

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 13-cv-01300-MSK-MJW

COLORADO OUTFITTERS ASSOCIATION, et al.

Plaintiffs,

v.

JOHN W. HICKENLOOPER, Governor of the State of Colorado,

Defendant.

DEFENDANT'S UNOPPOSED MOTION FOR CLOSURE OF COURTROOM
DURING PORTIONS OF TESTIMONY BY AURORA POLICE CHIEF DANIEL
OATES

Defendant John W. Hickenlooper, in his official capacity as Governor of the State of Colorado, respectfully requests that the Court issue an order closing the courtroom during those portions of testimony from Aurora Police Chief Daniel Oates that address the mass shooting in Aurora that occurred on July 20, 2012. As grounds for this motion, the Governor states as follows:

1. *Duty to confer*: Undersigned counsel has conferred with counsel for Plaintiffs concerning the relief requested in this motion. It is unopposed.

BACKGROUND

2. The Governor has listed as a witness for the defense Aurora Police Chief Daniel Oates. Chief Oates managed the Aurora Police Department's response to, and subsequent investigation of, the mass shooting that occurred at the Century 16 movie theater in Aurora, Colorado on July 20, 2012.

3. Chief Oates was deposed under the terms of the parties' stipulated protective order (Doc. 50). By agreement of the parties, those portions of his deposition and associated exhibits that relate to the Aurora theater shooting have been designated as confidential.

4. The district attorney for the 18th Judicial District is seeking the death penalty against the Aurora shooting defendant in *People v. Holmes*, Arapahoe County Case No. 12 CR 1522.

5. No trial date has been set for the trial in *Holmes*. Given the case's extremely high profile, however, every development has been closely tracked and reported extensively by the news media.

6. On August 13, 2012, the presiding judge in the *Holmes* matter issued a broad order to limit pre-trial publicity, a copy of which is attached hereto as Exhibit A. That order prohibits law enforcement officers, including Chief Oates, from "mak[ing] an extrajudicial statement that he or she knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." *Exhibit A* at 2, 4.

7. On December 4, 2013, the presiding judge denied a motion by several civil plaintiffs – shooting victims seeking damages "against the landowners of the Century 16 Theatres" – for access to exhibits that were admitted during the preliminary hearing. *Exhibit B*. The district judge ruled that "the People's interest in preserving the integrity of the prosecution of this case and the defendant's

constitutional right to a fair trial outweigh the victims' interest in receiving copies of the preliminary hearing exhibits to facilitate their federal lawsuit." *Id.* at 8.

8. Chief Oates' testimony will be consistent with the pretrial publicity order imposed in the Holmes prosecution. That order prohibits only "extrajudicial statements," and so does not apply to testimony in the above-captioned case.

9. However, any testimony and other evidence related to the Aurora theater shooting will garner substantial publicity, and inherently carries with it the risks discussed in the order attached as Exhibit B.

APPLICABLE RULES

10. Fed.R.Civ.P. 77(b) provides that "[e]very trial on the merits must be conducted in open court[.]" Although the rule is phrased in absolute terms, "an exception may be made...when there is a threat of irreparable harm." 14-77 Moore's Federal Practice – Civil, § 77.03.

11. D.C.Colo.LCivR 7.2(a) provides that "[u]nless restricted by statute, rule of civil procedure, or court order, the public shall have access to all documents filed with the court and all court proceedings." This "presumption of public access recognized and promoted by the local rule finds its root in the common law rights of access to judicial proceedings and to inspect judicial records. *Huddleson v. City of Pueblo*, 270 F.R.D. 635, 636 (D. Colo. 2010), citing *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1067 (3d Cir. 1984).

12. D.C.Colo.LCivR 7.2(c) requires a motion to restrict public access to:
(1) identify the document or the proceeding for which restriction is sought;

(2) address the interest to be protected and why such interest outweighs the presumption of public access; (3) identify a clearly defined and serious injury that would result if access is not restricted; (4) explain why no alternative to restriction is practicable or why only restriction will adequately protect the interest in question; and (5) identify the level of restriction sought.

ARGUMENT

13. Document or proceeding for which restriction is sought: As noted above, the Governor requests closure of the courtroom only for those portions of Chief Oates' testimony that pertain directly to the events surrounding the Aurora theater shooting. The defense anticipates offering three exhibits during this portion of this testimony that it also requests be kept under seal.

14. The interest to be protected and why such interest outweighs the presumption of public access: Restricted access during the identified portions of Chief Oates' testimony is important to ensure that the jury pool and trial in *People v. Holmes* are not adversely affected. *Holmes* is an extraordinarily high-profile death penalty case that will not yet have been tried at the time that Chief Oates testifies. While the instant case has received substantial media attention, it pales in comparison to the reporting on *Holmes*. Chief Oates' testimony would not contravene the pre-trial publicity order in *Holmes*. Nonetheless, if given in open court it will be intensely scrutinized and widely disseminated. This could lead to publicity that might taint the jury pool or otherwise adversely affect the fairness of the *Holmes* prosecution. *See also* Exhibit B at 8 ("the Court is concerned that

granting [the motion for access to exhibits] would open the proverbial floodgates....Granting access to all the exhibits to an ever-widening group of nonparties would be unwise, as it would unnecessarily risk compromising the integrity of the proceedings and the defendant's right to a fair trial.”)

15. Injuries that will result if access is not restricted: As noted above, failure to restrict access to the courtroom during the identified portions of Chief Oates' testimony would create the potential of adverse pretrial publicity for the *Holmes* prosecution. If this motion is denied, however, the Governor's defense of the challenged large-capacity magazine ban may be substantially compromised. Failure to close the courtroom will likely limit the scope of Chief Oates' testimony over concerns of the publicity that it would generate, its potential effect on the pending prosecution, and the likely reaction of the criminal defendant to additional pretrial publicity. *See, e.g.,* Exhibit C (motion seeking sanctions for alleged violation of pretrial publicity order). This limitation would prejudice the defense of this case because the Aurora theater shooting was a significant catalyst underlying the passage of HB 1224. Chief Oates' testimony concerning those events is important to demonstrating the nexus between limiting magazine capacity and the Colorado General Assembly's goal of ensuring public safety.

16. Why no alternative to restriction is practicable: Aside from delaying this trial until after the *Holmes* prosecution is complete – which is not a viable option – closure of the courtroom is the only restriction that would adequately ensure that Chief Oates' testimony about the Aurora theater shooting poses no risk

to the integrity of the pending criminal prosecution. While monitors for the visual exhibits could be turned away from the gallery, that solution would not be feasible for the third exhibit, which contains audio. Moreover, Chief Oates would not be able to describe the exhibits, what they mean, or their bearing on the claims in this case if that testimony were public. Nor can the Court prohibit the media from reporting what it hears or observes *See New York Times Co. v. United States*, 403 U.S. 713 (1971).

17. Level of restriction sought: The Governor requests that Chief Oates' testimony pertaining to the Aurora theater shooting, along with the associated exhibits, be subject to Level 1 restriction pursuant to D.C.Colo.LCivR 7.2(b).

WHEREFORE, the Governor respectfully requests that this Court issue an order closing the courtroom during the portions of Chief Oates' testimony that pertain to the Aurora theater shooting, and placing the associated exhibits under a Level 1 restriction.¹

JOHN W. SUTHERS
Attorney General

s/ Matthew D. Grove

¹ In the "Special Issues" section of the draft final pretrial order (Doc. 119-0), the Governor indicated that he might also seek closure of the courtroom for portions of the testimony of Reading, Connecticut Chief of Police Douglas Fuchs that concerned the Newtown shooting. After additional consideration, the Governor hereby informs the Court that he will not seek closure of the courtroom for any of Chief Fuchs' testimony.

KATHLEEN SPALDING*

Senior Assistant Attorney General

MATTHEW D. GROVE *

Assistant Attorney General

STEPHANIE SCOVILLE*

Senior Assistant Attorney General

LEEANN MORRILL*

First Assistant Attorney General

Attorneys for Governor John W.

