

REDACTED

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff	
v.	
JAMES HOLMES, Defendant	♦ COURT USE ONLY ♦
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
MOTION FOR A CERTIFICATE TO COMPEL ATTENDANCE OF JANA WINTER, AN OUT OF STATE WITNESS FROM NEW YORK AND PRODUCTION OF HER NOTES [D-026]	

On July 23, 2012, the Aurora Police Department took a package into custody sent by Mr. Holmes to his University of Colorado psychiatrist. Despite the fact that, as explained below, the package and its privileged contents were made subject to a protective order issued by this Court, an article written by Fox News reporter Jana Winter revealing alleged details about the contents of the package was published on the Fox News website on July 25, 2012. Undersigned counsel have used all available means to determine which law enforcement agent violated this Court's Order by leaking the contents of this notebook to the media. As none of these efforts have revealed the source of the leaked information, Jana Winter has become a material and necessary witness in this case and her notes are material and necessary to the defense in this matter.

Defendant James Holmes therefore moves this Court to issue a Certificate under Seal of the Court for the attendance and testimony of Ms. Winter, who resides in New York, pursuant to C.R.S. § 16-9-203, and to compel this witness to produce to the Court her notes from her conversations with the sources mentioned in her article described below, pursuant to C.R.S. § 16-9-205. As further grounds for this motion, Mr. Holmes states the following:

1. On July 23, 2012 this Court issued an order limiting pretrial publicity instructing the parties and law enforcement to refrain from disseminating information that "will have a substantial likelihood of prejudicing a criminal proceeding."

2. On July 25, 2012, following the seizure of the above-referenced package, Mr. Holmes filed a motion for an immediate protective order pursuant to C.R.S. §13-90-107(1), and his constitutional rights to a fair trial and due process of law, requesting this Court to order that any member of law enforcement (including the prosecution and all agents), and any agent or employee thereof, in this case who has access to evidence seized in connection with this case refrain from opening or viewing the material in the package, and to immediately seal that item

and either turn it over to the Court, to counsel for Mr. Holmes, or maintain it in a sealed fashion and not view it unless and until the Court issued further orders related to the documents. *See* Defense Motion for Immediate Protective Order [D-008]. This Court granted this motion that same day on July 25, 2012 at 9:30 a.m.

3. Approximately thirty to forty-five minutes later and despite this protective order, Fox News first published an on-line article authored by Ms. Winter disclosing the substance of these privileged materials, including the fact that the package contained a notebook “full of details about how he was going to kill people,” and “drawings and illustrations of the massacre.” The article cites two unnamed “law enforcement source[s].” *See* Attachment to [D-009]. In response, Mr. Holmes immediately filed an additional motion to seal the privileged materials in order to further litigate issues relating to privilege. *See* Motion for Immediate Production and Protection of Privileged Material [D-009]. This Court also granted this motion that same day on July 25, 2012.

4. In addition, Mr. Holmes immediately filed a motion for this Court to order the government to comply with the Court’s previously-issued order limiting pre-trial publicity, directing the government to refrain from disseminating information that presents a danger to the fairness of a trial in this matter, and specifically prohibiting the government from disseminating information and material that appears to possibly be privileged, or that Mr. Holmes alleges is privileged, until issues of privilege can be fully litigated. *See* Motion for Compliance with Order Limiting Pre-Trial Publicity [D-010]. This Court again granted this motion that same day on July 25, 2012 and directed the prosecution to serve all law enforcement officers with the Court’s Order.

5. On October 2, 2012, Mr. Holmes filed a motion requesting that this Court impose sanctions on the government for violating this Court’s order limiting pretrial publicity by leaking privileged and confidential information to the media concerning the contents of a package that Mr. Holmes sent to his treating psychiatrist. *See* Motion for Sanctions for Violating This Court’s Order Limiting Pretrial Publicity by Leaking Privileged and Confidential Information to the Media and Request for Evidentiary Hearing [D-017]. An evidentiary hearing was held on this motion on December 10, 2012.

6. At the December 10, 2012 evidentiary hearing, the defense submitted Exhibits 1 through 6 which were the affidavits of University of Colorado police officers and lay witnesses that had some contact with the package containing the materials referenced in defense motions 008, 009, 010 and 017. Each of these witnesses attested that they had no knowledge of the contents of the notebook nor did they discuss the package with the media. *See* Hearing Exhibits 1-6.

7. The remaining witnesses revealed in the discovery that had any contact with notebook from which information was leaked were called to testify at the December 10, 2012 motion hearing. While several of the law enforcement witnesses admitted to partially viewing the contents of the notebook, none of the witnesses admitted to providing any information to the news media. *See* Reporter’s Transcript, December 10, 2012.

