DISTRICT COURT, ADAMS COUNTY, COLORADO Adams County Justice Center 1100 Judicial Center Drive Brighton, CO 80601	DATE FILED: April 28, 2022 8:04 PM CASE NUMBER: 2021CR2794
THE PEOPLE OF THE STATE OF COLORADO, **Plaintiff** **v.** **NATHAN WOODYARD,** **Defendant**	▲COURT USE ONLY▲ Case No.: 2021CR2794 Div.: L

ORDER RE: THE DENVER GAZETTE'S FORTHWITH MOTION TO VACATE UNCONSTITUTIONAL PRIOR RESTRAINT

The matter comes before the Court on The Denver Gazette's Forthwith Motion To Vacate Unconstitutional Prior Restraint ("Motion"), the People's (P-14-NW) Urgent Motion For Protective Order, Mr. Woodyard's (NW-6) Defense's Response To The Denver Gazette's Forthwith Motion To Vacate Unconstitutional Prior Restraint Order, and the People's Response To The Denver Gazette's Motion To Vacate Unconstitutional Prior Restraint. Having reviewed the above, the Court finds and orders as follows.

BACKGROUND

The allegations from this case stem from the death of Elijah McClain in August of 2019. On August 26, 2021 Colorado's statewide grand jury indicted the Defendant, along with four other co-defendants (21CR2782 charging Randy Roedema, 21CR2788 charging Jason Rosenblatt, 21CR2800 charging Jeremy Cooper, and 21CR2806 charging Peter Cichuniec). The criminal case was filed with this Court on September 1, 2021.

In the afternoon on April 25, 2022, the Court was contacted by the People and notified that a reporter from The Denver Gazette contacted and informed them that the newspaper had in its possession copies of two suppressed filings in this case and two suppressed filings in 21CR2800. The filings the Denver Gazette had from this case are Mr. Woodyard's (NW—3-2) Motion For Probable Cause Review [and] Motion To Dismiss For Lack Of Probable Cause and

the People's Response to the Defendant's motion.[1] The Court was also notified that The Denver Gazette was in possession of Mr. Cooper's Motion to Dismiss for Lack of Probable Cause *And* Request That The Court Delay Finding As To Probable Cause Until All Motions Addressing The Indictment Have Been Filed, Argued, And Ruled Upon As To Any And All Additional Evidence That May Be Relevant To The Actions Of the Grand Jury, *And* Preliminary Motion To Dismiss For Improper Instruction Of the Law To The Grand Jury and the People's response to those motions. The People expressed concern because these filings, especially the motion for probable cause review in this case, contained extensive quotation and discussion of testimony before the grand jury that handed down the indictments in all the co-defendant matters, and that this Court has ruled to be kept under seal.

Despite the fact that all the pleadings were all either marked suppressed or sealed in the Court file upon order of the Court, the Court was notified that copies had been apparently been inadvertently given to a reporter for The Denver Gazette by court clerk staff.

In an attempt to ameliorate the situation, and consistent with prior orders suppressing the pleadings and sealing the grand jury materials, this Court immediately entered a short Protective Order at 2:01 p.m. on April 25th ("Protective Order"), ordering:

1. The Denver Gazette and its agents, employees, and assigns shall delete and destroy any copies of the Suppressed and/or Sealed materials they obtained from the court file.

2. The Denver Gazette and its agents, employees, and assigns shall not reveal any contents of the Suppressed and/or Sealed materials they obtained from the court file to any other person or entity.

At 3:24 p.m. on April 26th, The Denver Gazette filed its Motion. In it, The Denver Gazette moved for the Court to vacate the Protective Order, arguing that it was an unconstitutional prior restraint order because it "bars The Gazette from publishing truthful information on a matter of legitimate public concern that was lawfully obtained by a reporter for the newspaper." Motion at 1. In the Motion the counsel for the Gazette represented that the Gazette obtained the documents on April 14, 2022. According to the Motion, one of its reporters entered the clerk's office and "specifically asked to inspect 'all publicly available records'" that were filed in the connected cases since February 1, 2022. Motion at 4. In response to this request the records clerk provided the reporter with copies of records, including copies of suppressed pleadings.