Hickenlooper

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Denver, Colorado 80203

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CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2014 I served a true and complete copy of the foregoing MOTION FOR CLOSURE OF COURTROOM DURING PORTIONS OF TESTIMONY BY AURORA POLICE CHIEF DANIEL OATES upon all counsel of record listed below via the CM/ECF system for the United States District Court for the District of Colorado:

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s/ Kathleen Spalding

DISTRICT COURT, COUNTY OF ARAPAHOE, STATE OF COLORADO 7325 S Potomac Street Centennial, Colorado 80112	♦ COURT USE ONLY ♦
Plaintiff: People of the State of Colorado v. Defendant: James Holmes	Case No. 12CR1522 Division: 201
ORDER RE MOTION TO LIMIT PRE-TRIAL PUBLICITY (D-2)	

This matter comes before the Court on Defendant's Motion to Limit Pretrial Publicity. The Court has reviewed Defendant's Motion and the applicable authorities. Having heard argument from the parties, the Court FINDS and ORDERS as follows:

Defendant has sought an Order restricting pretrial publicity. Defendant's case has already received attention from the media. The case is likely to continue to generate media attention. In light of such anticipated publicity and the difficulty in anticipating all possible scenarios, this Order is meant to provide guidelines to all involved in this case.

Counsel involved in this matter will no doubt conduct themselves in a professional way. However, the nature of this case and the pretrial publicity that has already occurred, together with the anticipated publicity from the trial, demonstrate the need for Court intervention to guide the conduct of counsel and those associated with them to avoid lowering the level of advocacy in this case.

When lawyers quarrel with each other, the arguments sometimes tend to become acrimonious. Disputes of this type divert time, energy and resources from the primary task of preparing for trial to determine the provability of charges. The public spectacle of a quarrel among attorneys over allegations of ethical improprieties would greatly reduce the public's confidence in the adjudicative process. The news coverage of the proceedings would focus on personalities of the advocates and deflect attention from their advocacy of important legal and factual issues which will determine the outcome of this case.

Without suggesting that there have been any violations of general ethical principles, it is necessary for the Court to articulate the following to be followed in this litigation in the form of this Order for future guidance in all forms of extrajudicial statements about this litigation.

Colorado Rules of Professional Conduct 3.6 and 3.8 provide the basis for this Order.

I. Extrajudicial Statements by Attorneys:

A. Any lawyer, law firm or legal representative (investigators of any firm) associated with the prosecution or defense participating in or associated with the investigation or litigation of this criminal matter shall not, from the filing of a complaint, information or indictment, the issuance of an arrest warrant or arrest, until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state, without elaboration:

- (1) The claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
- (2) Information contained in the public record;
- (3) That an investigation of a matter is in progress;
- (4) The scheduling or result of any step in litigation;
- (5) A request for assistance in obtaining evidence and information necessary thereto;
- (6) A warning of danger considering the behavior of a person involved, when there is reason to believe there exists the likelihood of substantial harm to an individual or to the public interest;
- (7) The identity, residence, occupation, and family status of the accused;
- (8) If the accused has not been apprehended, information to aid in apprehension of that person; and
- (9) The facts, time and place of an arrest as well as the identity of the investigating and arresting officers or agencies and the length of the investigation.

B. A lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

C. No lawyer associated in a firm or government agency with a lawyer subject to Section I (A) above shall make a statement prohibited by Section I (A) (1)-(9).

D. Any lawyer, law firm or legal representative (investigators of any firm) associated with the prosecution or defense participating in or associated with the investigation or litigation of this criminal matter shall not, from the filing of a complaint, information or indictment, the issuance of an arrest warrant or arrest, until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement that a reasonable person would

expect to be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter and that relates to:

- (1) The character, credibility, reputation, or criminal record of a party, suspect in a criminal investigation or witness, or identity of a witness, or the expected testimony of a party or witness;
- (2) In a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;
- (3) The performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
- (4) Any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;
- (5) Information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or
- (6) The fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

E. During the selection of a jury or trial of this criminal matter, any lawyer or law firm associated with the prosecution or defense of this criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to the trial, parties or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that he may quote from or refer without comment to public records of the Court in this case.

F. Any lawyer or law firm associated with the prosecution or defense of this criminal matter shall exercise reasonable care to prevent his or her employees and associates from making an extrajudicial statement that he or she would be prohibited from making under this Order.