8. The defense is unaware of any other witness that could provide the names of the

law enforcement sources referenced in Jana Winter's July 25, 2012 news article. As a result, the defense has exhausted all known investigative and evidentiary avenues to obtain this information. Based on current information, Ms. Winter appears to be the only witness that can provide the court with the name of the law enforcement agents that leaked privileged information and violated this Court's order limiting pretrial publicity. As such, she is a material and necessary witness in this matter. Further, based on current information, Jana Winter's notes regarding her contact with the two law enforcement sources appear to be the only written documentation of this information. These notes are also material and necessary in this matter.

9. Identifying the law enforcement sources who leaked this information to the media is an issue of serious and material importance to this case. By leaking this prejudicial information to the media in a case that has received such significant public attention, the government's actions have seriously jeopardized 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).

10. Ms. Winter works for FoxNews.com at Fox News Channel located at 1211 Avenue of the Americas, New York, New York.

11. Both Colorado and New York have adopted the Uniform Act to Secure the Attendance of Witness From Without a State in Criminal Proceedings. *See* C.R.S. §16-9-201, *et. seq.*, McKinney's CPL §640.10. Further, both Colorado and New York extend this act to include subpoenas duces tecum as well as subpoenas ad testificandum. *See* C.R.S. §16-9-205, *Matter of Farber*, 394 A.2d 330, 337 (N.J. 1978).

12. Pursuant to C.R.S. §§16-9-203 and 16-9-205, in order to subpoena a witness or documentation from without the state, the defense requires a certificate under court seal from the court which is hearing the criminal trial. The certificate must state (1) that there is a criminal case pending before a court of record in Colorado, (2) that the witness is a material and necessary witness in that prosecution, and (3) the witness's presence will be required for a certain number of days.

13. Once this court issues such a certificate in this case, a proceeding may be instituted in the supreme court of New York in order for a justice to determine whether or not to compel that witness to attend and testify in this Court and to submit the requested documentation to this Court. McKinney's CPL §640.10(2). The justice in the supreme court of New York must determine (1) that the witness and documentation are material and necessary, (2) that it will not cause undue hardship to the witness to be compelled to attend and testify or provide such documentation, and (3) that the laws of the state in which the prosecution is pending will provide protection from arrest and the service of civil and criminal process. *Id.* Regarding the third prong, C.R.S. §16-9-204(1) provides the protection required by New York law before the New York supreme court may order a person in New York to travel to Colorado to testify. *See* McKinney's CPL §640.10(2).

14. The certificate issued by this court will be prima facie evidence of all of the facts

stated therein. The New York supreme court will need sufficient evidence in order to make a determination that Jana Winter is a material and necessary witness and the documents requested are material and necessary to this case.

15. Both Colorado and New York laws require fees to be paid to a witness when they are compelled to travel across state lines to testify. It appears these laws are meant to compensate the witness for the cost of travel. The laws of both states differ regarding the compensation due. Colorado provides that the witness shall receive "the sum of ten cents a mile for each mile by the ordinarily traveled route to and from the court where the prosecution is pending or, in the alternative and at the discretion of the court, an airplane ticket and twenty dollars for each day that he is required to travel and attend as a witness." See C.R.S. §16-9-203(2). New York law provides payment of "the sum of ten cents for each mile and five dollars for each day that he is required to travel and attend as a witness." See McKinney's CPL §640.10(2).

16. The total number of days this witness would be traveling and testifying is estimated to be three days. The total mileage from the witness's place of business where she would be served with the subpoena to court would be 3,596 miles. Under the Colorado compensation scheme, the full amount of compensation by mileage would be \$359.60. In the alternative, the fee would be the cost of a round-trip airline ticket plus \$60.

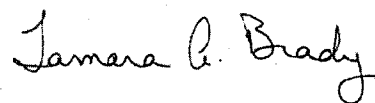
17. As having to incur travel costs could cause potential hardship, the defense will reimburse the witness by purchasing and providing a round-trip airline ticket from New York to Colorado, transportation to and from the airports in both New York and Colorado, and room and board in Colorado.

18. The defense respectfully asks this Court to certify through issuance of the attached certificate that by providing this compensation, the defense will satisfy the compensation requirements of C.R.S. §16-9-203(2) if the New York supreme court issues a summons to the witnesses to appear in Arapahoe District Court as a witness.

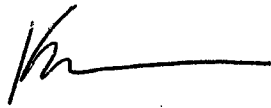
Mr. Holmes files this motion, and makes all other motions and objections in this case, whether or not specifically noted at the time of making the motion or objection, on the following grounds and authorities: the Due Process Clause, the Right to a Fair Trial by an Impartial Jury, the Rights to Counsel, 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.



