

ARAPAHOE COUNTY
DISTRICT COURT
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DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO

Court Address: 7325 S. Potomac St.
Centennial, CO 80112

Plaintiff: PEOPLE OF THE STATE OF COLORADO

vs.

Defendant: JAMES E. HOLMES

and,

Non-Party Movants: ABC, Inc.; The Associated Press; Bloomberg L.P.; Cable News Network, Inc. ("CNN"); CBS News, a division of CBS Broadcasting Inc., and CBS Television Stations, Inc., a subsidiary of CBS Corporation; *The Denver Post*; Dow Jones & Company; Fox News Network, LLC; Gannett; KCNC-TV, Channel 4; KDVR-TV, Channel 31; KMGH-TV, Channel 7; KUSA-TV, Channel 9; *Los Angeles Times*; The McClatchy Company; National Public Radio ("NPR"); NBCUniversal Media, LLC; The New York Times Company; The E.W. Scripps Company; and *The Washington Post*

▲ COURT USE ONLY ▲

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Case No. 12-CR-1522

Division: 201

[CORRECTED] MOTION BY MEDIA PETITIONERS FOR CLARIFICATION OF THE COURT'S ORDERS REGARDING PRE-TRIAL PUBLICITY



Movants, ABC, Inc.; The Associated Press; Bloomberg L.P.; Cable News Network, Inc. (“CNN”); CBS News, a division of CBS Broadcasting Inc., and CBS Television Stations, Inc., a subsidiary of CBS Corporation; *The Denver Post*; Dow Jones & Company; Fox News Network, LLC; Gannett; KCNC-TV, Channel 4; KDVR-TV, Channel 31; KMGH-TV, Channel 7; KUSA-TV, Channel 9; *Los Angeles Times*; The McClatchy Company; National Public Radio (“NPR”); NBCUniversal Media, LLC; The New York Times Company; E.W. Scripps Company; and *The Washington Post* (collectively, the “Media Petitioners”), by and through their undersigned counsel at Levine Sullivan Koch & Schulz, LLP, hereby respectfully move the Court to enter an order clarifying the scope of its Orders regarding pretrial publicity.

As grounds for this Motion, the movants state as follows:

1. On July 23, 2012, the Court entered an Order re Motion to Limit Pre-Trial Publicity (D-2) (“Order”).
2. On July 25, 2012, the Court entered an Amended Order re Motion for Compliance with Order Limiting Pre-Trial Publicity (D-10) (“Amended Order”).
3. In both of these Orders, the Court commanded the parties to comply with Rules 3.6 and 3.8 of the Colorado Rules of Professional Conduct, imposing the potential sanction of contempt of court for any violation of the Rules. *See* Order at 1.
4. By the express terms of these Orders, and as contemplated in the Colorado Rules of Professional Conduct, the prohibitions on “extra-judicial statements” effective under Rule 3.8, apply only to the District Attorney’s Office and criminal “Law Enforcement Agencies involved in this case.” Amended Order at 1; *see also* Order at 4 (stating that the Order applies to “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.”
5. Despite the Orders’ unambiguous language limiting their prohibitions to (a) the “extrajudicial *statements*” (b) made by those criminal law enforcement agencies participating in the prosecution of this case, several non-criminal law enforcement agencies have cited the Court’s Orders as prohibiting them from commenting at all on ancillary matters unrelated to the prosecution of the defendant in this case; these agencies have also declared their “public records” that have been the subject of requests under Colorado’s Open Records Act (“CORA”) are actually “criminal justice records,” because of their connection to the Aurora theater shooting.
6. In fulfilling the press’ “watchdog” role,¹ Media Petitioners have sought to examine the actions of various *non-law* enforcement agencies, both before and after the tragic

¹ *See, e.g., Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975) (“[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of

events of July 20th. At every turn, since the issuance of the Court's Order Limiting Pretrial Publicity, these non-law enforcement agencies – including the entire Aurora city government – have asserted that the Order prohibits them from making any public comments about the conduct of city agencies. For example, recently, the Aurora History Museum refused to issue any statement regarding its plans for the Memorial Park across the street from the Century Aurora 16 movie theater, citing the Court's Order.

7. In addition, a number of public records requests by Media Petitioners have been denied on grounds that they purportedly sought “criminal justice records” that are part of the ongoing investigation of the crimes charged herein; these include:

- Records showing *how many* rural metro ambulances responded to the shooting, their response times, and where they transported those who were wounded in the charged crimes;
- Inspection and occupancy reports of the Aurora Fire Department for the Century Aurora 16 movie theater dating back weeks and months *before* July 20;
- Records showing when off-duty police officers have worked at the Century Aurora 16 movie theater in the two *months preceding* July 20 shooting;

Each of the above records requests denials was accompanied by a statement that the City cannot *comment* on such matters because doing so could violate the Court's Orders Limiting Pretrial Publicity. See also Ex. A (Letter from Attorney General, citing to the Court's order limiting pretrial publicity as a basis to withhold public records requested under CORA).