II. Releases of Information by Law Enforcement Agencies:

A. From the date of this Order until the completion of the trial or disposition without trial, law enforcement officers shall not release or authorize the release of any extrajudicial statement for dissemination by means of public communication, if the law enforcement officers know or reasonably should know that it will have a substantial likelihood of prejudicing a criminal proceeding. Law enforcement officers and agencies are subject to the same restrictions as set forth above for attorneys in Section I regarding extrajudicial statements.

B. Law enforcement officers and agencies shall not exercise their custodial authority over an accused individual in a manner that is likely to result in either:

- (1) The deliberate exposure of a person in custody for the purpose of photographing or televising by representatives of the news media; or
- (2) The interviewing by representatives of the news media of a person in custody except upon request or consent by that person to an interview after being informed adequately of the right to consult with counsel and of the right to refuse to grant an interview.

C. Nothing in this Order is intended to preclude any law enforcement officer or agency from replying to charges of misconduct that are publicly made against him or her from participating in any legislative, administrative, or investigative hearing.

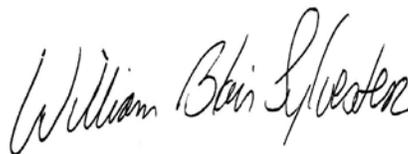
III. Disclosure by Court Personnel:

Court personnel shall not disclose, to any unauthorized person, information relating to this pending criminal case that is not a matter of public records of the Court and that may be prejudicial to the right of the People or the Defendant to a fair trial.

IV. Applicability:

Attorneys of record will be served a copy of this Order and this will constitute service upon the District Attorney's Office and the Public Defender's Office. The Court Orders the District Attorney's Office to comply with Colorado Rule of Professional Conduct 3.8(f) in exercising reasonable care to ensure all applicable law enforcement agencies including Aurora Police Department, Arapahoe County Sheriff's Department, Colorado Bureau of Investigation, Federal Bureau of Investigation and the Bureau of Alcohol, Tobacco, Firearms and Explosives all receive prompt notice of this Order and comply with this Order accordingly.

DATED this 23rd day of July, 2012.



WILLIAM BLAIR SYLVESTER
DISTRICT COURT JUDGE

I certify that on _____ (date), I hand delivered this Order to the following:

- Petitioner Prosecuting Attorney Defendant
- Other: _____

CLERK

REDACTED

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO 7325 S. Potomac Street Centennial, Colorado 80112	
<hr/> PEOPLE OF THE STATE OF COLORADO v. JAMES EAGAN HOLMES Defendant	<hr/> ΔCOURT USE ONLY Δ Case No: 12CR1522 Div.: 201
ORDER REGARDING CERTAIN VICTIMS' MOTION FOR EXTENSION OF EXISTING ORDER SEALING CERTAIN EXHIBITS TO THOSE VICTIMS AND FOR RELEASE OF EXHIBITS TO VICTIMS UNDER THAT ORDER (C-68-A)	

INTRODUCTION

This matter comes before the Court on the motion filed by some of the victims of the July 20, 2012 shooting who are pursuing a civil action against the landowners of the Century 16 Theatres (“Century”) in the United States District Court for the District of Colorado.¹ In Motion C-68, the victims ask the Court to grant them access to the exhibits admitted during the preliminary hearing, which was held in January of this year. The motion does not seek to vacate any orders suppressing the preliminary hearing exhibits. Instead, it urges the Court to modify

¹ These victims are identified as Brandon Axelrod, Joshua Nowlan, Denise Traynom, Jerri Jackson, Gregory Medek, Rena Medek, Theresa Hoover, Lynn Johnson, Machael Sweeney, Malik Sweeney, Chichi Spruel, Derick Spruel, Munirih Gravelly, and Ashley Moser. For purposes of this Order, the Court refers to these specified victims as “the victims.”

the “Gag Order” to allow them, and their designated counsel and consulting experts, to obtain copies of those exhibits.² For the reasons articulated in this Order, the motion is denied.