At 9:50 p.m. on April 26th, the People filed its Motion to Set Deadline To Respond To The Denver Gazette's Motion To Vacate Unconstitutional Restraint asking the Court to set a deadline of 14 days for it to respond. It also notified the Court it intended to provide the co-

[1] Part of the People's Response requested that the Court strike the portion of the Motion for Probable Cause Review that included Mr. Woodyard's probable cause argument and references to grand jury material. The Court granted the motion to strike finding that any argument is prohibited by statute in a probable cause review pursuant to C.R.S. 16-5-204(4)(k).

defendants copies of The Denver Gazette's Motion in this case because the People believed all co-defendants should have the opportunity to respond.

The next morning, at 6:41 a.m. on April 27th, The Denver Gazette filed its Response in Opposition To The People's Motion To Set Briefing Schedule On The Denver Gazette's Forthwith Motion To Vacate Unconstitutional Prior Restraint Order, arguing that immediate action was necessary.

A few hours later, at 9:27 a.m. on April 27th, the People filed in this case and the co-defendant cases an Urgent Motion for Protective Order to "memorialize" how it learned about The Denver Gazette's possession of suppressed documents from the Court file. The People argued that a Protective Order was necessary to protect grand jury secrecy and the rights of all parties involved in the matters to ensure a fair trial and an impartial jury.

At 1:46 p.m. on April 27th, after completing the Court's morning docket and having an opportunity to read the motions filed overnight and in the morning, the Court entered its Order for Response in each of the five connected cases, ordering the People to provide The Denver Gazette's Motion to the defendant in each case and ordered any briefing regarding the various motions to be submitted to the Court by noon on April 28, 2022. The Court also noted that it had prioritized the matter on its docket and would be issuing an order as soon as practicable after the noon deadline on April 28th.

At 10:33 a.m. on April 28th, Mr. Woodyard filed his Response To The Denver Gazette's Forthwith Motion To Vacate Unconstitutional Prior Restraint Order. In it he joined the Denver Gazette in requesting that the Court vacate the Protective Order. Mr. Rosenblatt filed a response at 11:54am stating no position. At 12:46pm the People filed their Response to The Denver Gazette's Motion to Vacate Unconstitutional Prior Restraint, requesting the Court maintain the Protective Order.

At 12:46 p.m. on April 28th, the People filed their Response To The Denver Gazette's Motion To Vacate Unconstitutional Prior Restraint reiterating in greater detail their argument that the Protective Order should not be vacated and that prior restraint of The Denver Gazette's speech was necessary to protect the state's interest in maintaining grand jury secrecy and providing co-defendants a fair trial before an impartial jury.

ANALYSIS

In the Court's research of the issue before it, the Court found no previous Colorado, state, or federal law directly on point. Because there are a number of important constitutional rights to be considered and weighed, the Court will thoroughly explain its analysis.

Prior Restraint

The Court recognizes its Protective Order is a prior restraint. The First Amendment limits the choices the government may make in its efforts to regulate or prohibit speech, but it does not bar all government attempt to regulate speech, and it does not absolutely prohibit prior restraints against publication. *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 570 (1976). A prior restraint is an

order that prohibits the press from publishing or broadcasting lawfully obtained information. *Alexander v. United State*s, 509 U.S. 544, 550 (1993).

Notably, "[a] prior restraint . . . has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." *Nebraska Press Ass'n*, 427 U.S. at 559. The Court recognizes in the context of the press, this has a particular importance:

> The damage can be particularly great when the prior restraint falls upon the communication of news and commentary on current events. Truthful reports of public judicial proceedings have been afforded special protection against subsequent punishment. For the same reasons the protection against prior restraint should have particular force as applied to reporting of criminal proceedings, whether the crime in question is a single isolated act or a pattern of criminal conduct.
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> "A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." [*Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966)].

