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District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	<p style="text-align: center;">Filed</p> <p style="text-align: center;">AUG - 9 2012</p> <p style="text-align: center;"><small>CLERK OF THE DISTRICT COURT ARAPAHOE COUNTY, COLORADO</small></p> <p style="text-align: center;">σ COURT USE ONLY σ</p>
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff v. JAMES HOLMES, Defendant	
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	Case No. 12CR1522 Division 22
DEFENDANT'S RESPONSE TO MOTION TO UNSEAL COURT FILE AND PROSECUTION'S RESPONSE [P-9]	

On July 27, 2012, numerous news media organizations filed a Motion to Unseal Court File (Including Docket). If granted, the media's request to unseal the entire file in this highly publicized case, including the register of actions, would impinge upon Mr. Holmes' right to a fair trial by an impartial jury as protected by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article II, sections 16 and 25 of the Colorado Constitution. Therefore, Mr. Holmes, through counsel, objects. In support of this objection, he states the following:

I. The Procedure the Court is Currently Following Satisfies the Public's Constitutional Right of Access to Court Proceedings.

1. The media attention this case has received has been extraordinary. To protect Mr. Holmes' constitutional right to a fair trial by an impartial jury in light of this intense public scrutiny, this Court issued an order on July 20, 2012 sealing orders, affidavits, warrants, and the case file from public inspection. However, since that time, and on an ongoing basis, the Court has unsealed a number of individual documents it concluded were appropriate for public viewing.¹ In addition, the Court has kept the proceedings in this case open to both the media and the public. It also granted expanded media coverage of the July 26, 2012 advisement hearing in this case, allowing both video cameras and still photography in the courtroom.

¹ The defense has proposed procedures for evaluating the propriety of unsealing future documents in section IV, below.



2. These measures have fully satisfied the constitutional concerns of the media and the public, as the Court has kept the proceedings in this case open to the public. See *Press-Enterprise v. Superior Court*, 476 U.S. 1, 13 (1986) (“*Press-Enterprise II*”) (qualified First Amendment right of access attaches to preliminary hearing); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605 (1982) (“right of access to criminal trials in particular is properly afforded protection by the First Amendment”); *Star Journal Publ’g Corp. v. Cnty. Ct.*, 591 P.2d 1028 (Colo. 1979).

II. The Public Has Only Limited Common Law and Statutory Rights to Access Judicial Records, Including the Court File and Register of Actions, and the Decision Whether to Provide Access is Within the Sound Discretion of the Trial Court.

3. The public’s right to access judicial records, including the court file in a criminal case and the register of actions, is governed by common law and the Colorado Criminal Justice Records Act. See *Nixon v. Warner Communications*, 435 U.S. 589, 597 (1978) (“It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.”); *United States v. Hickey*, 767 F.2d 705, 708 (10th Cir. 1985) (noting that U.S. Supreme Court has never held that constitutional right of access to court proceedings also applies to court files and documents, and analyzing defendant’s request for access to sealed court documents under common law right of access); C.R.S. §§ 24-72-301—08 (defining and establishing parameters for public access to criminal justice records).

4. The United States Supreme Court has made clear that “the right to inspect and copy judicial records is not absolute,” and “[e]very court has supervisory power over its own records and files.” *Id.* at 598. Thus, “the decision as to access [to judicial records] is one best left to the sound discretion of the trial court.” *Id.* at 599. See also C.R.S. § 24-72-305(1)(b) (allowing inspection of criminal justice records unless inspection is prohibited, *inter alia*, “by the order of any court”); Colorado Judicial Dept. 05-01 § 4.60(a) (“Information in court records is not accessible to the public if protected by . . . court order”).

5. To determine whether unsealing the case file is warranted under the public’s common law right of access and the Colorado Criminal Justice Records Act, this Court must apply a simple balancing test to evaluate whether “the public’s right of access is outweighed by competing interests.” *Hickey*, 767 F.2d at 708. This analysis is “necessarily fact-bound” and “there can be no comprehensive formula for decision-making.” *Id.*

6. Additionally the Colorado Supreme Court has noted that the concerns a custodian of criminal justice records must take into account when considering whether to provide access to records include “the privacy interests of individuals who may be impacted by a decision to allow inspection; the agency’s interest in keeping confidential information confidential; the agency’s interest in pursuing ongoing investigations without compromising them; the public purpose to be served in allowing inspection; and any other pertinent consideration relevant to the circumstances of the particular request.” *Harris v. Denver Post Corp.*, 123 P.3d 1166, 1175 (Colo. 2005); see also *Freedom Colorado Info., Inc. v. El Paso County Sheriff’s Dept.*, 196 P.3d 892, 895 (Colo. 2008).

assessing the defendant's guilt," continued sealing of the court file and register of actions is warranted.² *McVeigh*, 119 F.3d at 814.