PROCEDURAL HISTORY

At the outset of this case, the Court suppressed all orders, search warrants, affidavits in support of search warrants, and the case file. *See* Order P-1. Over the ensuing months, however, the Court gradually unsealed or unsuppressed documents as required or permitted by Colorado case law and the Colorado Criminal Justice Records Act (“CCJRA”), section 24-72-301, C.R.S. (2013), *et. seq.* *See* Order C-4c (ruling that the register of actions and specified pleadings and orders should be unsuppressed); Amended Order C-12 (ruling that the court file should be unsuppressed with certain exceptions and subject to redaction by the parties); Order C-13 (ruling that the names of victims should be unredacted from the complaint and pleadings); Order C-24 (ruling that the affidavits of probable cause in support of all search and arrest warrants and any requests seeking the production of records be unsealed and released). On November 22, the Court denied the defendant’s motion to suppress all transcripts of the proceedings, as

² The Court has issued several orders related to the suppression of the court file, pretrial publicity, and extrajudicial statements by the parties and law enforcement. *See* Order D-2; Order D-2a; Order C-4; Order C-4c; Order D-10; Order C-12; Order C-13; Order C-24. It is unclear which of these Orders the victims view as the “Gag Order.” But that is inconsequential to their motion, as they do not seek relief from any particular order; rather, they seek access to certain suppressed records that would otherwise be accessible only to the parties and the Court’s staff.

well as the register of actions, and declined to remove the case from the Court's website. *See* Order D-180-A.

Despite, or perhaps because of, the numerous motions and orders addressing the ability of the public and the media to access various portions of the court record, confusion persists regarding the status of the record. Accordingly, the Court believes that some clarification is in order.

In Amended Order C-12, the Court ruled that, with certain exceptions, any documents that had previously been suppressed should be released to the public and the media subject to appropriate redactions by the parties. Further, the Court declared that any future documents submitted by the parties would be placed in the public file and would "be presumed released to the public and the media." *Id.* at p. 3. However, the Court allowed the parties to shield information from the public and the media by submitting redacted copies of any pleadings and other filings for the public file. *Id.* Additionally, based on "unusual circumstances," a party may seek suppression of an entire filing by: (1) "stamping or writing 'SUPPRESSED' at the top of both the original and the redacted version of the pleading;" and (2) stating the grounds in support of the request to suppress. *Id.* If the Court grants a request to suppress a filing, the filing is not included in the public file, although the register of actions still reflects the filing.

In addition to determining which filings should be suppressed, the Court decides on a case-by-case basis which documents shall be displayed on the Court's website. Generally speaking, the Court posts copies of all pleadings and other filings that have not been suppressed on the website. If a pleading or filing has been redacted, only the redacted version is posted on the website. The updated register of actions is also posted at the end of each week.³

Transcripts of public proceedings are available to the public and the media through the proper administrative procedures, with the exception of transcripts of bench conferences and *in camera* hearings, which are suppressed. *See* Order D-180-A at pp. 6-8; Order C-72 at p. 2. With respect to exhibits presented during court proceedings, on October 23, the Court suppressed any exhibits admitted during the noncapital motions hearings which had not previously been released to the public and the media. *See* October 23, 2013 Minute Order. However, the Court has not previously determined whether the exhibits from the preliminary hearing are suppressed or available to the public and the media. The Court addresses the question now.

ANALYSIS

The victims argue that allowing them access to the preliminary hearing exhibits at this juncture in the proceedings will not jeopardize the defendant's right

³ The Court makes redactions to the register of actions when appropriate.

to a fair trial. Motion at pp. 2-3. The victims correctly point out that the preliminary hearing was open to the public, the exhibits in question were presented during that hearing, and the contents of some of those exhibits were included in media reports. *Id.* at p. 3. Therefore, assert the victims, “any chance that [the] [d]efendant’s right to a fair trial would be somehow tainted [has] already occurred” and will not be “further increase[d].” *Id.* The victims also argue that their right to be present for and informed of all critical stages of the criminal justice process under the Victims’ Rights Act (“VRA”), section 24-4.1-301 C.R.S. (2013) *et. seq.*, is implicated if they are denied access to exhibits introduced during a “critical stage” of the proceedings. *Id.* at pp. 3-4. Lastly, the victims contend that “they stand in a unique situation to [the] other victims” because they have filed a civil lawsuit connected with this case and have certain rights to conduct discovery in that matter, and “their inability to access certain important information that has been [suppressed] by this Court’s previous Order may interfere with their pursuit of that action.” *Id.* at p. 4.

The defendant and the People object to the victims’ motion.⁴ The defendant contends that neither the VRA nor any other authority grants victims the right to intervene in a criminal case in order to access suppressed evidence and documents

⁴ Century also responded to Motion C-68. Century takes no position on the victims’ requests, but asks that, to the extent the Court grants the relief requested, the Court should also include Century in any disclosure of criminal records or in any extension or modification of the “Gag Order.” Century’s Response at p. 2.

that may be of assistance in a pending civil lawsuit. Defendant's Response at pp. 1-2. The People maintain that, as relevant here, they and the Court have already complied with the VRA by allowing the victims and their legal representatives to be present at the preliminary hearing. People's Response at p. 2. The People express concern that, in order for all of the named victims in this case to be treated with fairness and respect, if the Court grants Motion C-68, "all of the victims in this case should be granted the same access to the preliminary hearing materials as the [moving] victims." *Id.* The People believe that it will be difficult "to protect the integrity of the prosecution . . . if such a large number of people are provided with copies of the preliminary hearing materials in advance of the trial." *Id.*

A. The CCJRA

Due to the nature of the request advanced by the victims, as non-parties, the proper analysis is under the CCJRA.⁵ Under the CCJRA, exhibits qualify as criminal justice records. *See* § 24-72-302(4), C.R.S. (2013) (defining "[c]riminal justice records" as including "books, papers, cards, photographs, tapes, recordings, or other documentary materials . . . that are made, maintained, or kept by any

⁵ The victims do not respond to the defendant's argument that their motion is, in fact, an attempt to impermissibly intervene in a criminal prosecution. *See generally* Reply. In *People v. Ham*, 734 P.2d 623, 625 (Colo. 1987), the Colorado Supreme Court stated that "[i]ntervention is a procedural device whereby an outsider or stranger to litigation may enter the case as a party for the purpose of presenting a claim or defense." Because the victims are not attempting to enter the case as parties for the purpose of presenting a claim or defense, the Court need not address the defendant's intervention argument.

criminal justice agency”). Because exhibits are not records of official actions under the CCJRA, they are subject to discretionary disclosure by their custodian. *See* § 24-72-304(1), C.R.S. (2013). When determining whether documents subject to discretionary disclosure should be released, custodians of criminal justice records conduct a balancing test, “taking into account relevant public and private interests.” *Harris v. Denver Post Corp.*, 123 P.3d 1166, 1170 (Colo. 2005).

The Court disagrees with the victims that giving them “special status” to access exhibits in this case would not pose a threat to the investigation or the Court’s ability to hold a fair trial. It is true that some of the exhibits requested were displayed at the preliminary hearing and, as a result, members of the public and the media were able to view them. However, certain exhibits were not displayed at all or were only briefly displayed. Unlike previous situations where the Court found that it would be futile to redact or suppress information already made public, suppression of exhibits never or only briefly displayed in public serves the purposes of preserving the integrity of this litigation and protecting the defendant’s right to a fair trial.⁶ Such suppression is also consistent with the suppression of exhibits admitted during the noncapital motions hearings.

⁶ Other courts have recognized that the public does not have a right to access courtroom exhibits; rather, the decision whether to disclose courtroom exhibits to the public is left to the discretion of the trial court. *See, e.g., Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982) (“Although the right of access to criminal trials is of constitutional stature, it is not absolute”); *Belo Broad. Corp. v. Clark*, 654 F.2d 423, 428, 434 (5th Cir. 1981) (“the Constitution grants neither press nor public the right to physical access to courtroom

The Court finds that the People's interest in preserving the integrity of the prosecution of this case and the defendant's constitutional right to a fair trial outweigh the victims' interest in receiving copies of the preliminary hearing exhibits to facilitate their civil lawsuit. The Court understands the victims' position as civil litigants. However, the reality is that they are unlikely to complete their civil action before the trial in this case. Indeed, to the extent that the victims believe that the preliminary hearing exhibits are relevant to their civil action, the Court anticipates that some of the evidence that will not be made public until the trial will be just as relevant as those exhibits. Thus, granting the victims access to the preliminary hearing exhibits at this time would accomplish little.

