2016 the Court conducted a hearing on Star Tribune Media Company LLC's motion to intervene and unseal the files in this matter.

Leita Walker of Faegre Baker Daniels, 2200 Wells Fargo Center, 90 South Seventh Street, Minneapolis, MN, 55402 represented Star Tribune Media Company LLC ("Star Tribune").

Curtis Smith and Jana Deach of Moss and Barnett, 150 South Fifth Street, Suite 1200, Minneapolis, MN, 55402 represented Ms. Manuela Testolini, who was present.

Bruce Recher and Lisa Spencer of Henson & Efron, P.A., 220 South Sixth Street, Suite 1800, Minneapolis, MN, 55402 represented Bremer Trust, N.A.

Based on the record and arguments of counsel, the Court makes the following:

ORDER

1. Star Tribune's motion to intervene for the sole purpose of asserting the public and press right of access to court records in this case is **GRANTED**.

2. This Order will not be sealed and will be accessible to the public.

3. Star Tribune's motion to unseal the files in this matter is **GRANTED**;

4. Except for documents or parts thereof deemed confidential under Minnesota General Rules of Practice 11.02, such as the confidential information form and any restricted identifiers on financial source documents, the court file shall be unsealed 30 days from the date of this order;

5. During this 30-day window, the parties may request, by motion and with notice to Star Tribune, redaction or sealing of additional individual documents in this court file; and

6. The attached memorandum is incorporated here.

BY THE COURT:

August 15, 2016

Thomas S. Fraser
Judge of District Court

MEMORANDUM

FACTS

Prince Rogers Nelson and Manuela Testolini were married in 2001. In May, 2006, Ms. Testolini commenced this dissolution proceeding against Mr. Nelson in Hennepin County District Court. On July 11, 2006, at the request of both parties and based on affidavits in support of a motion to seal, the presiding judge issued an order sealing the court file. The parties thereafter engaged in negotiations and a mediation, which led to a settlement. The parties submitted their written settlement agreement to the Court. On October 2, 2007, the Court issued its Findings of Fact, Conclusions of Law and Order for Judgment, and Judgment and Decree based on the parties' agreement. The Judgment and Decree contains a confidentiality provision.

Mr. Nelson died on April 21, 2016. Bremer Trust, N.A. was appointed as Special Administrator of his Estate by Order of the Carver County District Court Probate Division. Amidst the media flurry sparked by Mr. Nelson's death, Star Tribune Media Company LLC ("Star Tribune") tried to review the court file in this dissolution as part of its ongoing coverage of Mr. Nelson and investigation of his death. It was unable to do so because of the sealing order. Star Tribune now moves to intervene in this dissolution case for the limited purpose of unsealing the court file. Ms. Testolini and Bremer Trust oppose Star Tribune's motion, and request that the court file remain sealed.

The Court will first address the motion to intervene.

MOTION TO INTERVENE

Standard for Intervention

The requirements for intervention in a closed case are governed by Minnesota Rules of Civil Procedure 24.01, which provides as follows:

> Upon timely application anyone shall be permitted to intervene in an action when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Citing this rule, the Minnesota Supreme Court established a four-part test for intervention. *Minneapolis Star Tribune Co. v. Schumacher*, 392 N.W.2d 197, 207 (Minn. 1986). The elements are: (1) a timely application for intervention; (2) an interest relating to the property or transaction which is the subject of the action; (3) circumstances demonstrating that the disposition of the action may as a practical matter impair or impede the party's ability to protect that interest; and (4) a showing that the party is not adequately represented by the existing parties. *Id.* The Court will consider each of these elements in turn.

1. **Timely Application for Intervention**

The first *Schumacher* element is that the application for intervention must be timely. "The timeliness of the application to intervene, as in any case, will be based upon the particular circumstances involved and such factors as how far the suit has progressed, the reason for any delay in seeking intervention, and any prejudice to the existing parties because of a delay." *Id.* at 207.

Star Tribune argues that its motion is timely, and claims it asserted its interest in public access within weeks of its reporter learning of the sealed file. Star Tribune Mem. at 3-4. In the view of Star Tribune, intervention can be timely even if it is exercised years after the case is decided. Otherwise, the only way for news organizations to preserve their right of access would be to intervene in every case where a motion to seal was filed -- a burdensome and unrealistic proposition.

Ms. Testolini and Bremer Trust contend the motion to intervene is untimely. They point to the fact that the dissolution action was sealed nine years ago, and note that two 2006 Star Tribune columns mention the sealing of this divorce file. Deach Aff. Exs. A, B. In the view of Ms. Testolini and Bremer Trust, these columns, written by a reporter who focuses on celebrities, constitutes knowledge on the part of Star Tribune of the existence of these sealed records. According to these litigants, Star Tribune should have attempted to intervene at the time the proceeding began or soon thereafter if they were interested in it.

"The case law regarding the requirement of timely intervention reveals that such a matter must be determined on a case-by-case basis." *Engelrup v. Potter*, 224 N.W.2d. 484, 488 (Minn. 1974). In making a determination on timeliness, the Court examines several factors, including how far the case has progressed at the time of intervention, the reason for delay, and the possible prejudice to the existing parties caused by that delay. *Schumacher*, 392 N.W.2d at 207; *see also SST, Inc. v. Minneapolis*, 228 N.W.2d 225, 230 (Minn. 1979). Post-trial interventions are often disfavored due to this potential prejudice. *Brakke v. Beardsley*, 279 N.W.2d 798, 801 (Minn. 1979).

a. Progression of case at time of intervention

This dissolution proceeding was completed nine years ago.

b. Reason for delay

Star Tribune argues that its motion at this point is not delayed and is timely because the dissolution proceeding has newfound significance to the public in the wake of Mr. Nelson's recent death. Star Tribune Mem. at 4-5. The ongoing investigation into Mr. Nelson's death, its cause, and the subsequent estate issues have sparked a massive amount of public interest in everything to do with Mr. Nelson. In Star Tribune's view, it is unfair to expect it to have foreseen this nine years ago when the dissolution was finalized.

Ms. Testolini and Bremer Trust assert that Star Tribune waited far too long to bring this motion, and that Star Tribune does so now only as a matter of opportunism shortly after Mr. Nelson's death.

The Court accepts Star Tribune's reasoning for bringing this motion at this juncture, and finds no delay in light of the particular circumstances of this case. It is not for the parties or the Court to sit in judgment on the media's determination of newsworthiness. The passage of several years does not necessarily bar a newspaper from intervening in sealed proceedings, including marital dissolutions. *See In Re Marriage of Fry*, Court File No. 27-FA-296122 (Hennepin Cty. Dist. Ct. October 18, 2011).

c. Possible prejudice to existing parties

Intervention by the media in a closed case does not present the potential for prejudice to litigants that normally arises when the case is still being litigated. "The Star Tribune's motion to intervene cannot impede the parties' efforts to conclude a painful process, one that most people wish could be private and quiet; the divorce is done." *Fry* at 4.

Ms. Testolini and Bremer Trust argue they will be prejudiced if the record is unsealed. This is an argument directed at the merits of Star Tribune's claim, not its ability to assert its claim.

Ms. Testolini and Bremer Trust also note that Mr. Nelson was a private person, who can no longer personally defend his desire for privacy in this matter. But privacy rights do not necessarily survive a party's death. *Estate of Benson by Benson v. Minnesota Bd. of Medical Practice*, 526 N.W.2d 634, 637 (Minn. Ct. App. 1995).

The Court finds that no party is prejudiced due to the timing of the motion to intervene.

2. An Interest Relating to the Property or Transaction That is the Subject of the Action

The second *Schumacher* element is that the proposed intervenor must demonstrate an interest relating to the property or transaction that is the subject of the action. "This interest must be a legally protected one which can be found in the public's right to access ... The Star Tribune carries the banner of the public's right to know and its desire to gather information on a newsworthy matter." *Fry* at 4-5. In *Fry*, the Court found that the

public's presumed right of access to court files in a marital dissolution proceeding amounted to a legally protected interest that the Star Tribune may assert. The facts of *Fry* are similar to the present case, and the same ruling applies. Star Tribune, as a large news organization in the region, has a legitimate interest in searching for newsworthy information on behalf of the public, and as such has a legitimate interest in this dissolution proceeding.

3. Circumstances Demonstrating That the Disposition of the Action May as a Practical Matter Impair or Impede the Party's Ability to Protect That Interest

The third *Schumacher* factor is that the proposed intervenor must demonstrate that disposition of the action may impede or impair their ability to protect their interest in the action. If Star Tribune or another media organization did not intervene, the record in this matter would remain sealed, thereby impairing the media's ability (and, consequentially, the public's) to glean any newsworthy information from it.

Ms. Testolini and Bremer Trust argue that Star Tribune's quest for information about Mr. Nelson's death and his estate would be better directed to the Carver County Sheriff or the probate file in that county. Although these sources are likely to have more current and relevant data, that is not a reason to deny intervention. The media has no restrictions on the number or nature of sources it seeks in an investigation. Nor is it the role of litigants or judges to second-guess the news-gathering strategy of the media.

Star Tribune has shown that the sealed file impedes its ability to protect its interest.

4. A Showing That the Party is not Adequately Represented by the Existing Parties

A proposed intervenor must also show that its interests are not adequately represented by existing parties. Star Tribune's interests in seeking open access to court files, and reporting on any newsworthy elements in that file, are certainly not represented by Ms. Testolini or Bremer Trust, who wish to avoid both scenarios. As Star Tribune argued at the hearing, sealing orders are often granted by agreement of the litigants when no media entity is present to object. The media is entitled to be heard when public access to court files is restricted.

Rule 24 should be construed liberally to allow intervention where possible. *Omegon, Inc. v. City of Minnetonka*, 346 N.W.2d 684 (Minn. Ct. App. 1984). Star Tribune has met the four factors of the *Schumacher* test and, as in that case and many others since, will be allowed to intervene for the limited purpose of moving to unseal the court file.

MOTION TO UNSEAL

The Court now turns to the merits of Star Tribune's motion to unseal. The right of access to civil court documents is considered "fundamental to a democratic state." *Schumacher*, 392 N.W.2d at 202. A presumption exists in favor of public access, though not an absolute one. To defeat this presumption and restrict access, a party must demonstrate a sufficiently strong interest in denying access. A court has much discretion in supervising its own records, and can deny access where it believes files may be used for improper purpose. *Id.*

A. The Common Law Right of Access to Inspect Civil Court Records

Schumacher frames two standards to weigh competing interests regarding public access to civil court records – a common-law standard, and a constitutional standard. *Id.* (citations omitted). While some jurisdictions have applied the constitutional standard, Minnesota courts generally apply the common-law standard. *Id.* at 205.

Under the common-law standard, the Court must apply a balancing test to determine whose interests should prevail. The interests of the party seeking access, including the presumption of public access, are weighed against the interests of the party seeking to prevent access, including the right to privacy, safety concerns, and potential for improper use of the sealed file. *Id.* at 202-03.

1. Right to Privacy

Ms. Testolini strongly desires that this matter remain sealed. She expresses fear of harassment, alleging several unpleasant encounters with fans and media over the past nine years while the record was sealed, and notes that such harassment has increased since Mr. Nelson's death. Testolini Aff. at 4.

Ms. Testolini is also concerned that unsealed information would immediately make its way onto the internet, and furnishes several message-board posts and comments from the original dissolution proceeding in support of this. Testolini Aff. Exs. A, B. She argues that the financial records in this matter are not of legitimate public interest, contends that the relative privacy she has enjoyed for the past nine years will be undone if the record is unsealed, and that this will have an adverse impact on herself and her family. *Id.* at 8-9. In the view of Ms. Testolini and Bremer Trust, Ms. Testolini relied on

the sealing of the file and the confidentiality provision in the Judgment and Decree for this relative privacy.

As Star Tribune observes, Ms. Testolini does not specify precisely how she relied on the sealing of the record or what she would have done differently had the record been public. To a certain degree, parties always rely on a sealing order in a case where one is present; if this alone were enough to bar intervention, no intervention would ever be granted. *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 790 (3d Cir. 1994). As such, reliance alone is not enough to prevent public access to sealed files.

Star Tribune argues that, as in *Fry*, most of the financial and personal information contained in the sealed file is likely "stale" after this amount of time. *Fry* at 11. It notes that if Ms. Testolini desired to stay out of the public eye, she should not have provided pictures of her children to *Us Magazine*. Star Tribune Reply at 11. Furthermore, Star Tribune claims that Ms. Testolini does not demonstrate any basis for her belief that unsealing this matter will have a corresponding impact on her personal life in Los Angeles, and that her argument is essentially a personal preference for privacy.

The Court agrees that Ms. Testolini does not show how the unsealing of nine-year-old dissolution documents will affect her personal life, particularly given her remarriage and relocation to Los Angeles several years ago. Many of the message-board posts and comments she cites were posted in the immediate aftermath of her divorce from an international celebrity. It is unclear that unsealing this matter will affect internet activity relating to Ms. Testolini. Even if it did, that alone is not sufficient to bar all public access

to court documents. Her marriage to Mr. Nelson put her in the public eye; this is true regardless of information in the sealed documents.

Ms. Testolini states that the sealed files have nothing to do with Mr. Nelson's death and its subsequent legal issues. Testolini Aff. at 3. If that proves to be true, information disclosed is unlikely to subject her to a higher level of unwanted public attention than she has already received.