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Chief Trial Deputy State Public Defender



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Deputy State Public Defender

Dated: January 17, 2013

I hereby certify that on January 17, 2013, I

mailed, via the United States Mail,
 faxed, or
 hand-delivered

a true and correct copy of the above and foregoing document to:

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District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff	
v.	
JAMES HOLMES, Defendant	♦ COURT USE ONLY ♦
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
CERTIFICATE OF THE DISTRICT COURT OF COLORADO [D-026]	

HAVING REVIEWED THE MOTION AND AFFIDAVIT of the Defendant to Compel the Attendance of Witnesses from Another State, this Court, being the Court of Record in this matter pending in the State of Colorado, makes the following Certificate of the District Court of Colorado pursuant to Colo. Rev. Stat. §16-9-203 (2004) and McKinney's CPL §640.10(2):

1. The above-captioned case is now pending in the Arapahoe District Court in which James Holmes is charged with 166 felony counts, including 24 counts of first degree murder.
2. On July 23, 2012, the Aurora Police Department took a package into custody sent by Mr. Holmes to his University of Colorado psychiatrist. Despite the fact that the package and its privileged contents were made subject to a protective order issued by this Court, an article written by Fox News reporter Jana Winter revealing alleged details about the contents of the package was published on the Fox News website on July 25, 2012.
3. Identifying the law enforcement sources who leaked this information to the media is an issue of serious and material importance to this case. The violation of this Court's protective order and the leak of prejudicial information to the media in a case that has received such significant public attention, have 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).
4. Therefore, the Court finds that Jana Winter is a material and necessary witness in this case.

5. On July 23, 2012, this Court issued an order limiting pre-trial publicity instructing the parties and law enforcement to refrain from disseminating information that “will have a substantial likelihood of prejudicing a criminal proceeding.”

6. On July 25, 2012, at 9:30 a.m., this Court granted the defense Motion for Immediate Protective Order [D-008]. This Court ordered that any member of law enforcement (including the prosecution and all agents), and any agent or employee thereof, in this case who has access to evidence seized in connection with this case refrain from opening or viewing the material in the package from Mr. Holmes addressed to his treating psychiatrist and seized from the University of Colorado pursuant to search warrant on July 23, 2012, and immediately seal that item and either turn it over to the Court, to counsel for Mr. Holmes, or maintain it in a sealed fashion and not view it unless and until the Court issues further Orders related to the documents.

7. On July 25, 2012, at approximately 10 a.m., Fox News first published an on-line article disclosing the substance of these privileged materials, including the fact that the package contained a notebook “full of details about how he was going to kill people,” and “drawings and illustrations of the massacre.” The article cites two unnamed “law enforcement source[s].”

8. On July 25, 2012, this Court granted a defense Motion for Immediate Production and Protection of Privileged Material [D-009] thereby ordering the immediate production and sealing of the contents of the package obtained by law enforcement on July 23, 2012 that was sent by James Holmes to his psychiatrist at the University of Colorado.

9. On July 25, 2012, this Court granted a defense Motion for Compliance with Order Limiting Pre-Trial Publicity [D-010] and directed the prosecution to serve all law enforcement officers with this Court’s Order.

10. On December 10, 2012, this Court held a hearing on a defense Motion for Sanctions for Violating This Court’s Order Limiting Pretrial Publicity by Leaking Privileged and Confidential Information to the Media and Request for Evidentiary Hearing [D-017]. At that hearing the defense filed Exhibits 1 through 6 consisting of affidavits from University of Colorado police officers and lay witnesses that had some contact with the package containing the materials referenced in defense motions 008, 009, 010 and 017. According to these affidavits, none of these witnesses had any knowledge of the contents of the notebook nor did they discuss the package with the media.

11. This Court also heard testimony from 14 law enforcement witnesses. Several of these witnesses either partially viewed the contents of the notebook inside the package Mr. Holmes sent to his psychiatrist, or heard conversations about those contents. However, none of these witnesses admitted to providing any information regarding the contents of the notebook to any media personnel.

12. Based on the information provided by defense counsel, there is no other witness beyond those that provided affidavits to the court or those that testified at the December 10, 2012 hearing, or any other documentation that could provide the names of the law enforcement agents that leaked privileged and protected information to Jana Winter.

13. Based on the above information as well as the contents of the defense’s Motion

for A Certificate to Compel Attendance of Jana Winter, An Out of State Witness From New York, this Court finds that defense counsel have used all available means to determine which law enforcement agent violated this Court's Order by leaking the contents of the subject notebook to the media. As none of these efforts have revealed the source of the leaked information, Jana Winter has become a material and necessary witness in this case.

14. Based on the contents of the defense Motion for A certificate to Compel Attendance of Jana Winter, An Out of State Witness From New York and the Exhibits attached thereto, this Court finds that the defense will satisfy the compensation requirements of C.R.S. §16-9-203(2) and McKinney's CPL §640.10(2) by purchasing and providing Jana Winter with a round-trip airline ticket from New York to Colorado, transportation to and from the airports in New York and Colorado, and room and board in Colorado.

15. Jana Winters will be required to spend 3 days in travel and testimony in this case.

16. Colorado law, specifically Colo. Rev. Stat. §16-9-203 (2004), provides for protection from arrest and service of civil and criminal process in connection with matters which arose before witness' entry into Colorado when the witnesses are commanded by a summons issued from a court of record in another state to appear in Colorado.

WILLIAM BLAIR SYLVESTER
DISTRICT COURT JUDGE

Date

Court Seal: