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District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	2013 AUG 30 PM
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff v. **JAMES HOLMES,** Defendant	σ COURT USE ONLY σ
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REPLY IN FURTHER SUPPORT OF MOTION OF NON-PARTY JANA WINTER TO VACATE THE SEPTEMBER 30, 2013 HEARING DATE (C-53)

Jana Winter, by and through her undersigned counsel, submits this reply in further support of her request that the Court vacate the September 30, 2013 hearing date.

ARGUMENT

The parties do not dispute that Winter's appeal to the New York Court of Appeals—New York's highest court—implicates important questions of New York public policy. Nor could they: All five justices of the intermediate appellate court unanimously agreed that New York has a strong public policy shielding journalists from being compelled to disclose the sort of confidential information that Holmes seeks here. (Slip op. at 6-7.) And New York's highest court—which will soon hear Winter's appeal—has recognized that a subpoena for testimony in an out-of-state criminal proceeding that contravenes a strong public policy of New York State may be unlawful. *See Matter of Codey (Capital Cities, Am. Broad. Corp.)*, 82 N.Y.2d 521, 530

n.3, 626 N.E.2d 636 n.3 (1993).

Moreover, Winter's counsel are working diligently to perfect her appeal so that it can be heard on the earliest possible date. That, of course, will minimize any interference with this Court's ability to consider Winter's motion to quash. To that end, Winter has requested an expedited briefing schedule before the Court of Appeals, proposing that: (1) Winter's opening brief be due September 10; (2) Holmes' opposition be due October 1; (3) Winter's reply be due October 8; and (4) oral argument take place in October or November.[1] But despite consenting to expedited consideration in the Appellate Division, Holmes has inexplicably refused to consent to similar treatment in the Court of Appeals.

Given the question of exceptional importance raised by Winter's appeal, its expeditious prosecution, and the dire consequences that could befall Winter in this Court were she ordered to disclose confidential newsgathering information, this Court should adjourn the September 30 date to give the New York Court of Appeals an opportunity to rule on Winter's appeal. That would promote both individual fairness to Winter and comity for a sister state as it considers a question of extraordinary importance to its public policy. Even under Colorado's shield law, Winter should not have to take the stand except as a "last resort." *Gordon v. Boyles*, 9 P.3d 1106, 1121 (Colo. 2000). Because a ruling from the Court of Appeals that the subpoena compelling Winter's appearance is unlawful would preempt any need for Winter to testify, this Court should allow the Court of Appeals to weigh in before Winter is put to what this Court has recognized is a "Hobson's Choice" between serving up to six months in jail or destroying her career. (April 1, 2013 Tr. at 137:5-23.)

[1] In addition to seeking an expedited briefing schedule, Winter today also asked the New York Court of Appeals to stay the enforcement of her subpoena until her appeal is decided. Winter filed this motion because, due to the very short timeframe between now and when she is next due to appear in this Court, it would not have been prudent to wait to file it until after this Court rules on her motion to adjourn the September 30 hearing. However, should this Court grant Winter's requested adjournment before her motion to stay in New York is decided, Winter will immediately ask the New York Court of Appeals to permit her to withdraw the motion, without prejudice to renew.

I. The Adjournment Will Not Affect the Timeline for Motions or for Trial

Holmes' contention that the adjournment requested here "is likely to impact the timeline for both sets of motions hearings as well as the current trial date" is unfounded. (Holmes Opp. ¶ 11.) Holmes does not need Winter's testimony to engage in motion practice: He has no motions pending that relate at all to Winter's testimony, save for his Motion for Sanctions. That motion has been pending for almost a year; the requested adjournment will not affect its adjudication. And Holmes has never specified what sanctions he hopes to win on that motion if he succeeds, let alone how that unspecified remedy might bear on his trial.

Nor does Holmes explain why he needs Winter's testimony to prepare for trial. Rather than explain why Holmes needs Winter's testimony to prepare for trial, he simply quotes this Court's Order Re C-25 and C-25a. That order, however, was issued on March 27, 2013—*before* Winter filed her Motion to Quash on March 28, 2013. Thus, this order was issued before the Court was made aware of the significant First Amendment interests at stake in this proceeding. Shortly thereafter, on April 8, the Court issued a decision recognizing, "the significant First Amendment interests of Winter and the general public" that were implicated by Holmes' subpoena. (Order Regarding Jana Winter's Second Ripeness Contention Raised in Support of Her Motion to Quash Subpoena and for Protective Order (C-26(a)) (Filed April 8, 2013) at p. 3.) Further, since then, Holmes' trial process has changed dramatically.[2] As this Court held just days ago, because Holmes changed his plea to not guilty by reason of insanity, it is now clear that "the defense's position in this case is that he 'suffers from a severe mental illness and was in the throes of a psychotic episode when he committed the acts that resulted in the tragic loss of life and injuries sustained by moviegoers on July 20, 2012.'" (Order re: D-54B and P-44 at 25-26 (*citing* Motion D-76a at p. 2).) Accordingly, this Court found that "the focus of the trial is

[2] For example, at the time of that order, trial was scheduled for August 2013.

likely to be on whether the prosecution can prove beyond a reasonable doubt the defendant's sanity at the time of the shooting." (*Id.*)