11. Third, at this early stage in the process, it is almost impossible for this Court to prospectively engage in the "fact-bound" analysis of determining whether unsealing the entire court file and register of actions is appropriate. *Hickey*, 767 F.2d at 708. Neither the Court nor the parties can anticipate the nature of the pleadings and the litigation that will ensue in the coming months. The defense has only recently received a voluminous amount of initial discovery, and is still in the midst of processing this information. Unsealing the entire case file at this point is likely to have a chilling effect on the ability of the parties to make candid arguments about significant legal issues in the case going forward. *McVeigh*, 119 F.3d at 814. While the Court can certainly revisit the issue of unsealing the court file at a later date, it is necessary at this juncture for the Court to pursue the prudent and cautious approach of keeping the court file and register of actions sealed given the significance of Mr. Holmes' constitutional rights at stake.

12. Fourth, as noted in section I above, while this Court has placed appropriate limits on the public disclosure of information in this case, it has not unnecessarily shrouded this case in secrecy or closed off all avenues of public access to information. In addition to unsealing selected documents, the Court has kept the proceedings in this case open to the media and the public, and even granted expanded media coverage of Mr. Holmes' advisement hearing on July 26, 2012. This Court has only prohibited heightened media scrutiny after properly weighing "[w]hether there is a reasonable likelihood that expanded media coverage would interfere with the rights of the parties to a fair trial; whether there is a reasonable likelihood that expanded media coverage would unduly detract from the solemnity, decorum and dignity of the court; and whether expanded media coverage would create adverse effects which could be greater than those caused by traditional media coverage." Order Re: Requests for Expanded Media Coverage of July 30, 2012 Hearing [D-7], p. 1.

13. Finally, Mr. Holmes disputes the media's contention that this Court must make a finding that there are "no other available measures that would adequately protect the defendant's fair trial rights." See Motion to Unseal Court File, p. 12 (citing *Press-Enterprise II*, 478 U.S. at 14). This standard is only applicable where it has been established that the public has a qualified First Amendment right of access to the court proceeding at issue, in contrast to the common law right of access that applies here. However, even if this Court were to engage in such an analysis, at this point in time there are no viable "alternative measures" available to protect Mr. Holmes' fair trial rights. It is simply too early in the process to conclude that "extensive voir dire" or "emphatic and clear instructions" to the jury can mitigate the damaging publicity that will result from unsealing the court file and register of actions and ensure Mr. Holmes receives a fair trial.

² The defense's concern that confidential or inadmissible information will be disclosed to the public if the media's request is granted is as great with respect to the register of actions as it is with respect to the court file. The register of actions not only contains information about the pleadings that are filed and orders that are issued, but minute orders of court proceedings that could include descriptions of *in camera* proceedings or conversations conducted at the bench that were properly shielded from earshot of the public during the proceeding itself.

IV. The Court File Should Remain Sealed, and the Parties Should Have an Opportunity to be Heard Before the Court Releases Additional Pleadings Filed in this Case to the Public.

14. For the reasons stated above, Mr. Holmes objects to the unsealing of any additional documents presently contained in the case file.

15. Mr. Holmes further objects to the online posting of pleadings filed by the parties in the "Cases of Interest" section of the state judicial branch website. While documents that are unsealed may be accessible at the courthouse, posting them online in a specially-dedicated section of this website is inconsistent with both the judicial branch's obligation to ensure that Mr. Holmes receives a fair trial somewhere in the state of Colorado, as well as with this Court's orders limiting pre-trial publicity in this case. As a result of this website, the public and the media have more access to the pleadings and orders in this case than in cases that are not deemed "Cases of Interest" and have received far less publicity than Mr. Holmes' case. Continued use of this website will negatively impact Mr. Holmes' ability to receive a fair trial by an impartial jury.

16. Additionally, the Court must engage in the balancing test articulated in *Hickey*, 767 F.2d at 708 and *Harris*, 123 P.3d at 1175, prior to unsealing any future documents that are filed in this case. The defense requests that if the Court is considering unsealing a particular pleading in this case in the future, it provide the parties with an opportunity to be heard before it releases additional documents into the public domain.

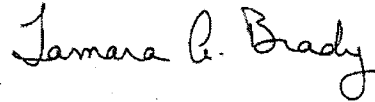
17. Finally, because the defense generally objects to the unsealing of documents filed in this case, it objects to the proposal articulated at the July 30, 2012 pre-trial hearing that the parties be required to provide both a redacted and unredacted version of every pleading filed with the clerk's office.

18. Instead, the defense proposes that if, after hearing arguments of both parties and engaging in the balancing test, the Court determines that a pleading should be unsealed, the party that authored the pleading be directed to provide the Court with a redacted version.

Mr. Holmes files this response, and makes all other motions and objections in this case, whether or not specifically noted at the time, 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.



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Dated: August 9, 2012

I hereby certify that on August 9, 2012, I

mailed, via the United States Mail,
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a true and correct copy of the above and foregoing document to:

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