Ms. Testolini's desire for privacy, while important to consider, does not outweigh the public's right of access to court documents. Ms. Testolini and Bremer Trust make clear their own preferences for privacy in this proceeding, but fail to show how these override the presumption of public access. Star Tribune correctly states that this case is unique only in that it involves an international celebrity, and that it would be unfair to grant special privacy rights based solely on this. The presumption of public access to court files outweighs individual wishes for privacy.

Ms. Testolini and Bremer Trust argue that Mr. Nelson's lifelong desire for privacy should continue posthumously and is an interest to be weighed in this proceeding. Star Tribune counters that there is a long-established rule in Minnesota that privacy rights do not survive an individual's death.

While no cases deal directly with this, Minnesota Statutes section 573.01 and *Estate of Benson by Benson v. Minn. Bd. of Med. Practice*, 526 N.W.2d 634, 637 (Minn. Ct. App. 1995) both support the principle that causes of action do not generally survive an individual's death, including invasion of privacy. As such, Mr. Nelson's purported desires will not be given significant weight posthumously.

The Court finds that the proposed unsealing would not violate Ms. Testolini's right to privacy. The public's presumptive right of access outweighs her preferences in this matter.

2. Safety Concerns

Denial of public access has been found appropriate if allowing access to the records could result in "thefts, exploitation, trespass and physical injury" to the parties. *Schumacher* at 200. Ms. Testolini invokes those grounds, citing several incidents over the past nine years as reason to keep this matter sealed. These include negative posts on online fora, harassment by media and paparazzi, and unwanted attention by the public and fans of Mr. Nelson. Testolini Aff. at 2-4. She fears that any unsealing will exacerbate these problems for herself and her family.

Neither Ms. Testolini nor Bremer Trust has shown how Ms. Testolini's unfortunate encounters with fans or paparazzi, either in person or online, would be affected by the unsealing of this file – particularly as Ms. Testolini is not an heir of Mr. Nelson nor a party in the current probate proceeding, and now lives two thousand miles from the eye of this media storm and investigation surrounding Mr. Nelson's death. By virtue of her marriage to Mr. Nelson, Ms. Testolini remains exposed to potential unwanted attention in person and online, but this would be the case even if the file remained sealed. It is doubtful that the unsealing of a nine-year-old dissolution file containing "stale" financial information would significantly change this.

In *Schumacher*, a significant risk of increased harassment to the parties led to restricted access to the court files. *Schumacher* at 206. This risk was based on intrusions

the parties had already experienced due to the significant public interest in their proceeding, as well as the potential impact that unsealed information might have had on other pending suits. *Id.* Here, the public's focus is directed at the current investigation of Mr. Nelson's death and probate proceeding, not at Ms. Testolini's closed dissolution proceeding.

The Court does not find that the potential for an increase in harassment or similar activities is sufficient to bar access to the file.

3. Potential for Improper Use

Ms. Testolini and Bremer Trust both express concerns that the information in the file may be improperly used if it is unsealed. In their view, even if this is not Star Tribune's intent, improper use may be an unintended consequence due to the disclosure of documents in the file. Bremer Trust Aff. at 13. They do not explain what this "improper use" might be or how this may occur, although the Court recognizes that this may be difficult to do without revealing information from the sealed file. Star Tribune responds that it is a reputable newspaper, and that its coverage has been and will remain responsible and fair.

The Court has no reason to assume that improper use will occur.

Bremer Trust is concerned that disclosure of many of the sealed documents could interfere with the ongoing Carver County proceedings. Bremer Trust Mem. at 11. Star Tribune responds that it does not seek access to financial source documents at this stage, but rather an opportunity to review the entire file generally, reserving requests for access to specific documents until after its review. Star Tribune Reply at 13-14.

It is unclear how nine-year-old documents could interfere with an ongoing probate proceeding in another county, but these and other specific concerns can be addressed by an in-camera review of specific documents.

B. Right of Access in Divorce Proceedings

In Star Tribune's view, the state is a third party to every civil dispute given the use of public courts for resolution of those disputes. Star Tribune's Mem. pp. 8-9. As such, Star Tribune argues that the public has a right of access to inspect court proceedings, and the media has an extensive right of access in all stages of judicial proceedings as a form of public monitoring. *Id.* Star Tribune contends that divorces are no different from any civil proceeding that uses public courts for resolution, and that all elements of the proceeding and related documents should be subject to the same high level of public access.

This view finds support in the case law. "Marriage is a civil contract, to which there are three parties: the husband, the wife, and the State . . . the public occupies the position of a third party; and it is the duty of the State . . . to guard the relation." *Kasal v. Kasal*, 35 N.W.2d 745, 746 (Minn. 1949).

Ms. Testolini and Bremer Trust contend that while there is a general presumption of access in dissolution proceedings, the documents sought by Star Tribune are settlement documents for which there is no historic or philosophical presumption of openness. Petitioner's Mem. at 12-13. In their view, this includes the Judgment and Decree. They argue that the Court was involved only to adopt the parties' stipulated Judgment and

Decree and did not preside over any other dissolution issues in this matter, and that consequentially, there should be no right of public access to these documents.

Star Tribune counters that the decree is a final judgment, and cites extensive case law to support its view that this type of document does indeed fall under the historic presumption of public access. Star Tribune's Reply Mem. at 15. Star Tribune argues that the presumption of access is in fact strongest regarding final judgments due to the legal weight they carry. *Id.*

In most civil cases, the parties are able to keep the terms of a settlement confidential because the law does not require the settlement agreement to be filed with the Court. *See Schumacher*, 392 N.W.2d at 204-05. Instead, the parties typically notify the Court that a settlement has been reached and request dismissal of the case.

The same is not true in divorce cases, where the Court has a statutory obligation to review the terms of any settlement to make sure that it is "just and equitable." Minn. Stat. § 518.58. "In dissolution cases, the court sits as a third party, representing all of the citizens of the State of Minnesota to see that a fair property distribution is made." *Maranda v. Maranda*, 449 N.W.2d 158, 165 (Minn. 1989) (citations omitted). Thus, whether the divorce decree is the product of the settlement or a trial, a court's duty is the same – to ensure that it is fair to both parties.

Where a court is charged with the duty to review the terms of a settlement, that settlement is not automatically entitled to any more confidentiality than a judge's decision or jury's verdict embodying the same terms. The Court agrees that the

Judgment and Decree in the dissolution proceeding is not a settlement document entitled to special protection.

Even if it were a settlement document, "strong countervailing reasons" must be demonstrated for access to be restricted. *Schumacher*, 392 N.W.2d at 206. These have not been demonstrated. The Court, while sympathetic to Ms. Testolini's concerns of privacy and cognizant of her profound desire to keep the file sealed, does not find that these concerns override the general presumption of public access in dissolution proceedings. She and Bremer Trust will, however, have an opportunity to argue that specific documents, or portions thereof, should remain sealed.