People v. Bryant, 94 P.3d 624, 628 (Colo. 2004).

To justify a prior restraint, the state must have an interest of the "highest order" it seeks to protect. *Fla. Star v B.J.F*, 491 U.S. 524, 533 (1989). The restraint must be the narrowest available to protect that interest; and the restraint must be necessary to protect against an evil that is great and certain, would result from the reportage, and cannot be mitigated by less intrusive measures. *CBS, Inc. v. Davis*, 510 U.S. 1315, 1317 (1994).

Consequently, the Court must consider whether the interest of the state in this case in maintaining grand jury secrecy and providing a fair trial in front of an impartial jury are interests of the "highest order" and whether the Protective Order is necessary to protect against an evil that is great and certain, would result from The Denver Gazette's reportage, and cannot be mitigated by less intrusive measures.

Government Interest in Maintaining Grand Jury Secrecy

"Historically, the grand jury has served an important role in the administration of criminal justice." *Butterworth v. Smith*, 494 U.S. 624, 629 (1990). The Supreme Court has stated:

> We consistently have recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings. *See*, e. g., *United States v. Procter & Gamble Co*., supra. In particular, we have noted several

> distinct interests served by safeguarding the confidentiality of grand jury proceedings. First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.

Douglas Oil Co. v. Petrol Stops Northwest, 411 U.S. 211, 218 (1979). Case law is clear that even when a grand jury has ended its activities, the interest in grand jury secrecy still exists. Courts are directed to consider not only the immediate effects on a current grand jury, but also the possible effect on future grand juries. *Id*. That said, the "invocation of grand jury interests is not 'some talisman that dissolves all constitutional protections." *Butterworth*, 494 U.S. 624, 631 (1990). And Courts must remember "that grand juries must operate within the limits of the First Amendment as well as the Fifth." *Branzburg v. Hayes*, 408 U.S. 665, 708 (1972).

The Court is therefore required to balance the first amendment rights of The Denver Gazette with the state's interest in preserving the confidentiality of grand jury proceedings. In doing so, the Court first looks at four opinions that impact this analysis.

People v. Bryant

The Court turns first to *People v. Bryant*, the leading Colorado opinion addressing prior restraint. 94 P.3d 624 (Colo. 2004). In that case, Kobe Bryant, a professional basketball player, was charged with sexual assault. The case was highly publicized and of public interest. Prior to trial, the district court held a confidential *in camera* proceeding regarding the relevancy and materiality of evidence of the alleged victim's prior or subsequent sexual conduct. Under Colorado's Rape Shield statute, the contents of the *in camera* hearing, and any transcripts of the hearing, are to remain confidential and under seal in the future. Unfortunately, after the hearing, the court reporter mistakenly emailed transcripts of the hearing to the wrong mailing list—a list that included seven media entities.

The court reporter immediately notified the district court and the court entered an order stating that the transcripts were not for public dissemination and that "[a]nyone who has received these transcripts is ordered to delete and destroy any copies and not reveal any contents thereof, or be subject to contempt of court." *Bryant*, 94 P.3d at 626.

The seven media entities subsequently filed an original proceeding under C.A.R. 21 with the Colorado Supreme Court, arguing the district court's order violated their constitutional rights under the First Amendment. They asserted that "at the moment the transcript arrived at their computers, they lawfully acquired the information and were entitled to publish it." *Id.* at 633.

The Court, in a 4-3 decision, held that the prior restraint was constitutional and that:

> The state has an interest of the highest order in this case in providing a confidential evidentiary proceeding under the rape shield statute, because such hearings protect victims' privacy, encourage victims to report sexual assault, and further the prosecution and deterrence of sexual assault.

Id. at 626.