8. Media Petitioners firmly believe that the records of these *non-law* enforcement agencies (and any associated comments by public servants at those agencies), are *not* within the ambit of the Court's Orders Limiting Pretrial Publicity, as none of these agencies is participating in the *prosecution* of this defendant, and the information sought about the official actions of these agencies bears no logical nexus to the prosecution or defense of this criminal case. Yet, these agencies have repeatedly cited to the Court's Orders Limiting Pretrial Publicity as a basis for their refusal to provide information to the press, and through them, the public.

9. The Orders Limiting Pretrial Publicity are not only limited to criminal law enforcement agencies participating in the prosecution of this case, they are expressly limited to certain “extrajudicial statements”; the Orders do not purport to affect the duties of government agencies to comply with CORA.² Case law in other jurisdictions has made clear that virtually

those operations.”); *Mills v. Alabama*, 384 U.S. 214, 219 (1966) (the press is the “constitutionally chosen means for keeping officials . . . responsible to all the people whom they were selected to serve.”).

² On July 23, 2012, the Court ordered the University of Colorado not to disclose certain specifically identified “public records” *that had previously been requested* by various news

identical rules of professional conduct governing “extra-judicial statements” by law enforcement agencies and attorneys of record,³ do *not* affect the responsibility of government entities to provide public records in response to state open records statutes. *See, e.g., Cox Ariz. Publ’ns, Inc. v. Collins*, 852 P.2d 1194, 1198-99 (Ariz. 1993) (holding that an identically-worded Arizona Rule of Professional Conduct does not in any way limit the responsibilities of a prosecutor to disclose “public records” under Arizona’s open records statute: “Simply handing over public records to reporters without comment is not necessarily an ‘extrajudicial statement.’” (citing *Bludworth v. Palm Beach Newspapers, Inc.*, 476 So. 2d 775 (Fla. App. 1985) (“We do not see how releasing an investigatory document constitutes making an ‘extrajudicial statement.’”))).

10. Leaving no doubt the Rules here are intended to apply no more broadly, the Court’s Orders expressly permit the making of extrajudicial *statements* by personnel within the “applicable law enforcement agencies” that do no more than recite the contents of “information contained in the public record.” Order at 2 ¶ I.A.(2); *see also* Colo. R. Prof. Conduct 3.6(b)(2) (a lawyer involved in litigation is authorized to state, outside of the courtroom, any “information contained in a public record.” (emphasis added)).

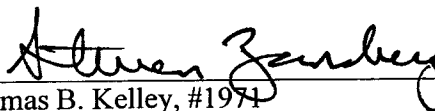
11. Because various non-law enforcement agencies have mistakenly construed this Court’s Orders as precluding their ability to respond to press inquiries concerning their official actions – *unrelated* to investigating this crime or prosecuting the defendant – the Media Petitioners respectfully request that the Court forthwith clarify that its Orders Limiting Pretrial Publicity were not, and are not, intended to limit the ability of *non*-criminal law enforcement agencies to provide public comment on matters of public concern (or to release public records in compliance with CORA).

organizations under CORA. Notably, those records requesters were not provided the statutorily-mandated notice and opportunity to be heard *prior to* entry of an order prohibiting disclosure of “public records”; nor was the custodian required to demonstrate that disclosure of “public records” would cause “*substantial injury* to the public interest.” *See* § 24-72-204(6)(a), C.R.S. (emphasis added).

³ *See, e.g.,* Colo. R. Prof. Conduct 3.6, Comment (2012) (making repeated reference to the Rule’s scope of limiting only “a lawyer’s making *statements*,” “*commentary* of a lawyer,” and “extrajudicial *speech*.” (emphasis added)); *id.* Rule 3.8(f) (directing prosecutors to “refrain from making extrajudicial *comments*.” (emphasis added)).

Respectfully submitted this 6th day of August,
2012, by:

LEVINE SULLIVAN KOCH & SCHULZ,
LLP



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Steven D. Zansberg, #26634
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Attorneys for Media Petitioners

CERTIFICATE OF MAILING

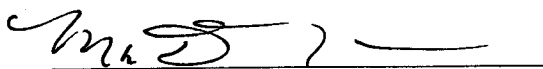
I hereby certify that on this 6th day of August, 2012, a true and correct copy of this **MOTION BY MEDIA PETITIONERS FOR CLARIFICATION OF THE COURT'S ORDER REGARDING PRE-TRIAL PUBLICITY** was delivered via FACSIMILE to the attorneys below and was deposited in the United States Mail, postage prepaid, correctly addressed to the following:

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August 1, 2012

Allison Sherry
Jeremy P. Meyer
Denver Post
101 West Colfax Avenue, Suite 600
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RE: Your July 27, 2012 open records request regarding James Eagan Holmes

Dear Ms. Sherry and Mr. Meyer,

We are in receipt of your July 27, 2012, request under the Colorado Open Records Act. As you know, District Court Judge William Blair Sylvester has issued an order limiting pretrial publicity in the case involving Mr. Holmes. Therefore, we are denying release of responsive records pursuant to C.R.S. § 24-72-204(1)(c).

Records responsive to your request would also be subject to additional privileges, including the attorney-client and work product privileges, C.R.S. § 24-72-204(3)(a)(IV), and exemptions under the Criminal Justice Records Act, including but not limited to C.R.S. § 24-72-305(5).

Sincerely,
FOR THE ATTORNEY GENERAL

/s/

CAROLYN A. TYLER
Communications Director

