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District Court Jefferson County, Colorado Court Address: 100 Jefferson County Parkway Golden, CO 80401-1070	12 DEC 19 AM 8:15
PEOPLE OF THE STATE OF COLORADO v. **AUSTIN REED SIGG** Defendant	FILED COURT JEFFERSON COUNTY, CO **COURT USE ONLY**
Scott W. Storey, District Attorney 500 Jefferson County Parkway Golden, CO 80401-6020 Phone Number: (303)271-6800 FAX Number: (303)271-6888 Scott W. Storey #13482 Harold Sargent #14289 Dana J. Easter #14984 Jennifer Rhoads #30952 Miles Madorin #11373	Case No. 12CR02899 Div: 11 Ctrm:

MOTION TO RECONSIDER RULING CLOSING THE PRELIMINARY HEARING (P-13)

SCOTT W. STOREY, District Attorney in and for the First Judicial District, County of Jefferson, State of Colorado, respectfully requests this Honorable Court to reconsider its order closing the preliminary hearing to the public.

The People did not anticipate that the Court would rule on the closing of the courtroom, and were unprepared to argue our position. Although we stated our objection, we now present the Court with legal authority supporting our view that the courtroom should remain open to the public for the preliminary hearing.

Colorado and United States Supreme Court case law set a high standard for the closing of any criminal proceeding, including a preliminary hearing. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986); *Star Journal Publishing Corp. v. County Court*, 197 Colo. 234, 591 P.2d 1028 (1978). Closure of any hearing requires that (1) the party seeking closure advances an overriding interest that is likely to be prejudiced; (2) the closure is no broader than necessary to protect that interest; (3) the court considers reasonable alternatives to closing the hearing; and (4) the court makes findings adequate to support the closure. *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210 (1984).

Limited closure of some criminal proceedings has been approved by the Colorado courts, but only in extraordinary circumstances. The district court's closing of the courtroom doors to prevent ingress and egress during a child victim's testimony at trial was approved in *People v. Whitman*, 205 P.3d 371 (Colo. App. 2007). The district court did not exclude the public from viewing the testimony, but only tried to limit distractions which had been shown to affect the victim in the past. This partial closure supported a "substantial" state interest, whereas full closure would have needed to be supported by a "compelling" one. If a child victim or witness were actually testifying at preliminary hearing some limited closure might be justified, but the People do not anticipate testimony from a child.

Section 16-5-301(2) is the only provision in Colorado law allowing the closing of a preliminary hearing:

> (2) If a person is accused of an unlawful sexual offense classified as a felony, upon the request of any party to the proceeding, the court may exclude from the preliminary hearing any member of the general public. In making a ruling for exclusion the court shall:
>
> (a) Set forth sufficient findings of fact and conclusions of law to support the order; and
>
> (b) Make its order sufficiently narrow to protect the requesting party's compelling interest considering any reasonable alternative to exclusion for the entire hearing of all member of the general public.

The law was passed as part of a bill seeking to implement safeguards for victims of sexual assaults. *Senate Bill 92-60, attached.* Its obvious goal was to allow sexual assault victims to testify in an unthreatening manner in a way which advances the truth-seeking process. Limited closure under extreme circumstances is all that was anticipated. There appear to be no published cases interpreting this provision. Although the defendant is charged with felony sexual offenses, there is no need to close the courtroom to protect the victim. The People believe the public has a right to know how the investigation and prosecution of Jessica Ridgeway is proceeding, especially in light of the public resources which have been dedicated to this murder.

In the brief hearing where the Court considered closing the preliminary hearing neither side presented any evidence. There were no facts presented for the Court to make findings on. Aside from the defense assertion that the media coverage has been pervasive and extensive, no facts were even referenced. The People concede, of course, that there has been extensive media interest in this case, and that this Court's ruling was itself front-page news. However, even accepting this broad generalization as a finding of fact, much more would be required in order to support closure of a courtroom.

The Court's stated reason for closing the courtroom was that the amount of publicity reporting the evidence at preliminary hearing would infect the potential jury pool, making it impossible to select a Jefferson County jury. Section 16-6-101(a), C.R.S. allows for a change of venue when a fair trial cannot take place in the county of venue. To support a change of venue motion a great deal more is required than merely a curious media.

To be entitled to a change of venue defendant would be required to show either the existence of massive, pervasive, and prejudicial publicity which has created a presumption that the defendant would be denied a fair trial, or that he would be denied a fair trial based upon a nexus between extensive pretrial publicity and the jury panel that results in actual prejudice against the defendant. *People v. Botham*, 629 P.2d 589, 596 (1981).

The existence of extensive publicity does not alone trigger a defendant's due process right to a change of venue. Prejudice should only be presumed in extreme circumstances. *People v. Harlan*, 8 P.3d 448 (Colo. 2000). Jurors may possess familiarity with the facts of a case as long as they can lay that aside to reach a fair and impartial verdict. To presume they cannot would require careful scrutiny of the media coverage to determine if the publicity was so "ubiquitous and vituperative that most jurors could not ignore its influence." *Harlan* at pg. 469, citing *People v. McCrary*, 190 Colo. 538, 545, 549 P.2d 1320, 1325-26 (1976).