More specifically, the Court held that:

> (1) the transcribed in camera proceedings concern the relevancy and materiality of evidence of specific instances of the victim's sexual conduct prior to and after the alleged sexual assault, and opinion evidence related thereto; (2) the state of Colorado has not made these transcribed proceedings publicly available; (3) the District Court has not yet determined whether all or any portion of the matters reported therein consist of relevant and material evidence potentially admissible at trial in this case; (4) the Colorado rape shield statute presumptively declares inadmissible all evidence of a victim's prior or subsequent sexual conduct and related opinion evidence, unless the defendant proves at an in camera hearing that such evidence is relevant and material; (5) the transcripts of in camera rape shield hearings do not become public unless and until they are introduced at trial; (6) reporting publicly the contents of the in camera transcripts would cause great and certain harm to the state's interest in providing the rape shield hearing in this case, including the victim's privacy and safety interest, encouraging victims to report sexual assault, and prosecuting and deterring sexual assault; and (7) the District Court's order, properly narrowed, is the only means available to protect this interest.

Id. at 637. The Court held that the state had not made the transcribed proceedings publicly available because every page of the transcripts was marked with highly visible lettering that read "* * IN CAMERA PROCEEDINGS * *." *Id*. at 633. Further, the Court noted that the media entities expended no effort in obtaining the transcripts—they just appeared on their computers. Thus, the entities had "no stake in the transcripts as a result of their investigative efforts." *Id*. at 638.

In the present case, however, while the method of inadvertent disclosure to the press is very similar to that in *Bryant*, the state interests at issue are the issues of grand jury secrecy and the provision of a fair trial. Thus, the Court must examine cases that consider grand jury materials.

In re Subpoena 2018R00776

In *In re Subpoena 2018R00776*, 947 F.3d 148 (3rd Cir 2020), the Court upheld a prior restraint designed to preserve the secrecy of grand jury proceedings. In that case, ABC Corp. received a grand jury subpoena seeking subscriber information. It also received a nondisclosure order prohibiting it from notifying anyone of the data request. ABC Corp. argued that the

nondisclosure order constituted a prior restraint on speech. The Court agreed but upheld the order.

The Court held "that protecting the secrecy of an investigation is a paramount interest of the government," and that "[t]he government's interest is particularly acute where, as here, the investigation is ongoing." *In re Subpoena 2018R00776*, 947 F.3d at 156. The Court considered the government interests in grand jury secrecy discussed above in *Douglas Oil Co.*, especially the need to protect that secrecy to avoid giving notice to the target of the investigation. The Court also noted that this was not a case where ABC Corp. was being prohibited from speaking about information it obtained independent of its participation in the grand jury proceedings:

> Courts consistently distinguish between disclosure of information that a witness has independent of his participation in grand jury proceedings and information the witness learns as a result of his participation. This approach strikes a "balance" between First Amendment rights and the government's "interests in preserving the confidentiality of its grand jury proceedings."

Id. at 157-158.

Here, however, the grand jury's investigation has ended, and the prior restraint order is directed at speech regarding truthful information that The Denver Gazette obtained through its news-gathering efforts, even though it was also due to an inadvertent disclosure by a court employee.

In re Charlotte Observer

In *In re Charlotte Observer*, 921 F.2d 47 (4th Cir. 1990), a district court judge mentioned the name of an attorney during a hearing and stated the attorney was a part of an ongoing grand jury investigation. In doing do, the judge disclosed the subject of a grand jury investigation inadvertently in open court. Once the judge realized there were two newspaper reporters in the courtroom, he issued an oral order to the reporters not to report about the attorney being subject to an investigation. He further told the reporters they would be held in contempt of court if they did. The Circuit Court of Appeals held:

> On the present record, however, "the cat is out of the bag." The district court did not close the hearing and the disclosure was made in the courtroom, a particularly public forum. Once announced to the world, the information lost its secret characteristic, an aspect that could not be restored by the issuance of an injunction to two reporters. The district court injunction applied only to the two reporters and not to others who may have obtained the information from some collateral source. Moreover, the attorney, whose name was inadvertently mentioned in open court, in all probability was aware that he was a target of the investigation because such targets are often notified by letter from the United States Attorney, and this would be expected when the target is a practicing attorney.
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> To enjoin the press from publishing the name of the person identified in open court as a target of a grand jury investigation is the type of prior restraint

> condemned in *Nebraska Press*. Once the name has been made public in open court, the First Amendment protection of a free press comes into play. On the present record where only a target's name has been mentioned, Federal Rule of Criminal Procedure 6(e)(3)(C) is not strong enough to resist the force of the First Amendment.