Moreover, the Court is concerned that granting Motion C-68 would open the proverbial floodgates. Other nonparties could assert an interest in the preliminary hearing exhibits and other exhibits. Granting access to all the exhibits to an ever-widening group of nonparties would be unwise, as it would unnecessarily risk compromising the integrity of the proceedings and the defendant's right to a fair trial.

exhibits. . . . good reasons may exist for a trial court, in the exercise of its supervisory power over its own records and files, to deny requested access to courtroom exhibits") (citations and quotations omitted); *State v. Archuleta*, 857 P.2d 234, 242 (Utah 1993) ("We agree with the trial court's statement that there is no history of the public's being 'admitted beyond the bar' to physically handle and copy exhibits, especially at a preliminary hearing. Nor do we believe that granting such a right would play a significant positive role in the functioning of the process. . . . Therefore, we hold that the First Amendment provides no presumptive right of public access to exhibits used at a preliminary hearing").

B. The VRA

The VRA protects the rights of victims of, and witnesses to, crimes. The VRA was enacted “to assure that all victims of and witnesses to crimes are honored and protected by law enforcement agencies, prosecutors, and judges in a manner no less vigorous than the protection afforded criminal defendants.” See § 24-4.1-301, C.R.S. (2013). The VRA lists a number of rights afforded to victims, including “[t]he right to be informed of and present for all critical stages of the criminal justice process.” § 24-4.1-302.5(1)(b). The legislature has deemed the preliminary hearing a “critical stage.” § 24-4.1-302(2)(b).

Having the right to be present at all critical stages of the criminal justice process, including the preliminary hearing, is distinct from having access to exhibits for purposes of pursuing a civil claim. Nothing in the VRA suggests that victims are entitled to criminal court exhibits before the trial has actually taken place in order to litigate a civil lawsuit. To hold otherwise would be to bootstrap the VRA into the civil arena in order to obtain discovery not otherwise available. As relevant here, the Court agrees with the People that both the Court and the People have complied with the requirements of the VRA by allowing the victims and their legal representatives to be present at the preliminary hearing, listen to the testimony, and view any published exhibits at that time.

The victims' contention, that their rights under the VRA should not be limited or abridged "simply to accommodate a procedural issue," is unpersuasive. First, as indicated, there is no right to copy exhibits under the VRA. Second, the Court does not deny the victims access to the preliminary hearing exhibits merely to accommodate a procedural issue. Rather, the Court does so because it is concerned that such access will affect the integrity of this litigation and the defendant's constitutional right to a fair trial. The Court cannot think of more significant substantive interests.

CONCLUSION

For all the foregoing reasons, Motion C-68 is denied. The preliminary hearing exhibits are suppressed and are not accessible to the victims at this time.

Dated this 4th day of December of 2013.

BY THE COURT:



Carlos A. Samour, Jr.
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2013, a true and correct copy of the Court's **Order Regarding Certain Victims' Motion for Extension of Existing Order Sealing Certain Exhibits to Those Victims and for Release of Exhibits to Victims Under That Order (C-68-A)** was served upon the following parties of record:

Karen Pearson
Amy Jorgenson
Rich Orman
Dan Zook
Jacob Edson
Lisa Teesch-Maguire
George Brauchler
Arapahoe County District Attorney's Office
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(via email)

Sherilyn Koslosky
Rhonda Crandall
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Tamara Brady
Kristen Nelson
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A handwritten signature in cursive script, appearing to read "Kevin S. Taylor", is written over a horizontal line.

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	Filed OCT 2 2012 <small>CLERK OF THE COMBINED COURT ARAPAHOE COUNTY, COLORADO</small> σ COURT USE ONLY σ
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff v. JAMES HOLMES, Defendant	Case No. 12CR1522 Division 22
DOUGLAS K. WILSON, Colorado State Public Defender Daniel King (No. 26129) Tamara A. Brady (No. 20728) Chief Trial Deputy State Public Defenders 1290 Broadway, Suite 900 Denver, Colorado 80203 Phone (303) 764-1400 Fax (303) 764-1478 E-mail: state.pubdef@coloradodefenders.us	
MOTION FOR SANCTIONS FOR VIOLATING THIS COURT'S ORDER LIMITING PRETRIAL PUBLICITY BY LEAKING PRIVILEGED AND CONFIDENTIAL INFORMATION TO THE MEDIA AND REQUEST FOR EVIDENTIARY HEARING [D-017]	

