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FILED IN THE COMBINED COURT

JAN - 9 2013

JEFFERSON COUNTY COLORADO

District Court, Jefferson County, Colorado 100 Jefferson County Parkway, Golden, Colorado	
PEOPLE OF THE STATE OF COLORADO, Plaintiff v. AUSTIN REED SIGG, Defendant	σ COURT USE ONLY σ
DOUGLAS K. WILSON, State Public Defender MITCHELL J. AHNSTEDT,NO.25934 RYAN P. LOEWER, NO. 33378 KATHERINE SPENGLER, NO. 34243 Deputy Public Defender Golden Regional Office 560 Golden Ridge Road, #100, Golden, CO 80401 Phone: (303) 279-7841 Fax: (303) 279-3082 Email: golden.pubdef@coloradodefenders.us	Case No. 12CR2899 Division 11

DEFENDANT'S REPLY TO DISTRICT ATTORNEY'S MOTION TO RECONSIDER RULING CLOSING THE PRELIMINARY HEARING

AND

DEFENDANT'S REPLY TO PETITION BY MEDIA PETITIONERS TO VACATE COURT'S ORDER CLOSING PRELIMINARY HEARING

(D-22)

COMES NOW, Austin Sigg, by and through the undersigned defense counsel, and respectfully submits his reply to The District Attorney's MOTION TO RECONSIDER RULING CLOSING THE PRELIMINARY HEARING and his reply to the Media's PETITION BY MEDIA PETITIONERS TO VACATE COURT'S *SUA SPONTE* ORDER CLOSING PRELIMINARY HEARING.

Specifically, defense counsel agrees with the Court's Order closing the Preliminary Hearing to the public and the media. As grounds, defense counsel would state the following:

PRESENT POSTURE OF THE CASE

1. On December 12, 2012, this Court entered its Order closing the preliminary hearing. The Court explained that this decision was made out of necessary concern and well thought out caution.

DOCKETED

2. Subsequent to the Court's Order closing the preliminary hearing, the District Attorney filed a MOTION TO RECONSIDER RULING CLOSING THE PRELIMINARY HEARIN and the media filed a PETITION BY MEDIA PETITIONERS TO VACATE COURT'S *SUA SPONTE* ORDER CLSING PRELIMINARY HEARING.

3. The charges in this case, which include allegations of Murder in the First Degree and Sex Assault, are of the most serious that may be placed against an individual in Colorado. There has been much public fervor and media attention associated with this case and the Court has already found it necessary to place a Gag Order on the parties and to require redacted motions to be filed in order to protect Austin Sigg's right to fair trial. The undersigned counsel contend that there has been such pervasive and prejudicial pretrial publicity associated with this case that Austin Sigg's right to an impartial jury may have already been compromised.

4. There exists the real potential for media misrepresentation in this case. The Court should recall that even within the first weeks of Austin Sigg's arrest, the media misrepresented District Attorney Scott Story comments. While the Court may not completely eliminate the media from all proceedings, the possibility of the media misrepresenting and misreporting statements made during the preliminary hearing are of utmost concern. Moreover, the testimony at preliminary hearing will be presented against Austin Sigg without the benefit of motions protecting his rights guaranteed by the Fourth, Fifth and Sixth Amendments to the United States Constitution and it's Colorado counterparts and will include much otherwise inadmissible hearsay.

LEGAL STANDARD FOR CLOSING PROCEEDINGS

5. Closing any proceeding requires the Court's careful consideration of possible conflicting interests: the accused's right to fair trial, the accused's right to an impartial jury, the accused's right to a public trial, and the right of the public to attend trial and pretrial proceedings. Frequently, the public's attention to criminal proceedings is able to take place due to the presence and reporting of a news media representative.[1]

6. The Court, however, has the ultimate discretion to disallow news media representatives when closure is deemed necessary to further the administration of justice and the truth-finding process.

7. The Court's discretion to close proceedings is limited to those instances where there is an "overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 509 (1984).

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[1] Limitations on the media's First Amendment rights are rarely tolerated and only in unique circumstances may courts exclude reporters from criminal proceedings. *See* Nebraska Press Assn. v. Stuart, 427 U.S. 539 (1976); *see also* People ex rel. McKevitt v. Harvey, 491 P.2d 563 (Colo. 1971) (establishing that prior media restraint is subject to a "heavy presumption" of invalidity). Also, there is a strong presumption of openness in our criminal justice system due to a longstanding and historical distrust of secret trials. *See, e.g.,* In re the Matter of P.R. v. District Court, 637 P.2d 346, 353 (Colo. 1981).

8. The United States Supreme Court articulated the "substantial probability" standard for closing proceedings in Press-Enterprise, *supra*:

> "[P]roceedings cannot be closed unless specific, on the record findings are made demonstrating that 'closure is essential to preserve higher values and is narrowly tailored to serve that interest.' If the interest asserted is the right of the accused to a fair trial, the preliminary hearing shall be closed only if specific findings are made demonstrating that, first, there is a *substantial probability* that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights."

464 U.S. at 509 (1984) (emphasis added) (citations omitted).[2]

9. While Press-Enterprise has established a "substantial probability" standard, the Colorado Supreme Court in Star Journal Publishing Corp v. County Court established a "clear and present danger" standard for determining propriety of closure.

> A judge may close a pretrial hearing only if (1) the dissemination of information would create a *clear and present danger* to the fairness of the trial; and (2) the prejudicial effect of such information on trial fairness cannot be avoided by any reasonable alternative means.

591 P.2d 1028 (Colo. 1970) (emphasis added) (citing section 8-3.2 of the ABA Standards for Criminal Justice Relating to Fair Trial and Free Press (2d Ed. 1978)).[3]

SPECIFICALLY CLOSING PRELIMINARY HEARING PROCEEDINGS AS THERE EXISTS CLEAR AND PRESENT DANGER THAT AUSTIN SIGG'S RIGHT TO FAIR TRIAL WILL BE PREJUDICED WITHOUT CLOSURE

10. While closure of the courtroom altogether seems to be the most drastic measure, appellate courts have ordered trial courts to contemplate narrowly tailored circumstances to close off only portions of the proceedings such as preliminary

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[2] The ABA Standards for Criminal Justice, Fair Trial and Free Press (3d ed. 1992) now follows the Press-Enterprise "substantial probability" standard.

[3] *But see* People v. Heller, 698 P.2d 1357 (Colo. App. 1984) reversed on other grounds 712 P.2d 1023 (Colo. 1986) (holding that defendant must also establish a nexus between extensive pretrial publicity and prejudicial effect on the jury panel). Also, appellate courts have found alternative, lesser restrictive, means to preserve a defendant's right to fair trial: "(1) allow extensive *voir dire* examination of prospective jurors; (2) change the trial venue to a place less exposed to intense publicity; (3) continue the trial to allow public attention to subside; (4) impanel the venire from an area that has not been exposed to intense pretrial publicity; (5) enlarge the size of the jury; or (6) emphatically and clearly instruct the jurors on each juror's sworn duty to decide the case only on evidence presented in open court." Colo. Prac., Criminal Practice & Procedure § 16.35 (2nd ed.) (citing, *inter alia*, People v. Botham, 629 P.2d 589 (Colo. 1981)); *and* Press-Enterprise Co. v. Superior Court of California for Riverside County, 478 U.S. 1, 13 (1986) (holding that "through *voir dire*, cumbersome as it is in some circumstances, a court can identify those jurors whose prior knowledge of the case would disable them from rendering an impartial verdict.").

hearings. *See* Star Journal Publishing Corp. v. County Court, *supra*; *see also* Des Moines Register & Tribune Co. v. Iowa District Court for Story County, 426 N.W.2d 142 (1988).

11. Defense counsel for Austin Sigg believe the evidence at the preliminary hearing will be without benefit of motions protecting his rights guaranteed by the Fourth, Fifth and Sixth Amendments to the United States Constitution and Colorado Constitution Article II, Sections 16 and 25. Also, hearsay evidence that is admissible at the preliminary hearing will not be admissible at the trial.

12. The United State Supreme Court specifically recognized the possible rationale of closing a preliminary hearing in Gannett Co. v. DePasquale, a case out of California.

> Publicity concerning the proceedings at a pretrial hearing [...] could influence public opinion against a defendant and inform potential jurors of inculpatory information wholly inadmissible at the actual trial."

Id. 443 U.S. 368, 443 (1979).[4]

13. Therefore, among other dangers, defendant believes that evidence in the relaxed procedural structure allowed at preliminary hearing and the near certainty of compromised public opinion by the media will substantially impair his right to a fair trial at a later time and that closing the proceeding is the only reasonable alternative that will protect his right to a fair trial.