The Court will order the file unsealed 30 days from the date of this Order to allow the parties to request, by motion and with notice to Star Tribune, redaction or sealing of individual documents in the court file.

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DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO 7325 S. Potomac St. Centennial, Colorado 80112	▲COURT USE ONLY▲
PEOPLE OF THE STATE OF COLORADO **v.** **JAMES EAGAN HOLMES,** **Defendant**	Case No. **12CR1522** Division: **201**

ORDER REGARDING PEOPLE'S MOTION TO LIMIT THE PUBLIC DISPLAY OF SOME ADMITTED EXHIBITS, SPECIFICALLY AUTOPSY PHOTOGRAPHS, CRIME SCENE PHOTOGRAPHS CONTAINING IMAGES OF HOMICIDE VICTIMS, AND CRIME SCENE VIDEOS CONTAINING IMAGES OF HOMICIDE VICTIMS, AND TO LIMIT VIEWING TO THE PARTIES, TO THE COURT, AND TO THE JURY (P-118-B)

In Order C-137, the Court addressed two requests for expanded media coverage of the trial filed by numerous news media organizations (hereafter "the Media Organizations"). Both requests were opposed by the People and the defendant. The Court granted one request in part and denied the other request. Order C-137 at p. 2. Therefore, the Court allowed the Media Organizations to access the transmission from the Court's closed-circuit camera, but prohibited them from having cameras in the courtroom and from video recording or photographing any part of the trial. *Id.* at pp. 8-9, 26.

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In Motion P-118, the People requested that the Court "order that photographs and videos taken during autopsies, at hospitals, and at the crime scene of homicide victims (collectively 'Graphic Images') be visible only to the jury, the Court, and the parties, but not to people seated in the public gallery and public gallery overflow rooms, and that the Graphic Images not be broadcast or disseminated in any manner other than to the parties, the jury, and the Court in this case for trial and any potential appellate purposes." Motion at pp. 1-2. The People proposed that the Court "allow the placement of a television viewing screen at the top of the square column next to the video-camera on that column," with "installation and equipment at the expense of the People through the direction of the Court, out of view of the public and the media." *Id.* at p. 2.

With the Court's permission, the People served a copy of their motion on Steven Zansberg, the legal representative of the Media Organizations. Zansberg later informed the People that his clients did not oppose the motion, and no other member of the media submitted an objection to the motion. Accordingly, the Court granted the motion. However, the Court noted that the People's proposal to install a screen at the top of the square column next to the closed-circuit camera in the courtroom was not feasible because the column is not sufficiently sturdy to hold a screen. Therefore, the Court indicated that it would have to find a different location in the vicinity of the camera for the installation of the screen.

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On March 18, the Court informed the prosecution that it had looked into finding an alternate location for the installation of a screen that would allow the Court, the parties, counsel, and the jury, but not the public or the media, to view the Graphic Images. The Court explained that it had been unable to find an appropriate place for the screen and that all other options will present major logistical difficulties, greatly complicate the proceedings, and substantially increase the risk of error. In light of these obstacles, the Court gave the prosecution an opportunity to be heard further on why it is necessary to conceal the Graphic Images from the public and the media. The prosecution filed a supplemental motion titled "Pleading P-118-B."[1] The prosecution advances two reasons in support of its request: (1) to allow the family members of some of the deceased victims (hereinafter "family members")[2] to attend the proceedings without being exposed to the Graphic Images; and (2) to protect the privacy of the family members and their deceased relatives.

For the reasons articulated in this Order, the Court makes most, but not all, of the accommodations requested by the People. First, the Court will prohibit the

[1] After reviewing Pleading P-118-B, the Court conducted legal research to determine whether any other court had dealt with the issues raised in Motion P-118 and Pleading P-118-B in a homicide case. This Order reflects the results of that research.

[2] The "family members" do not encompass all of the deceased victims' relatives who qualify as victims in this case pursuant to the August 28, 2013 Order and Order D-181-A. The "family members" group also does not include the surviving victims and relatives of the surviving victims who qualify as victims under the August 28, 2013 Order and Order D-181-A.

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broadcast of the Graphic Images. Second, the Court will bar the display of the Graphic Images on the largest screen in the courtroom. The Graphic Images will only be displayed on the screen that is farthest from the gallery and on the smallest screen in the Courtroom which is behind the jury and can only be seen from certain locations in the gallery. Third, the Court will make arrangements for all of the family members to attend the proceedings in an overflow room in which they will not be exposed to the Graphic Images. If this overflow room is not large enough, then, at the inconvenience of 16 other divisions in this Courthouse who conduct jury trials, the Court will convert the Jury Assembly Room into an overflow room where the family members may attend the proceedings without viewing the Graphic Images. Fourth, the public and the media will not be provided access to copies of any of the Graphic Images, and the Court will take precautions to eliminate the possibility of any recording of any kind being made while the Graphic Images are displayed. Fifth, the Court will prohibit the sketching of any of the Graphic Images. Sixth, the parties are ordered to advise the Court before the Graphic Images are introduced so that the Court may give a cautionary instruction to the family members. Finally, the Court will allow the family members time to leave the Courtroom following such an announcement.

However, because the People have not presented a compelling and overriding interest that outweighs the defendant's Sixth Amendment right to a

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public trial and the public's and the media's right of access to the proceedings under the First Amendment, the Court denies the request to conceal the Graphic Images from public view. As the Court explains in this Order, there are several other significant concerns that militate against granting the relief requested. Not only do the People fail to address these concerns, they do not appear to have thought about them.

A. Allowing the Family Members to Attend the Trial Without Being Exposed to the Graphic Images

The Court has reviewed the family members' remarks. The Court appreciates all of the comments submitted.

At the outset, the Court wishes to clarify that it has never questioned the notion that viewing evidence can be more difficult than hearing about it. The Court understands that visual observations of evidence may be more traumatizing than listening to testimony. What the Court said to the prosecution is that if the family members understandably wish to avoid viewing the Graphic Images as a coroner testifies about the autopsy of a loved one, they likely will wish to avoid hearing similarly graphic testimony from the coroner about the observations and findings made during that autopsy. The Court made this statement because it knows from experience that the testimony of a coroner regarding an autopsy is

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generally graphic and can be traumatic and difficult for the deceased's relatives. The Court stands by the comment it made.[3]

Nevertheless, after reading the family members' moving and heartfelt comments, the Court is persuaded that reasonable accommodations must be made to allow them to attend the proceedings without having to view the Graphic Images. While the Court felt compelled to make the aforementioned observation, the family members must be allowed to decide for themselves how to proceed. Therefore, the Court will prohibit the display of the Graphic Images on the largest screen in the courtroom, the only screen within view of the closed-circuit camera. This will allow the family members to be shielded from the Graphic Images while watching the closed-circuit transmission of the proceedings in an overflow room. The Court will also ensure that there is sufficient space in such overflow room to accommodate all of the family members.