James Holmes, through counsel, respectfully requests that this Court impose sanctions on the government for violating this Court's order limiting pretrial publicity by leaking privileged and confidential information to the media concerning the contents of a package that Mr. Holmes sent to his [REDACTED]. These violations have undermined Mr. Holmes' rights to due process and a fair trial by an impartial jury, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article II, sections 16, 18, 23 & 25 of the Colorado Constitution. Mr. Holmes requests an evidentiary hearing on this issue. In support of this motion, Mr. Holmes states the following:

1. After law enforcement officials seized a package sent from Mr. Holmes to [REDACTED] on July 23, 2012 pursuant to a search warrant, this Court issued a protective order at the request of the defense, *see* D-008 and Order Re: D-008, instructing all law enforcement officials, including the prosecutors, to refrain from opening or viewing the material in the package and to immediately seal the item.
2. Shortly after this order was issued, the media published articles disclosing information about the alleged contents of the package Mr. Holmes sent to [REDACTED], citing unnamed law enforcement sources.
3. As a result, the Court issued orders requiring the government to immediately seal the material in question, destroy any copies, and produce it to the Court, and also issued an order instructing the district attorney's office and law enforcement to comply with the Court's Order Limiting Pretrial Publicity. *See* Orders Re: D-009, D-010.

4. The defense next moved for immediate production of all discovery pertaining to this improper disclosure of privileged material in anticipation of requesting a hearing on this issue for the purpose of determining appropriate sanctions for this misconduct. *See* D-011.

5. Since then, the defense has received over 16,000 pages of discovery in this case. The discovery received thus far supports the defense's concern that the government was responsible for leaking information about the contents of the package to the media.

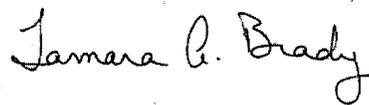
6. It is the defense's position that that sanctions are necessary because the government's actions have seriously jeopardized Mr. Holmes' constitutional rights to a fair trial, to a fair and impartial jury and to due process as protected by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article II, sections 16, 18, 23 & 25 of the Colorado Constitution. *See Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1965); *People v. Botham*, 629 P.2d 589 (Colo. 1981).

7. The defense respectfully requests that this Court set this motion for an evidentiary hearing on this matter.

Mr. Holmes files this motion, and makes all other motions and objections in this case, whether or not specifically noted at the time of making the motion or objection, on the following grounds and authorities: the Due Process Clause, the Right to a Fair Trial by an Impartial Jury, the Rights to Counsel, Equal Protection, Confrontation, and Compulsory Process, the Rights to Remain Silent and to Appeal, and the Right to be Free from Cruel and Unusual Punishment, pursuant to the Federal and Colorado Constitutions generally, and specifically, the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitutions, and Article II, sections 3, 6, 7, 10, 11, 16, 18, 20, 23, 25 and 28 of the Colorado Constitution.



Daniel King (No. 26129)
Chief Trial Deputy State Public Defender



Tamara A. Brady (No. 20728)
Chief Trial Deputy State Public Defender



Kristen M. Nelson (No. 44247)
Deputy State Public Defender

Dated: October 2, 2012

I hereby certify that on 10/2, 2012, I

mailed, via the United States Mail,
 faxed, or
 hand-delivered

a true and correct copy of the above and foregoing document to:

Carol Chambers
Rich Orman
Karen Pearson
Office of the District Attorney
6450 S. Revere Parkway
Centennial, Colorado 80111
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skos

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff v. JAMES HOLMES, Defendant	σ COURT USE ONLY σ
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ORDER RE: MOTION FOR SANCTIONS FOR VIOLATING THIS COURT'S ORDER LIMITING PRETRIAL PUBLICITY BY LEAKING PRIVILEGED AND CONFIDENTIAL INFORMATION TO THE MEDIA AND REQUEST FOR EVIDENTIARY HEARING [D-017]	

Defendant's motion is hereby GRANTED _____ DENIED _____.

BY THE COURT:

_____ JUDGE

_____ Dated