14. Pretrial publicity will influence juror attitudes and the deliberations in this case. When pretrial publicity is "massive, pervasive," and "inherently prejudicial," the denial of a fair trial can be presumed. Sheppard v. Maxwell, 384 U.S. 333 (1966) (holding that where a state trial judge did not fulfill his duty to protect the accused from the "inherently prejudicial publicity which saturated the community and to control disruptive influenced in the courtroom" a new trial was warranted); *see* People v. Loscutoff, 661 P.2d 274 (Colo. 1983); *see also* Walker v. People, 458 P.2d 238 (1969).

15. This case is precisely the type of instance in which pretrial publicity will deprive a defendant of objective jurors. As stated above, within a couple weeks of Austin Sigg's arrest, the media misrepresented statements given to it by then District Attorney Scott Story. The media has already and may further misrepresent what takes place during the preliminary hearing.

16. While there is widespread national media coverage and public interest in this case, the local Denver-metro media market is being fed the most information about this case. This particular market includes those individuals that will likely be forming Austin Sigg's jury.

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[4] However, the United State Supreme Court in Gannett Co. reversed the California Supreme Court's approval of the trial court's closure of a preliminary hearing as it and its lower courts had not, *inter alia*, attempted to "narrowly tailor[]" an alternative measure short of closing the proceeding.

RIGHT TO FAIR TRIAL

17. Constitutional principles of Due Process guarantee Austin Sigg's right to a fair trial. A reversal of the Court's ruling to close the preliminary hearing would impinge upon Austin Sigg's right to a fair trial by an impartial jury as protected by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article II, sections 16 and 25 of the Colorado Constitution

18. In order for Austin Sigg to have a fair trial, the trier of fact must decide the case only on the basis of evidence presented and admitted at trial and not by considering the presentation of facts and opinions contained in the media. *See*, Irvin v. Dowd, 366 U.S. 717 (1961).

THE COURT'S RULING DOES NOT UNFAIRLY TARGET THE MEDIA

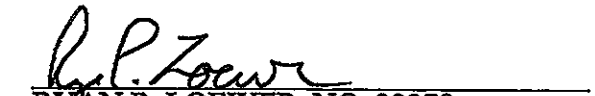
19. Defense counsel does not fail to see that the media's right to attend public proceedings is inherit in the First Amendment as the media itself is a member of the of the general public. Nebraska Press Assn. v. Stuart, 427 U.S. 539 91976). Denying media access to criminal proceedings while allowing the public to attend would violate a reporter's First Amendment rights. *See* Richmond Newspapers Inc. v. Virginia, 448 U.S. 555 (1980); Sacramento Bee v. United States District Court, 656 F. 2d 477 (9th Cir. 1981), cert. denied 456 U.S. 983 (1982); and Star Journal Publishing Corp. v. County Court, *supra*. However, the Court's current Order disallows both media and the general public from attending Austin Sigg's preliminary hearing. Thus, much of the media's concern is allayed.

FURTHER CONSTITUTIONAL CITATION

20. Austin Sigg makes this motion on the following grounds and authorities: the due process, trial by jury, right to counsel, equal protection, cruel and unusual punishment, confrontation, compulsory process, right to remain silent, and right to appeal clauses of the federal and Colorado Constitutions, and the first, fourth, sixth, eighth, ninth, tenth, and fourteenth amendments to the United States Constitution, and article II, sections 3, 6, 7, 10, 11, 16, 18, 20, 23, 25, and 28 of the Colorado Constitution.

WHEREFORE, Austin Sigg submits his reply to The District Attorney's MOTION TO RECONSIDER RULING CLOSING THE PRELIMINARY HEARING and his reply to the Media's PETITION BY MEDIA PETITIONERS TO VACATE COURT'S *SUA SPONTE* ORDER CLOSING PRELIMINARY HEARING and specifically prays for the Court to keep intact its Order closing the Preliminary Hearing to the press.

DOUGLAS K. WILSON,
COLORADO STATE PUBLIC DEFENDER



RYAN P. LOEWER, NO. 33378
Deputy State Public Defender

Dated: January 9, 2013

Certificate of Service
I certify that on 1/9/13,
I served the foregoing document by delivering X mailing ___ faxing ___
same to all opposing counsel.