B. The Family Members' Desire for Privacy

The Sixth Amendment of the United States Constitution states, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI. The right to a public trial is a fundamental right of a criminal defendant. Because the right to a public trial is "a

[3] When the Court made the comment in question, none of the prosecutors disagreed with it or took issue with it. This is not surprising. It is difficult to believe that an experienced trial lawyer would ever dispute that the graphic testimony of a coroner about an autopsy can be traumatic and difficult for the deceased's relatives.

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structural requirement of the Constitution," it is "a structural right, such that Sixth Amendment errors are categorically exempt from harm analysis." *Pena v. State*, 441 S.W.3d 635, 642 (Tex. App. 2014) (quotation omitted). However, this right, while fundamental, is not inviolate. The United States Supreme Court has ruled that "the right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." *Waller v. Georgia*, 467 U.S. 39, 45, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984). But "[s]uch circumstances will be rare, [] and the balance of interests must be struck with special care." *Id.* "The party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." *Id.* at 48, 104 S.Ct. 2210.

Recently, the Kansas Supreme Court commented on a defendant's constitutional right to a public trial:

> ***One of the fundamental rights of a criminal defendant is his right to a public trial. Trial court proceedings are generally required to be open and public, and a public trial is one which is public in the ordinary, common-sense meaning of the term. A public trial is not solely a private right of the parties, but one involving additional interests, including those of the public.*** The concept of a public trial implies that doors of the courtroom be kept open and that the public, or such portion thereof as may be conveniently accommodated, be

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> admitted, subject to the right of the court to exclude objectionable characters.

State v. Cox, 304 P.3d 327, 333 (Kan. 2013) (emphasis added) (quotation omitted).

The United States Supreme Court has also concluded "that the press and the public have a qualified First Amendment right to attend a criminal trial." *Waller*, 467 U.S. at 44, 104 S.Ct. 2210 (citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980)). This nation's history "in part reflects the widespread acknowledgement, long before there were behavioral scientists, that public trials had significant community therapeutic value." *Richmond Newspapers*, 448 U.S. at 570, 100 S.Ct. 2814. "[P]eople sensed from experience and observation . . . [that] the means used to achieve justice must have the support derived from public acceptance of both the process and its results." *Id.* at 571, 100 S.Ct. 2814.

In *Richmond Newspapers*, the Court addressed an order by the trial judge that closed a criminal trial to the public:

> ***When a shocking crime occurs, a community reaction of outrage and public protest often follows. Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion.*** Without an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful "self-help," as indeed they did regularly in the activities of vigilante "committees" on our frontiers. The accusation and conviction or acquittal, as much perhaps

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> as the execution of punishment, operate to restore the imbalance which was created by the offense or public charge, to reaffirm the temporarily lost feeling of security and, perhaps, to satisfy the latent urge to punish.
>
> Civilized societies withdraw both from the victim and the vigilante the enforcement of criminal laws, but they cannot erase from people's consciousness the fundamental, natural yearning to see justice done—or even the urge for retribution. ***The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is done in a corner or in any covert manner. It is not enough to say that results alone will satiate the natural community desire for "satisfaction."*** A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted. ***To work effectively, it is important that society's criminal process satisfy the appearance of justice, and the appearance of justice can best be provided by allowing people to observe it.***

Id. at 571-72, 100 S.Ct. 2814 (emphasis added) (internal quotations and citations omitted).

The Court in *Richmond Newspapers* aptly noted that "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Id.* at 572, 100 S.Ct. 2814. "The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that ***anyone*** is free to attend gives assurance that established procedures are being followed and that deviations will become known." *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984)

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(emphasis in original). Hence, openness "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Id.* (citation omitted).

The Court wants to make clear that it sympathizes with the concerns of the family members. Their pain is almost palpable in their comments. The Court is also sensitive to the family members' desire to maintain their privacy and the privacy of their loved ones. One of the family members predicted that if one of the deceased victims were the undersigned's relative, the undersigned "would want to exercise every option to present graphic evidence to the jury alone." Pleading P-118-B at p. 5. She is absolutely correct. But that is precisely why this nation's system of justice will not allow a judge to preside over the trial of the murder of his own relative. A judge could not be objective, fair, and impartial, much less apply the law faithfully, in such a trial.

The prosecution argues that "it is difficult to remember that the criminal justice field desensitizes us—to a certain degree—and it is very easy to forget—and very difficult to understand—the great hardship that our work often causes others." *Id.* at p. 8. Be that as it may, as this Order demonstrates, the Court's ruling is not based on its desensitization and is not the result of thoughtlessness. Nor is it difficult for the Court to understand the family members' hardship and pain. To the contrary, the Court, not the prosecutors, observed that attending the

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testimony of the coroners who conducted the autopsies of the family members' loved ones, even without being exposed to the Graphic Images, will be very difficult and may be traumatic.

The Court recognizes that the Media Organizations did not object to the prosecution's requests in Motion P-118. However, there is no guarantee that a different member of the media will not do so later, even during the trial. Zansberg certainly does not represent all media entities in the world. Nor does the media speak for all of the members of the public. Just because the Media Organizations chose not to object to Motion P-118 does not mean that a member of the public will not show up during the trial and demand, pursuant to his or her First Amendment rights, to view the Graphic Images as they are displayed in the courtroom. Neither the parties nor the Media Organizations have the authority to bind all members of the public to an agreement to conceal from public view the Graphic Images.

Regardless, the defendant has a fundamental right to a public trial under the Sixth Amendment. It is true that the defense did not object to Motion P-118 either, but the defendant has not executed a voluntary, knowing, and intelligent waiver of his constitutional right to a public trial. Nor have defense counsel waived such right on the defendant's behalf as a strategic decision in this case. And, in the end, the law imposes an independent duty on the Court to ensure this trial is public.

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To conceal the Graphic Images from the public and the media would be to partially close the trial.[4] This is problematic. As another Court recently recognized, "ours is an open judicial system." *In re The Spokesman-Review*, 569 F. Supp. 2d 1095, 1105 (D. Idaho 2008). Closure of any part of the trial can only be justified by "a compelling interest that outweighs the lengthy history of public access to open court proceedings." *Id.*

Though the Graphic Images are disturbing, "they are direct evidence of the crimes and are necessary to the jury's consideration and must be presented to the jury." *Id.* Approximately 150 exhibits, including the silent 45-minute crime scene video, a significant item of evidence, comprise the Graphic Images. In other words, the partial closure sought by the prosecution is not insubstantial, even for a four-month trial that involves thousands of exhibits.