A review of the facts in *Botham* give a sense of how extreme media coverage must be to force a change of venue on presumed prejudice. The defendant was charged with committing four brutal murders in 1975. At the time, more than 70 percent of the community subscribed to the local newspaper which ran an extraordinary number of articles, including numerous facts about the case. Not only did law enforcement provide

information, but the newspaper interviewed the forensic pathologist and quoted extensively from the arrest warrant affidavit. Facts were reported in the newspaper which did not come out at trial. Even then, the Colorado Supreme Court decided that "this was not a case where there was such massive, pervasive, and prejudicial publicity that the denial of a fair trial can be presumed." *Botham, supra* at 597. The Court did hold that during voir dire a sufficient number of jurors demonstrated an inability to set aside what they had learned from the media, supporting a change of venue on actual prejudice.

Without an evidentiary hearing allowing the Court to review the print and electronic coverage of the instant case, there is no record to support presumed prejudice. Such a finding would be difficult to make. The media coverage was far more extensive during Jessica Ridgeway's initial disappearance than subsequent to the defendant's arrest. Certainly there were many articles about the arrest, and, of course, some about the basic facts, but no reporting can be described as "vituperative." The defendant has not been extensively described in the media up to this point, aside from his age and some superficial descriptions.

Actual prejudice, of course, cannot be determined until jurors are called. The People submit that speculation on how coverage of the preliminary hearing might create actual prejudice is too thin a reed to support courtroom closure. Cases finding such prejudice contain examples of jury panels from decades ago, prior to modern media expansion, from relatively small population centers. *Botham* is one of the few cases reversed on an abuse of discretion in not changing venue, but the facts were extreme. Virtually every juror had learned information, including extensive details, about the case, and over half stated that they believed at one time that the defendant was guilty. That case, however, was from Mesa County in the mid-1970s. More recent cases from the larger metro areas have been able to empanel an impartial jury in the county of occurrence. *Harlan, supra; People v. Dore*, 997 P.2d 1214 (Colo. App. 1999). To overcome jurors who profess fairness and impartiality a defendant must show a pattern of deep and bitter prejudice against him throughout the community. *Botham, supra.* There is no reason to believe that media coverage of the preliminary hearing will cause such a result.

The People understand the Court's concern that, while coverage up to this point might not support a change of venue, evidence and testimony from the preliminary hearing would force that result. However, this concern is based only on speculation. There is every reason to believe that the media would restrict their coverage to a condensed version of the facts and not wade into sensationalism. While the facts themselves might be perceived as sensational, nothing presented in the courtroom will be incendiary.

It is doubtful, for example, that facts elicited at preliminary hearing will not be admissible at trial. Perhaps more importantly, affirmative defenses are not the subject of a preliminary hearing, but might form the crux of the trial. Jurors who read and remember the facts elicited at preliminary hearing would only recall evidence upon which there is no dispute, while still unexposed to evidence relating to any affirmative defense upon which the verdict might rest.

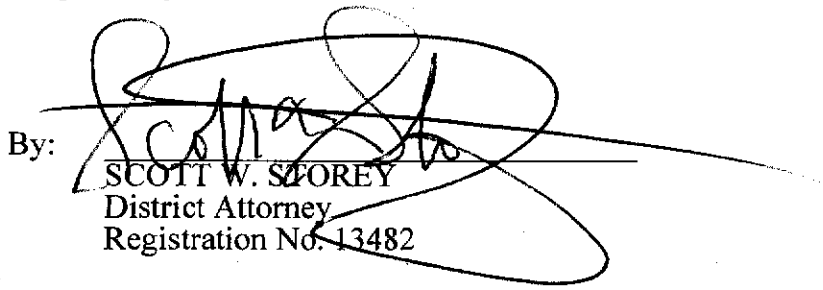
It is unlikely the trial in this case will occur close in time to the preliminary hearing, already set for a date months after the crime occurred. In an era of news saturation in multiple media platforms which, unfortunately, seem to include the reporting of a great deal of violent crime, the passage of time will cause memories of this case to fade away and blur into the details of other events. There is every reason to believe that a sufficient number of jurors will not possess any firm memories of this case precluding their ability to reach a fair verdict. *See, Harlan*, at 469 ("A significant passage of time between the occurrence of publicity and the trial decreases the prejudicial effect of pretrial publicity.")

Any potential problems can be remedied by trial procedure such as jury questionnaires and individualized voir dire in chambers. Should the Court determine that actual prejudice has occurred, venue can then be changed.

The juvenile code does allow for closure of certain court proceedings to protect juvenile defendants, Section 19-2-110, C.R.S. but once this case was filed into district court that provision became irrelevant. The effect of a transfer order is to convert the case to an adult proceeding, and the provisions of the Children's Code do not apply once the district court has acquired jurisdiction as a result of the transfer. *People v. Rivera*, 968 P.2d 1061 (Colo. App. 1997).

For the foregoing reasons the People respectfully request the Court reverse the Court's previous ruling and allow the preliminary hearing in this matter currently scheduled for February 22, 2013 be open to the public without restrictions, except those necessary to accommodate the size of the courtroom.

Respectfully submitted,



By: _____
SCOTT W. STOREY
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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing Motion to Reconsider was mailed on December 18, 2012 by depositing same in the interoffice mail, and addressed as follows:

Mitchell Ahnstedt
Deputy State Public Defender
First Judicial District
Golden, CO

Inter-Agency Mail

M. Dean