

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;">OCT 2 2012</p> <p style="text-align: center;">CLERK OF THE COMBINED COURT ARAPAHOE COUNTY, COLORADO</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	<p style="text-align: center;">σ COURT USE ONLY σ</p> <p>Case No. 12CR1522</p> <p>Division 22</p>
<p style="text-align: center;">MOTION FOR EVIDENTIARY HEARING TO INVESTIGATE VIOLATION OF COURT'S ORDER LIMITING PRETRIAL PUBLICITY [D-018]</p>	

James Holmes, through counsel, respectfully moves this Court to set an evidentiary hearing to investigate the circumstances under which a photo of Mr. Holmes was released to the media in violation of this Court's amended order limiting pretrial publicity and Mr. Holmes's 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. In support of this motion, Mr. Holmes states the following:

1. The government, including the Arapahoe County Sheriff's Department, is by now well aware that it is subject to this Court's Amended Order Re Motion to Limit Pre-Trial Publicity. *See* Order D-2a. This order precludes law enforcement from releasing information to the public that it "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." *See* Order D-2A, paragraph I(A); *see also* paragraph I(E)(5). The order also expressly states that law enforcement officers and agencies "shall not exercise their custodial authority over an accused individual in a manner that is likely to result in . . . [t]he deliberate exposure of a person in custody for the purpose of photographing . . . by representatives of the news media." *See* paragraph II(B)(1).

2. Despite this order, a photograph of Mr. Holmes was leaked to the media by the Arapahoe County Sheriff's Department on September 20, 2012, the same day Mr. Holmes appeared in court for the first time after receiving a haircut. *See* Attachment. This photo has been widely disseminated in the media. Because Rule 2 of Chapter 38 of the Colorado Court Rules, Public Access to Records and Information specifically bars "[e]xpanded media coverage of pretrial hearings in criminal cases, except advisements and arraignments," the public would not have had access to an image of Mr. Holmes but for this leak.

3. Furthermore, the photo was taken and distributed despite the fact that at the time, the prosecution's Motion for Court Order Authorizing Collection of Non-Testimonial Evidence [P-014], which included a request for permission to photograph Mr. Holmes, was pending before the Court.

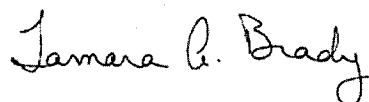
4. This photograph appears to have been released by the Arapahoe County Sheriff's Department in violation of the Court's order, and has also, once again, implicated Mr. Holmes' constitutional rights to a fair trial, to a fair and impartial jury and to due process as protected by the Fifth, Sixth, and 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).

5. Mr. Holmes respectfully requests an evidentiary hearing on this issue to investigate the circumstances under which this photograph of Mr. Holmes was taken and its purpose, the party responsible for distributing the photograph to the media, and what sanctions are an appropriate response to this violation.

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

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<p style="text-align: center;">ORDER RE: MOTION FOR EVIDENTIARY HEARING TO INVESTIGATE VIOLATION OF COURT'S ORDER LIMITING PRETRIAL PUBLICITY [D-018]</p>	

Defendant's motion is hereby GRANTED _____ DENIED _____.

BY THE COURT:

JUDGE

Dated

I hereby certify that on 10/2/12, 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
Fax: 720-874-8501

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Prosecution gives up fight for theater shooting suspect's notebook

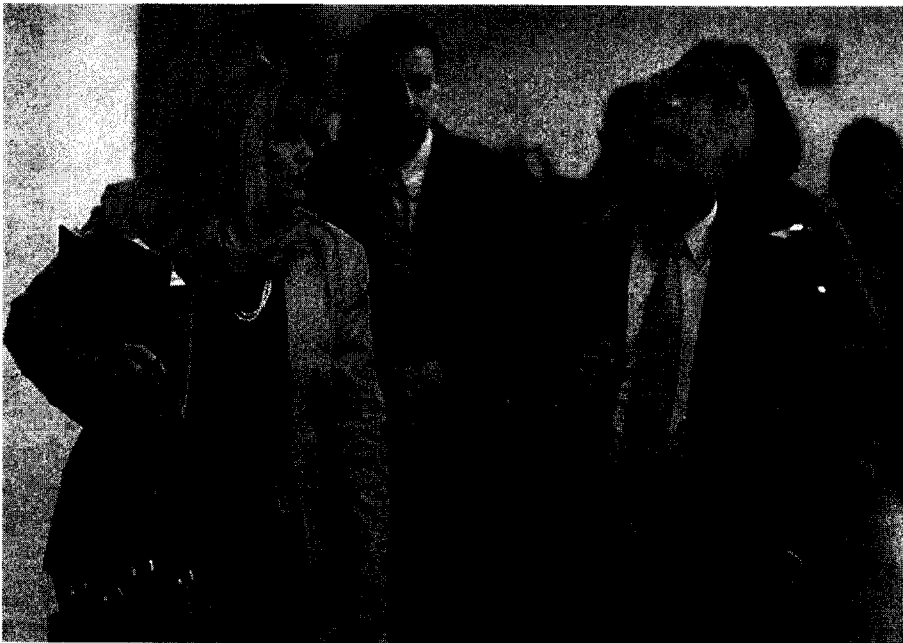
By **Jessica Fender and John Ingold**
The Denver Post