At least one Court has ruled that preventing the public and the media from watching graphic videos during a murder trial amounts to a partial closure of the trial. *Id.* In *In re The Spokesman-Review*, a capital case, the prosecution sought to prevent the public and the media from watching graphic videos during the trial. *Id.*

[4] On January 20, 2015, during a bench conference, the Court inquired about taking a very small portion of the testimony of Undersheriff Louie Perea at the bench outside the hearing of the public. The People objected on the ground that the trial must be open to the public, and requiring Perea to partially testify outside the hearing of the public would have been the equivalent of closing part of the proceedings. Later, during the same bench conference, as defense counsel made a particular request, the prosecution strenuously objected to the request being discussed outside the presence of the public because this is a public trial. The Court agreed with both of the prosecution's objections.

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Although the Court was "sensitive to the family's interest in maintaining their privacy and the dignity of the victim," it concluded that such interest did not outweigh the public's and the media's right of access to the videos. *Id.* Therefore, the trial judge ordered that "the courtroom [would] remain open during the presentation of the videos in question." *Id.*[5]

It appears that in *In re The Spokesman Review*, the prosecution's request involved excluding the public and the media from the courtroom while the graphic videos were played. But there is no basis to believe that the Court's ruling would have been different if the partial closure sought by the prosecution had involved the specific procedure requested in this case. To the contrary, the Court explained that the proposed use of a less restrictive procedure did not alter its analysis. *Id.* at 1106. In response to a motion to reconsider, the Court indicated that it had considered and rejected the use of "reasonable time, place, and manner restrictions for the viewing of the video such as: limiting the number of representatives of non-trial/non-court participants and a limitation on the manner in which the video tape is presented." *Id.*

Notably, while the Court in *In re The Spokesman-Review* denied the prosecution's request to prevent the public and the media from watching the

[5] *In re The Spokesman-Review* was decided under the First Amendment, not the Sixth Amendment. However, "there can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public." *Waller*, 467 U.S. at 46, 104 S.Ct. 2210.

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graphic videos shown during the trial, it granted the prosecution's request to close the courtroom during the testimony of the child victim and to subsequently provide a copy of the transcript of her testimony to the media. *Id.* at 1101, 1104. The Court explained that "[r]ecalling the details of the crimes in front of a group of disinterested peers [would] cause the minor victim . . . undue embarrassment, as well as psychological and possible physical harm." *Id.* at 1101. The child victim had experienced "multiple traumatic events . . . when she was eight years of age including the homicide of several family members, the abduction of she and her brother for several weeks during which time she and her brother were sexually assaulted and exploited, and the eventual murder of her brother." *Id.* In addition, "the minor victim suffer[ed] from ongoing and overwhelming concerns regarding [the] trial and further dissemination of information to the public regarding the substance of her testimony," and "her treatment providers [were] concerned about the re-exposure to the traumatic events that her testimony [would] require." *Id.* The Court concluded that "[t]hese concerns regarding the well-fare of the minor victim . . . [were] compelling" and outweighed the public's and the media's right of access. *Id.*

Thus, the decision in *In re The Spokesman-Review* highlights what type of compelling and overriding interest is required to outweigh the First Amendment's right of access and the Sixth Amendment's right to a public trial. The wishes of a

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deceased victim's relatives for privacy, while completely understandable, are not sufficient to warrant partial closure of the trial as graphic images of the deceased victims are displayed in the courtroom.

In *Pena v. State*, 441 S.W.3d 635 (Tex. App. 2014), the Court implied that the private display of graphic autopsy photographs would have affected the defendant's fundamental right to a public trial under the Sixth Amendment. There, the defendant argued that his conviction for murder should be reversed because the trial court judge "failed to hold a public trial," as "it closed the drape over the courtroom's windows to block the public's view" when certain "graphic photographs from the autopsy" were introduced into evidence, "in violation of [his] rights under the Sixth Amendment to the United States Constitution." *Id.* at 642. The Court rejected the claim because the defendant failed to object "to the alleged closing of the trial to the public." *Id.* at 643. In the alternative, the Court ruled that, even if the issue had been preserved, the defendant "failed to demonstrate that his trial was closed to the public . . . or that the trial court did not accommodate public viewing of the trial." *Id.* According to the Court, the record did not show "what the impact of [the drapes'] closure would have been on anyone's ability to attend or view the proceedings inside the courtroom." *Id.* To the contrary, it appeared to the Court "that the drape in question, if it was closed, would merely have prevented photography or videotaping by persons outside the

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courtroom, which would not have violated [the defendant's] Sixth Amendment rights." *Id.*

State v. Cox also provides guidance, although the Court acknowledges that it is factually different. There, the Kansas Supreme Court reversed the defendant's conviction because the trial judge "clear[ed] the courtroom during the testimony of [a witness], while her photographs of the victims' genitalia were displayed and discussed." *Cox*, 304 P.3d at 332. "As soon as the 'graphic images' were no longer displayed, members of the public were allowed back into the courtroom." *Id.* at 333. On appeal, the Court rejected the State's argument that the defendant had a duty to request specific findings related to the partial closure, noting that "[t]he judge's independent duty to ensure that a criminal defendant receives a fair trial is . . . well established." *Id.* at 334 (citation omitted). The Court added that "[a] defendant is not required to prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee." *Id.* (citations omitted). Rather, pursuant to United States Supreme Court precedent, "a public-trial violation [can] not be considered harmless error." *Id.* "Other courts have also held that, when the Sixth Amendment right to public trial has been violated, the harmless error rule does not apply." *Id.* (citations omitted). The Court in *State v. Cox* concluded that reversal was required because the partial closure of the courtroom during the trial "was not a 'minor violation[] of the public trial guarantee'." *Id.* (citation omitted).

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The cases on which the prosecution relies are unpublished decisions, in some instances completely devoid of precedential authority, and are inapposite. In *United States v. Kaufman*, 2005 WL 2648070, at *2 (D. Kan. 2005), the Court allowed "sexually-graphic videos of mentally ill victims" to be "shown in a manner so that they [would] not [be] viewable by individuals in the gallery." However, the Court acknowledged that this procedure impacted the First Amendment right of access of the public and the press. *Id.* ("the trial has been completely open to the press and the public ***with the exception*** that sexually graphic videos of mentally ill victims are shown in a manner so that they are not viewable by individuals in the gallery") (emphasis added). The Court approved partial closure of the proceedings because it "was necessary to protect the victims' right to be treated with fairness and with respect for the victims' dignity and privacy" under the federal Crime Victims' Rights Act). *Id.* (quotation omitted). Unlike this case, at issue in *Kauffman* were graphic videos depicting sexual acts of misconduct being perpetrated by the defendants on their mentally ill patients. *Id.* at *1.

Tennessee v. Vandenburg is a state trial court decision with no precedential value. It also dealt with graphic exhibits of a sexual nature.

Lastly, the prosecution relies on an email purportedly sent by one of the prosecutors in the case involving Oscar Pistorius. As the prosecution concedes,

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this email is related to a case from another country and has no precedential value here. Moreover, the email includes a single sentence that states that the parties agreed to "certain image prohibitions" based on that country's "criminal procedure act." No such "procedure act" exists in the United States, and, in any event, there is no indication that the restriction in Pistorius' case included allowing images to be shown at trial only to the lawyers, the parties, and the judge. The rest of the email addresses what images were allowed to be broadcast, an issue the Court has already addressed in this case.[6]

Significantly, the prosecution can point to no homicide case, let alone capital case, in the rich history of American jurisprudence in which a trial court has granted the relief it requests here. The Court's research unearthed no such case. At the hearing on March 18, this District Attorney's Office admitted that it has prosecuted hundreds of homicides in this Courthouse, but it has never once sought the relief it requests in this case.

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[6] The prosecution's reliance on other unpublished cases, Motion P-118 at pp. 5-6, is equally misplaced. In *United States v. Patkar*, 2008 WL 233062, at *2 (D. Haw. 2008), the Court denied a motion by the Associated Press for access to "materials that comprised the basis of the [charged] extortion [scheme]." Here, no copies of the Graphic Images will be accessible to the public or the press. In *State in Interest of KP*, 709 A.2d 315 (N.J. Super. Ch. Div. 1997), the Court denied a motion by the press to access juvenile court proceedings. Of course, this case does not involve juvenile proceedings. In *United States v. Robinson*, 2009 WL 137319, at *1-3 (D. Mass. 2009), the Court denied a newspaper's motion for disclosure of the identity of a victim who was subject to extortion after a sex-for-fee relationship. No such issue of identification is involved in the case at hand. Lastly, in *Gueits v. Kirkpatrick*, 618 F. Supp. 2d 193, 198 n.1 (E.D.N.Y. 2009), *rev'd on other grounds*, 612 F.3d 118 (2d Cir. 2010), the Court decided not to publish the victim's name in a court decision. Again, there is no issue related to the identification of a victim in this case.

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Given the current state of the law, the Court is not willing to risk error, much less structural error, in this capital case by ordering the partial closure of the trial. This does not mean that the Court lacks respect for the family members' rights under the Victims' Rights Act or that the Court is refusing to enforce those rights. The August 28, 2013 Order and Order D-181-A, allowing the hundreds of victims in this case (including those who are not named in any counts) to be present throughout the trial and at every other critical stage in these proceedings, speaks loud and clear on this point. But the Victims' Rights Act does not grant victims of crime the right to partially private proceedings. It grants them "the right to be treated with fairness, respect, and dignity." § 24-4.1-302.5(1)(a) (2014). The Court will ensure that the Graphic Images will be displayed in such a way that the victims' rights to be treated with fairness, respect, and dignity will be fully observed and enforced at all times by everyone involved.

In any event, the Court's concerns do not end with the law. There are other significant concerns that the People have failed to address, including two that lead the Court to question whether the People have thought through carefully their request for partial closure.

First, the prosecution does not explain why the family members are entitled to a partially private trial, but the surviving victims are not. Nor does the prosecution represent that the surviving victims and their relatives (hereinafter "the

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surviving victims") are not interested in having the procedure in question extended to them. The Victims' Rights Act applies equally to both groups—the family members and the surviving victims. Both groups are entitled to be treated with fairness, respect, and dignity. If the graphic photographs of the surviving victims' injuries do not necessitate the procedure at issue, then presumably neither do the Graphic Images.

Many of the photographs of the injuries sustained by the surviving victims are graphic. [redacted] The surviving victims will be on the stand as these photographs are displayed in all three screens in the courtroom. This will undoubtedly be very uncomfortable for them and may run contrary to their wishes regarding their privacy. There is no explanation in Motion P-118 or Pleading P-118-B as to why the prosecution is not concerned with these individuals' desire for privacy or why it has not asked that any of the photographs of their injuries be concealed from public view. If the Court were to grant the relief requested to the family members, it would have no basis to deny the same request by any of the surviving victims. Theoretically, at

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some point, this could become a substantially private trial with large portions of it closed to the public and the media.

Second, there are hundreds of victims in this case, *see* August 28, 2013 Order and Order D-181-A, and the prosecution has not represented that all of the victims (including relatives of some of the deceased victims) agree with the relief sought in Motion P-118 and Pleading P-118-B. If even one victim wishes to view the crime scene video or any other exhibit within the Graphic Images during the trial, he or she is entitled to do so under the First Amendment and the Colorado Victims' Rights Act. Indeed, the Court has ruled that all of the victims have a constitutional right to attend all parts of the trial. *See* August 28, 2013 Order and Order D-181-A. Yet, if the Court grants the prosecution's request for a partial closure of the trial, and a victim were to subsequently come forward and demand to view the Graphic Images as they are displayed in the courtroom, the Court would have no way to effectuate that victim's right to attend all parts of the trial. That victim's rights under the First Amendment and the Victims' Rights Act would have to yield to the family members' wishes for privacy. The Court is not aware of any authority that allows it to arbitrarily choose among victims' conflicting wishes, much less that allows it to ignore the Victims' Rights Act, as interpreted in the

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August 28, 2013 Order and Order D-181-A, in order to effectuate certain victims' desire for privacy.[7]

Third, even if the family members' desire for privacy were deemed to outweigh the defendant's right to a public trial and the public's and the media's right of access, the accommodations requested cannot be reasonably made. The logistics surrounding this trial—including security, accommodations for the public in the courtroom and elsewhere in the Courthouse, accommodations for prospective jurors in the courtroom and elsewhere in the Courthouse, audio equipment in the courtroom, the electronic presentation of evidence, the media's presence, etc.—are already extremely complicated and the space available in the courtroom is already very limited. Despite great effort, the Court was not able to find an appropriate place for a single screen that would satisfy the family members' wishes.

Further, all other options, including those advanced by the prosecution in Pleading P-118-B, present major logistical difficulties, greatly complicate the proceedings, and substantially increase the risk of error. Both of the prosecution's suggestions in Pleading P-118-B would reduce the already limited space in the courtroom and would require counsel and the defendant to turn their backs to the Court and the witness to watch the Graphic Images on the new screens. In other

[7] None of the cases on which the prosecution relies involved a large number of victims. Those cases are distinguishable on this additional ground.

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words, as a witness testifies about the Graphic Images, counsel and the defendant would be required to constantly turn back and forth between the witness and the new screens.