In re Charlotte Observer, 921 F.2d at 50.

This case is not completely on point because the grand jury information at question was not shared in open court. Instead, it was contained in suppressed filings that, like the situation in *Bryant*, were inadvertently given to The Denver Gazette by a court employee.

Landmark Communications v. Virginia

In *Landmark Communications v. Virginia*, 435 U.S. 829 (1978), a newspaper published accurate information about a pending issue before a state judicial review commission. By law the proceedings of the commission were confidential, and the paper was charged with a crime for unlawfully divulging information about a judge who was the subject of an investigation by the commission.

In reviewing the constitutionality of the criminal penalty against the newspaper, the Supreme Court noted that:

> The narrow and limited question presented, then, is whether the First Amendment permits the criminal punishment of third persons who are strangers to the inquiry, including the news media, for divulging or publishing truthful information regarding confidential proceedings of the Judicial Inquiry and Review Commission.

Landmark Commc'ns, 435 U.S. at 837. The Court specifically noted that the was no issue of information being obtained illegally. Nor was there a challenge to the "State's power to keep the Commission's proceedings confidential or to punish participants [in the proceedings] for breach of this mandate." *Id*. The Court then held that:

> The publication Virginia seeks to punish under its statute lies near the core of the First Amendment, and the Commonwealth's interests advanced by the imposition of criminal sanctions are insufficient to justify the actual and potential encroachments on freedom of speech and of the press which follow therefrom….neither the Commonwealth's interest in protecting the reputation of its judges, nor its interest in maintaining the institutional integrity of its courts is sufficient to justify the subsequent punishment of speech at issue here, even on the assumption that criminal sanctions do in fact enhance the guarantee of confidentiality.

Id. at 841.

This Court believes that the state's interest here, in maintaining the confidentiality of the grand jury system, is greater than the state interest in *Landmark Commc'ns* in maintaining the

confidentiality of the proceedings of its judicial review commission. However, that case concerned an after-the-fact punishment of speech, while at issue here is reconsideration of a prior restraint on speech, which is more disfavored. *See, e.g., Bryant*, 94 P.3d at 633 n.8 ("We recognize that many of these examples [of restraints on speech] arose in cases involving after-the-fact punishment of speech rather than prior restraints. Nonetheless, they are instructive because if these reasons are not compelling enough to justify an after-the fact restraint, they are certainly not sufficient to justify a prior restraint.").

Analysis

With the above cases in mind, the Court turns to an examination of the state's interest in grand jury secrecy specifically at issue in this case. Since the grand jury has ended its deliberations and issued its indictment, many of the considerations set forth in *Douglas Oil* are no longer applicable. Nevertheless,

> in considering the effects of disclosure on grand jury proceedings, the courts must consider not only the immediate effects upon a particular grand jury, but also the possible effect upon the functioning of future grand juries. Persons called upon to testify will consider the likelihood that their testimony may one day be disclosed to outside parties. Fear of future retribution or social stigma may act as powerful deterrents to those who would come forward and aid the grand jury in the performance of its duties.

Douglas Oil, 411 U.S. at 222. The Court believes this consideration is very similar to the Supreme Court's consideration in *Bryant* about the impact of publication, and the attendant loss of confidence in the confidentiality of court proceedings, on future sexual assault cases:

> the state's interests of the highest order in this case not only involve the victim's privacy interest, but also the reporting and prosecution of this and other sexual assault cases. Revealing the *in camera* rape shield evidence will not only destroy the utility of this very important legal mechanism in this case, but will demonstrate to other sexual assault victims that they cannot rely on the rape shield statute to prevent public airing of sexual conduct testimony the law deems inadmissible. This would directly undercut the reporting and prosecution of sexual assault cases, in contravention of the General Assembly's legislative purposes.