The law enforcement witnesses who testified in December that they were not Winter's sources will not provide probative evidence regarding Holmes' mental state at the time of the shootings. The contents of the notebook speak for themselves, and Holmes has confirmed that he sent the notebook to his mental health professional. (Supplemental Submission Regarding Response to Motion of Jana Winter for Inspection By Counsel and in Support of Oral Motion to Deny Jana Winter's Request to Quash Defense Subpoena [C-043c] ¶ 1 (enclosing what Holmes represented to be "photographs of the notebook that Mr. Holmes sent to Dr. Fenton").) Under the case law, Holmes' concession that he sent the notebook is an admission of the notebook's authenticity and admissibility, obviating the need for a law-enforcement witness to sponsor the notebook as an exhibit at trial. *Boulder Plaza Residential, LLC v. Summit Flooring, LLC*, 198 P.3d 1213, 1216 (Colo. Ct. App. 2008) (finding that a statement in a reply brief was a judicial admission); *see also Dennis v. Bradbury*, 236 F. Supp. 683, 692 (D. Colo. 1964) (treating a statement contained in the trial brief as a judicial admission). The availability of testimony regarding the credibility of potential witnesses[3] who may offer cumulative testimony regarding the circumstances under which the notebook—*which Holmes admits he sent*—was retrieved is therefore not even relevant, much less critical, to Holmes' trial strategy.

II. Winter Is Taking All Possible Measures to Expedite Her Appeal

Winter has made every effort to have her appeal heard by the Court of Appeals at the earliest possible time. She noticed her appeal the day after the intermediate appellate court's decision issued, and this week sought a request for an expedited briefing schedule and early oral argument. To be sure, the Court of Appeals controls its own calendar. But the Court historically

[3] It is not known whether anyone who testified at the December 10 hearing will in fact be a witness at trial.

disposes of its appeals promptly, and Winter has no reason to believe it would deviate from that course here. In any event, the threat to Winter's liberty is sufficiently significant that this Court should allow her appeal to proceed in New York before she is ordered to take the witness stand in this case.

Unable to seriously dispute the timing of Winter's appeal, Holmes is left to quibble in Colorado about New York appellate practice. Holmes' claim that "it remains unclear whether Winter is entitled to appeal [the Appellate Division's] decision as a matter of law" (Holmes Opp. ¶ 13) is flat wrong. Winter's appeal presents the question of how an indisputably strong public policy of New York State affects the application and interpretation of a state statute—a classic question of law appealable as of right when there is a double dissent in the Appellate Division. *See Hartford Acc. & Indem. Co. v. Vill. of Hempstead*, 48 N.Y.2d 218, 221-22, 397 N.E.2d 737, 739-40 (1979) (issues involving "public policy and the interpretation of statutes" are "matters of law"); *see also N.Y. State Office of Children & Family Servs. v. Lanterman*, 14 N.Y.3d 275, 281-82, 926 N.E.2d 233, 235-36 (2010) (appeal based in part on question of public policy involved a question of law appealed as of right). Indeed, Holmes' only cited case, *Matter of Daniel H.*, 15 N.Y.3d 883, 884, 938 N.E.2d 966, 968 (2010), explicitly involved a "mixed question of law and fact." But Holmes does not argue—because he cannot—that Winter's appeal presents a similarly mixed question; a question of public policy and statutory interpretation, like the one at issue in Winter's appeal, is plainly a matter of law.

III. The People's Concern that a C.A.R. 21 Stay Will Delay Trial Fundamentally Misunderstands Colorado Appellate Procedure

The People's concern that adjourning Winter's appearance could delay trial due to Winter (or Holmes) appealing an adverse ruling on Winter's motion to quash is similarly baseless. The People's objection fails at its first premise: that Winter would ask the Colorado Supreme Court

to grant extraordinary review under C.A.R. 21 of any order holding Winter in contempt, which the People posit would automatically stay proceedings below. (People's Response to C-53 at 2.)

The scenario spun out by the People is unlikely to occur, as Winter need not seek the extraordinary review contemplated by C.A.R. 21. Rather, the ordinary course would be for Winter to file a direct appeal under C.A.R. 1 and seek a stay of any contempt punishment while her appeals are pending under C.A.R. 8. After all, an order sanctioning Winter for contempt is a final judgment appealable as of right. C.R.C.P. 107(f); *Secs. Investor Prot. Corp., v. First Entm't Holding Corp.*, 36 P.3d 175, 178 (Colo. App. 2001). And Winter taking an appeal to the Colorado Court of Appeals in the normal course would allow Holmes' trial to proceed apace because a stay pending appeal pursuant to C.A.R. 8(a) would not affect ongoing proceedings in the trial court.

In any event, even if Winter were forced (or Holmes attempted) to seek extraordinary review of an order of this Court, the Colorado Supreme Court may "sua sponte, or upon motion" lift the automatic stay of the proceedings below. C.A.R. 21(g)(2). Winter would almost certainly support lifting the automatic stay of proceedings, which would allow the trial to continue as scheduled. Thus, Winter will not delay Holmes' trial by pursuing her own collateral appeal.

CONCLUSION

For the foregoing reasons, the Court should vacate the September 30, 2013 hearing date and instead hold a brief session for the purpose of continuing Winter's subpoena to a date in January 2014 that is convenient for the Court.

DATED this 30th day of August, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2013 I served the foregoing **REPLY IN FURTHER SUPPORT OF MOTION OF NON-PARTY JANA WINTER TO VACATE THE SEPTEMBER 30, 2013 HEARING DATE (C-53)** on the following by first class mail postage prepaid:

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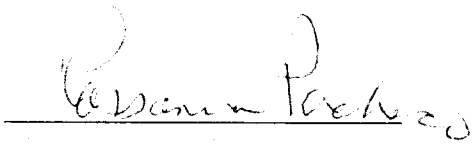
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