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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;">JUL 30 2012</p> <p style="text-align: center;"><small>CLERK OF THE COMBINED 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 408 22
RESPONSE TO PEOPLE'S MOTION TO CLARIFY COURT ORDER RE: MOTION TO LIMIT PRETRIAL PUBLICITY [P-007]	

On Friday, July 27, 2012, the government filed a motion seeking "clarification" of this Court's previous order limiting pretrial publicity and proposing alterations to this order. Mr. Holmes' state and federal constitutional rights to a fair trial by a fair and impartial jury are implicated by these proposed changes. See U.S. Const. amends. V, VI, and XIV; Colo. Const. Art. II, secs. 16, 18, and 25. Therefore, Mr. Holmes, through counsel, objects and submits the following in response:

1. The prosecution claims that paragraph I(A) of the Court's order is too restrictive because pursuant to its current terms, the government can only comment on a selected list of topics about the case, and therefore "cannot correct inaccurate information reported in the media."
2. Mr. Holmes disagrees. Despite the government's assertion that inaccurate media reports to which it cannot respond will increase the likelihood of prejudicing "the rights of the parties," the government does not have constitutional rights that are implicated by inaccurate media reports. Rather, the purpose of the Court's order limiting pretrial publicity is to protect Mr. Holmes' constitutional rights to a fair trial by an impartial jury. That is also why Rule 3.6(c) of the Colorado Rules of Professional Conduct, which is quoted in paragraph B of the Court's order, permits attorneys to make statements necessary to protect a *client* "from the substantial, undue prejudicial effect of recent publicity." See also Colo. R. Prof. Cond. 3.8(f) (prohibiting prosecutors from making statements that "have a substantial likelihood of heightening public condemnation of the accused").



3. A restrictive order is justified given the unusual and extraordinary media attention this case has received. Reports of the Aurora theater shootings and Mr. Holmes' arrest in this matter have not only saturated the American media, but have reached Europe, Asia, and Australia. This case is precisely the type of "rare" instance "in which pretrial publicity alone" has the potential to "actually deprive[] a defendant of the ability to obtain a fair trial." Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 404 n.1 (1979) (Rehnquist, J., concurring).

4. Under these circumstances, the Court's present restrictions on the parties' extrajudicial statements are necessary to protect Mr. Holmes' constitutional rights to a fair trial. As the United States Supreme Court has held, "Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors, and an outcome affected by extrajudicial statements would violate that fundamental right." Gentile v. State Bar of Nevada, 501 U.S. 1030, 1075 (1991).

5. The media interest in this case is so great that inaccurate reports, including those from tabloid publications, are inevitable. Some of these inaccuracies will undoubtedly be advanced by media outlets that are likely to reach the potential jury pool in this case; others may be reported primarily in far-flung places where the opinion of the public will have little impact on Mr. Holmes' right to a fair trial. While no one can control the precise nature and content of the extensive media coverage of this case, the Supreme Court has repeatedly observed that the statements of those *directly involved* in the proceedings have the greatest impact on the ability of the defendant to receive a fair trial. See Gentile, 501 U.S. at 1056 ("The police, the prosecution, [and] other government officials . . . hold innumerable avenues for the dissemination of information adverse to a criminal defendant."); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) ("The capacity of the jury eventually impaneled to decide the case fairly is influenced . . . in large part . . . by what attorneys, police, and other officials do to precipitate news coverage." (emphasis added)).

6. Thus, the focus of the Court's current order limiting pre-trial publicity is – and should remain – on strictly limiting the information that is proactively disseminated to the public by the attorneys and law enforcement agencies involved in this case.

7. Amending the order, as the prosecution has requested, to enable the government to make public statements about any topic that it fails to perceive will have a "substantial likelihood of materially prejudicing" Mr. Holmes' case will significantly expand the amount, nature, and quality of the extrajudicial statements made in this case to the detriment of his constitutional rights.

8. The prosecution also alleges that the specific categories of proscribed information enumerated in paragraph I(D) of the Court's order are "unnecessary" because the prohibitions in paragraph I(D) are "already precluded by Paragraph I(A)." Mr. Holmes disagrees.

9. Paragraph I(D) is based on Comment 5 to Rule 3.6 of the Colorado Rules of Professional Conduct, as well as section 8-1.1(b) of the ABA Standards for Criminal Justice, Fair Trial and Free Press. These categories of information are specifically enumerated because they are "more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to . . . a criminal matter." Colo. R. Prof. Cond. 3.6, Comment 5.

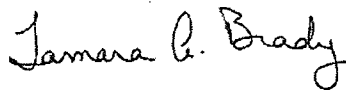
10. These topics, which include comments on the character or credibility of the accused, opinions about guilt or innocence, and information about statements made by a defendant or suspect, have been recognized for more than half a century as having the unique potential to prejudice a criminal trial. See, e.g., Sheppard v. Maxwell, 384 U.S. 333, 361 (1966) ("More specifically, the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; any statement made by Sheppard to officials; . . . any belief in guilt or innocence; or like statements concerning the merits of the case." (citing case law quoting American Bar Association's Canons of Professional Ethics prohibiting such statements)).

11. The Court's express prohibition against comments relating to these topics is not prejudicial to the government. The intensity of the media interest in this case requires the Court to provide as much guidance to the parties as possible about the impropriety of extrajudicial statements that have the potential to undermine Mr. Holmes' constitutional rights to a fair trial by an impartial jury.

Mr. Holmes files this response, 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.



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Dated: July 30, 2012

I hereby certify that on July 30, 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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skos