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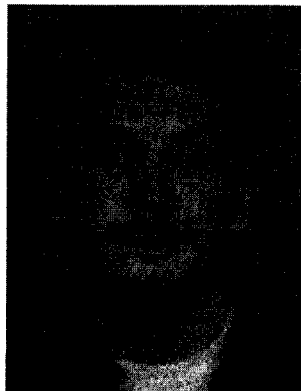
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Chief Deputy District Attorney Karen Pearson, left, talks to Aurora police major crimes Detective Craig Appel as they leave court after a hearing for suspected movie theater shooter James Holmes in district court in Centennial on Thursday, Sept. 20, 2012. (AP | Ed Andrieski)

CENTENNIAL — Worried about delaying the case and wary of traveling in "uncharted legal waters," prosecutors on Thursday suspended their attempts to see a notebook that accused Aurora movie theater killer James Holmes mailed to his psychiatrist.

In a hearing expected to help determine whether the notebook is protected by doctor-patient privilege, Arapahoe County Deputy District Attorney Rich Orman instead announced that prosecutors were backing down on the issue. Orman said, whatever the judge decided on the notebook, the ruling likely would have been appealed to the state Supreme

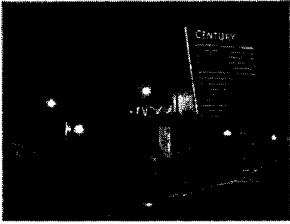


This undated photo provided Sept. 20, 2012 by the Arapahoe County Sheriff's Office shows Colorado

Court, prompting a months-

AURORA THEATER

SHOOTING



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long delay in the case.

movie theater shooting suspect
James Holmes. (Arapahoe County
Sheriff's Office | handout)

Incremental rulings by 18th Judicial District Chief Judge William Sylvester during an earlier hearing on the issue had gone against prosecutors. And Orman said his side wasn't interested in making Holmes' case a guinea pig before the state's highest court on the privilege question.

"These are uncharted legal waters," Orman said. "As far as I can tell, this particular factual circumstance has never arisen before, anywhere."

Prosecutors say Holmes put the notebook in the mail just hours before shooting started at an Aurora movie theater, killing 12 and wounding 58 more.

Previous reports from anonymous sources say the notebook contained plans for the massacre — information that could provide clues to Holmes' state of mind before the attack. Prosecutors said they should be able to use the notebook as evidence, while defense attorneys said it was private and should be returned to Holmes.

One reason Orman said he was willing to drop the fight, for now, is that doctor-patient privilege is waived if a defendant pleads not guilty by reason of insanity or seeks to use mental health as a mitigator at sentencing.

"We think we are most likely going to get this notebook eventually," he said.

Former Denver judge Christina Habas, who now works for the law firm Keating Wagner and represents some of the shooting victims, said there is no guarantee that an insanity plea would release the notebook.

"It is very possible," she said, "but it's not 100 percent certain."

Part of the uncertainty lies with what is actually



Defense Attorney Daniel King, left, leads the defense team out of the courtroom after a hearing for suspected theater shooter James Holmes in district court in Centennial on Thursday, Sept. 20, 2012. (AP | Ed Andrieski)

in the notebook and whether it speaks to Holmes' mental state, she said.

For the time being, the notebook will remain locked in a court clerk's office, though defense attorneys will be able to make copies of it under court and police supervision.

The prosecution's decision cut short what was expected to be a day-long hearing in Holmes' case. Holmes appeared in the courtroom with tightly cropped brown hair and a couple of days' facial scruff, a marked contrast to the curly orange hair and bushy muttonchops of his previous appearances.

During the hearing, prosecutors added 10 more counts of attempted first-degree murder to Holmes' charges, bringing his full slate to 152 counts in total. Prosecutors also amended 17 counts in what appears to be a move to correct

misspellings and clerical mistakes, though redactions in the public documents make it unclear.

Jessica Fender: 303-954-1244, jfender@denverpost.com or twitter.com/Oh-Fender

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A courtroom sketch shows suspected theater shooter James Holmes during a motions hearing Thursday.
(Bill Robles, The Associated Press)

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