Bryant, 94 P.3d at 636.

This is undoubtedly an important consideration. But while any inadvertent breach of grand jury secrecy by court personnel undermines public confidence in that secrecy to some extent, the cause of that loss of confidence is the inadvertent disclosure, not the news-gathering activities of The Denver Gazette.

Further, it is clear that in *Bryant*, the majority of the Court's opinion is not dedicated to this consideration but, instead, to the immediate, devastating, and irreversible impact that publication of the testimony in that case would have to the alleged victim's privacy rights

regarding her sexual history. The grand jury information at issue here presents no similar privacy concerns.

Further, although this is not a case where the information was presented in open court or some other public forum, it is also not a case where, like in *Bryant*, the information just appeared in the reporter's mailbox with obvious markings of confidentiality. Here, the reporter was actively pursuing a story about this criminal matter and realized, after reviewing the documents that had been given to her by the clerk's office, that suppressed materials were included.

Thus, the Supreme Court in *Bryant* was faced with a newspaper's receipt of confidential information (that was immediately recognizable as such) through no effort of its own, and the fact that publication of that information would (1) immediately and irreversibly violate the alleged victim's privacy rights concerning her sexual history (which are some of the most strongly protected privacy rights), and (2) undermine the public's confidence in the confidentiality of proceedings under the rape shield statute, to the detriment of the reporting and prosecuting of future sexual assault cases.

Here, the Court is also confronted with the negative impact that publication would have on the confidence of the public in the confidentiality of secret court proceedings—in this case grand jury proceedings—and the attendant negative effects that could have on future prosecutions. But the Court is not confronted with a potential irreversible violation of privacy rights. There is, as pointed out by the People, an impact on the ability to conduct a fair trial before an impartial jury. But, as will be discussed below, that impact is not immediate and irreversible. There are steps the Court can take in the future in order to assure a fair trial. Further, unlike the media entities in *Bryant*, here The Denver Gazette obtained the information through its news-gathering efforts.

Consequently, after the opportunity for further briefing, and the more in-depth review of the complicated constitutional issues that further time to research allowed, the Court concludes that the state's remaining interest in protecting grand jury secrecy in this case, where the grand jury has completed its deliberations, does *not* outweigh The Denver Gazette's First Amendment right to publish truthful and lawfully-attained information to the extent that a prior restraint may be put on such speech.[2]

Government Interest in Providing Defendants a Fair Trial Before an Impartial Jury

Also at issue is the state's interest in protecting the rights of the parties for a fair trial in front of an impartial jury. After further review, the Court has determined that while the state has such an interest, a prior restraint on speech such as the Protective Order could only be justified

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[2] The People argue in their Urgent Motion For Protective Order that "[t]he court has additional equitable powers to ensure that its orders are complied with, particularly when the disclosure came from the court itself." Urgent Motion at 3. The cases cited by the People are not applicable in the context of a prior restraint order and the state's interest in the efficient functioning of its courts is not a sufficient justification for a prior restraint of speech. *Landmark Commc'ns*, 435 U.S. at 841-842, 98 S.Ct. 1535 (holding that Virginia's "interest in maintaining the institutional integrity of its courts" was not a sufficient interest to support the restraint on free speech in that case).

on such grounds by showing that, without the prior restraint, insuring a fair trial would be impossible. That is not the case here.

In *Nebraska Press Ass'n*, a Nebraska trial judge entered an order in a case concerning six murders prohibiting "everyone in attendance from 'releas(ing) or authoriz(ing) the release for public dissemination in any form or manner whatsoever any testimony given or evidence adduced.'" 427 U.S. at 542. The reason given for the order was widespread coverage of the case. The Court expressed concern with its ability to impanel an impartial jury and conduct a fair trial.