Both proposals would also involve equipment that would temporarily block the Court's view of parts of the gallery, as well as the view that some people sitting in the gallery have of the proceedings, including the witness. Because some witnesses who testify about the Graphic Images are also likely to testify about other exhibits that are not included in the Graphic Images, the Court would be required to have an electronic system in place that would allow it to switch back and forth from the three screens already in the courtroom to the two new screens.

In sum, as much as the Court understands and respects the family members' desire for privacy, under the law, this is not a compelling and overriding interest that outweighs the defendant's constitutional right to a public trial or the public's and the media's right of access to open proceedings. Furthermore, there are several other concerns the People have failed to address. Therefore, the Court cannot make the accommodations requested. The Court is confident that, pursuant to the restrictions and provisions set forth in this Order, the public display of the Graphic Images, while not consistent with the family members' wish for privacy, will not interfere with their rights under the Victims' Rights Act to be treated with fairness, respect, and dignity in all judicial proceedings.

For all the foregoing reasons, the prosecution's requests in Pleading P-118-B are largely, but not entirely, granted. This Order supersedes Order P-118-A.

Dated this 24th day of March of 2015.

BY THE COURT:

Carlos A. Samour, Jr.
District Court Judge

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CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2015, a true and correct copy of the **Order regarding People's motion to limit the public display of some admitted exhibits, specifically autopsy photographs, crime scene photographs containing images of homicide victims, and crime scene videos containing images of homicide victims, and to limit viewing to the parties, to the Court, and to the jury (P-118-B)** was served upon the following parties of record:

Karen Pearson
Christina Taylor
Rich Orman
Jacob Edson
Lisa Teesch-Maguire
George Brauchler
Arapahoe County District Attorney's Office
6450 S. Revere Parkway
Centennial, CO 80111-6492
(via e-mail)

Sherilyn Koslosky
Rhonda Crandall
Daniel King
Tamara Brady
Kristen Nelson
Colorado State Public Defender's Office
1290 S. Broadway, Suite 900
Denver, CO 80203
(via e-mail)

Cheryl Robinson

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Majority Opinion >

Minnesota District Court, Tenth Judicial District, Anoka County.

State of Minnesota, Plaintiff, v. David Richard Clifford, Defendant.

02-CR-12-4361

October 3, 2012

C. Blair Buccicone, Robert Goodell, Assistant Anoka County Attorney, Anoka County Government Center, 2100 3 rd Avenue, Anoka, MN 55303.

Frederic Bruno, Attorney for Defendant, 5500 Wayzata Blvd #1450, Minneapolis MN 55416.

Jennifer A. Schlieper, Court Administrator, By: Wendy Christopherson, Deputy, Anoka County District Court, 325 East Main Street, Anoka MN 55303-2489, 763-422-7350.

Caroline Bachun, Assistant Minneapolis City Attorney John Borger, Attorney for Star Tribune Media Company LLC.

LAWRENCE R. JOHNSON, Judge of District Court.

ORDER

The above-entitled matter came before the undersigned Judge of District Court on August 23, 2012 at the Anoka County Courthouse, Anoka, Minnesota, pursuant to Plaintiffs motion for an order prohibiting extrajudicial statements, and motions from the City of Minneapolis and Star Tribune on their motions to intervene for limited purposes.

Plaintiff appeared by and through Clifford B. Buccicone and Robert D. Goodell, assistant Anoka County attorneys.

Defendant appeared in person and by Frederic Bruno, Esq., his legal counsel.

City of Minneapolis appeared by and through Caroline Bachun, Esq., Assistant City Attorney.

Star Tribune Media Company, LLC appeared by and through John Borger, Esq., its legal counsel.

The Court, based upon the files, records, submissions of the parties, and being duly advised in the premises, makes the following:

ORDER

1. The motion of the Star Tribune Media Company, LLC, to intervene was GRANTED.

2. Plaintiff's motion for an order prohibiting extrajudicial statements is DENIED.

3. The attached memorandum of law is incorporated herein by reference.

MEMORANDUM OF LAW

Procedural History

Defendant has been charged, by Amended Complaint, with Assault in the First Degree under Minn. Stat. § 609.221 , subd. 1 and a lesser charge of Assault in the Third Degree under Minn. Stat. § 609.223 , subd. 1. On July 19, 2012, the State filed a motion for an order preventing extrajudicial statements. The State seeks to prevent the attorneys and their employees from disclosing and making those statements that could interfere with a fair trial.

Analysis

Under Minn. R. Crim. P. 26.03 , subd. 7, this Court "may order attorneys, parties, witnesses, jurors and employees and officers of the court not to make extra-judicial statements relating to the case or the issues in the case for public dissemination during the trial." Not only may this Court issue such order under Rule 26.03 but the Supreme Court has made it "an affirmative constitutional duty [of trial courts] to minimize the effect of prejudicial pretrial publicity." Gannet Co. v. DePasquale, *443 U.S 368* (1979).

However, any order under Rule 26.03 limiting speech is a prior restraint, and therefore must not unconstitutionally infringe on the First Amendment rights of those whose speech is limited by such order. Under the prior restraint analysis, the State must first show harm necessary to justify the need for the restraint. The Supreme Court held in **[*2]** U.S. v. Brown, 218 F.3d 415 , (2000), that "a district court may... impose an appropriate gag order on parties and/or their lawyers if it determines that extrajudicial commentary by those individuals would present a 'substantial likelihood' of prejudicing the court's ability to conduct a fair trial." In addition to the presence of a substantial likelihood of prejudice, the order must be narrowly tailored and the least restrictive means available. *Id .;* Procunier v. Martinez, 416 U.S. 396 (1974).

The State's proposed order would limit only the attorneys' extrajudicial statements. Although, the Court notes most of the disputably prejudicial statements thus far have been made by those outside of the attorneys and within the social media context. The State's proposed order would not prevent future extrajudicial statements, like statements already made, by those outside of the attorneys. Furthermore, as officers of the court, attorneys are already ethically bound to limit extrajudicial statements through the Minnesota Rules of Professional Conduct. Under Minn. R. Prof. Conduct R 3.6(a)

> A lawyer who is participating or has participated in the investigation or litigation of a criminal matter shall not make an extrajudicial statement about the matter that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing a jury trial in a pending criminal matter.

Therefore, the attorney's ethical obligation to refrain from making prejudicial comments about this matter will exist

whether an order under Rule 26.03 is in place or not. The Court finds the rules of professional conduct provide a sufficient less restrictive mean of limiting the attorneys' statements to the media while protecting the parties' rights to a fair trial. An additional order, limiting those statements already restricted by the ethical rules would provide no greater protection against prejudicing the jury pool.

Because there are sufficient-less restrictive safeguards against attorneys' extrajudicial statements already in place, the States motion is DENIED.