In reviewing the order, the Supreme Court noted that it's previous cases "demonstrate that pretrial publicity even pervasive, adverse publicity does not inevitably lead to an unfair trial," *id*. at 554, and noted there were obvious alternatives to prior restraint of publication:

> (a) change of trial venue to a place less exposed to the intense publicity that seemed imminent in Lincoln County; (b) postponement of the trial to allow public attention to subside; (c) searching questioning of prospective jurors, as Mr. Chief Justice Marshall used in the Burr Case, to screen out those with fixed opinions as to guilt or innocence; (d) the use of emphatic and clear instructions on the sworn duty of each juror to decide the issues only on evidence presented in open court.

Id. at 563-564.

In a concurrence, Justice Brennan also recognized the ability for the *voir dire* to probe fully into any effect publicity had on prospective jurors. He noted steps a trial court can make to ensure a fair jury. Lastly, he noted that even if that were to fail, the appellate process is also a remedy. He stated, "We have indicated that even in a case involving outrageous publicity and a carnival atmosphere in the courtroom, these procedures would have been sufficient to guarantee the defendant a fair trial." *Id*. at 603.

Consequently, the Court concluded that:

> We cannot say on this record that alternatives to a prior restraint on petitioners would not have sufficiently mitigated the adverse effects of pretrial publicity so as to make prior restraint unnecessary. Nor can we conclude that the restraining order actually entered would serve its intended purpose. Reasonable minds can have few doubts about the gravity of the evil pretrial publicity can work, but the probability that it would do so here was not demonstrated with the degree of certainty our cases on prior restraint require.

Id at 569.

In *Hays v. Marano*, 114 A.D.3d 387 (N.Y.S.2d. 1985), while investigating a criminal matter involving New York Yankee baseball player Joseph Pepitone, a reporter "was granted access to the public court file in that proceeding." *Id*. at 388. While examining the file, the reporter realized it contained the grand jury testimony of Mr. Pepitone's co-defendant. The

reporter subsequently published an article containing some information from that testimony. The judge prevented the reporter from publishing any further stories.

The appellate court ordered that the trial court was prohibited from enforcing its order restraining the reporter. The Court held the reporter did not improperly obtain the information, nor did he unlawfully disclose it. The Court noted that "[i]t has frequently been stated that where a newspaper lawfully obtains truthful information about a matter of public significance, the State may not prevent its publication absent a need to further a State interest of the highest order." *Id.* at 389. Although the court only addressed the potential impact on a right to fair trial and not the state's interest in protecting grand jury secrecy, it held:

> It has been argued that further publication of the grand jury material by petitioner may interfere with Pepitone's ability to receive a fair trial. However, there is no evidence petitioner possesses any information beyond that which was published in his September 4 article. But even if petitioner possesses additional information, he should not be restrained from publishing what he has learned since it has not been demonstrated that other measures, such as a thorough voir dire, would not insure Pepitone a fair trial (*see, Nebraska Press Assn. v. Stuart*, 427 US 539). In addition, since the "gag" order was directed at petitioner alone, it would not have been an effective means to insure a fair trial because other members of the media were free to report on the proceedings based upon petitioner's research (*see, Nebraska Press Assn. v. Stuart*, supra.).

Id.

Here, the conclusion must be the same. This case already has significant pretrial publicity that will have to be contended with in *voir dire* regardless of the issue presently before the Court. It is not clear at this point that the information contained in the suppressed documents at issue is such that the Court's Protective Order, and its prior restraint on the speech of The Denver Gazette, is necessary for the defendants to obtain a fair trial in front of a fair jury. To say so would be speculative at this point.

CONCLUSION

For all the above reasons, the Court grants The Denver Gazette's Motion and vacates its Protective Order entered April 25, 2022. Further, the Court will stay the entry of this order **until noon on May 2, 2022** to preserve the People's ability to seek a C.A.R. 21 review of this Order if they so wish.

So Ordered this 28th day of April 2022

Priscilla Loew
District Court Judge