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District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	<b>Filed</b>  SEP 25 2013  CLERK OF THE COMBINED COURTS ARAPAHOE COUNTY, COLORADO  ⌘ COURT USE ONLY ⌘
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff  v.  <b>JAMES HOLMES,</b> Defendant	
DOUGLAS K. WILSON, Colorado State Public Defender Daniel King (No. 26129) Tamara A. Brady (No. 20728) Chief Trial Deputy State Public Defenders 1300 Broadway, Suite 400 Denver, Colorado 80203 Phone (303) 764-1400 Fax (303) 764-1478 E-mail: <a href="mailto:state.pubdef@coloradodefenders.us">state.pubdef@coloradodefenders.us</a>	Case No. <b>12CR1522</b>  Division 26
<b>MOTION FOR SPECIFIC PROCEDURES TO SAFEGUARD MR. HOLMES'S RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY [D-180]</b>	

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**CERTIFICATE OF CONFERRAL**

The prosecution states that it will need to review this pleading before taking a position on it.

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James Holmes, through counsel, respectfully moves this Court to undertake specific procedures to ensure his rights to due process and to a fair trial by an impartial jury in advance of the October motions hearings and in all procedures going forward. Specifically, Mr. Holmes requests that this Court: (1) suppress all transcripts of the proceedings in this case, and (2) remove this case from the "Cases of Interest" section of its website, which allows the public, including the media, to directly access all of the pleadings in this case from the internet.

Such procedures are necessary to protect Mr. Holmes's rights to due process and 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, and are consistent with the actions taken by the District Court in Arapahoe County in other capital cases.

In support of this motion, Mr. Holmes states the following:

1. Over the course of the last 14 months, the Court has issued numerous orders pertaining to the media and the public's access to the proceedings and the record in this case. The Court began by sealing from public view virtually all information related to the case. However, as the events in this case unfolded – and following protracted litigation by counsel for

the media – not only has the vast majority of information in this case been made public, but the Court has facilitated the media’s access to information about this case by posting links to the documents filed in this case as well as weekly summaries of the register of actions on the “Cases of Interest” section of the Court’s public website.<sup>1</sup>

2. As the Court noted in its order dated August 28, 2012, the practice of posting pleadings online is “a courtesy to the public and the media,” and is “not required of the Court.” See Order C-9, p. 1; see also Order C-13b (noting that “the judicial website is a courtesy provided to the public to facilitate public access to information about this case.”).

3. Throughout these proceedings, the defense has maintained the consistent position that public access to documents, pleadings, and other information about this case should be restricted to the extent constitutionally possible so as to protect Mr. Holmes’s right to a fair trial. See, e.g., Defendant’s Response to Motion to Unseal Court File and Prosecution’s Response [P-9]; Defendant’s Response to Order re: Proposed CMO [C-8]; Response to Court’s Request for Defense Position on Media’s Motion to Unseal Redacted Information (Victims’ Identities) [C-013]; Response to Court’s Order Allowing Opportunity to Submit Additional Documents Re: Motion to Unseal Redacted Information [C-13a]; Response to Media Petitioners’ Motion to Unseal Affidavits of Probable Cause in Support of Arrest and Search Warrants and Requests for Orders for Production of Documents [C-24].

4. Counsel for Mr. Holmes is concerned that the extensive media coverage of this case, which proceeds unabated, has and will continue to injure his constitutional right to receive a fair trial by an impartial jury in an irreparable fashion. See, e.g., *Sheppard v. Maxwell*, 384 U.S. 333, 350-51 (1966) (public scrutiny of criminal trial “must not be allowed to divert the trial from the very purpose of a court system to adjudicate controversies . . . in the calmness and solemnity of the courtroom according to legal procedures,” including “the requirement that the jury’s verdict be based on evidence received in open court, not from outside sources.” (internal quotations and citation omitted)); *Irvin v. Dowd*, 366 U.S. 717, 728 (1961) (reversal required where petitioner was “tried in an atmosphere [disturbed] by so huge a wave of public passion” that two-thirds of jurors admitted during voir dire to possessing a belief in his guilt); *United States v. McVeigh*, 119 F.3d 806, 815 (10th Cir. 1997) (district court properly exercised discretion to seal suppression motion in Oklahoma City bombing case because public disclosure of materials would “generate pre-trial publicity prejudicial to the interests of all parties in this criminal proceeding.”).

5. This concern is heightened given that the case is now moving into the stage of the case where evidentiary matters will be routinely discussed in court, and issues involving suppression of evidence will be litigated. Indeed, the prosecution appears to share this concern to an extent, as it has filed a number of its responses to non-capital motions under suppression, and has noted that it was doing so because the pleadings address evidence it intends to introduce at trial.

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<sup>1</sup> See [http://www.courts.state.co.us/Courts/County/Cases\\_of\\_Interest.cfm?County\\_ID=57](http://www.courts.state.co.us/Courts/County/Cases_of_Interest.cfm?County_ID=57). Mr. Holmes’s case is currently the only active case listed in this section. Information about the only other case listed, *People v. Aaron Thompson*, No. 07CR1483, was last updated in late 2009.

6. In *People v. Owens*, a capital case that was tried in Arapahoe County in 2008, the concern for the defendant's right to a fair trial led the court, with the agreement of all parties and approximately four months prior to trial, to suppress all transcripts of the proceedings and to deny access by the media to these transcripts. The court in that case concluded that the transcripts constituted criminal justice records within the meaning of C.R.S. § 24-72-301 *et. seq.*<sup>2</sup> as well as "judicial records" pursuant to *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978), to which the public and the media had a common law right of access. It further concluded that the public dissemination of transcripts in the case could be contrary to the public interest pursuant to statute, and that the common law right of access to transcripts was outweighed by concerns for the defendant's rights to due process and a fair trial by an impartial jury. The court also separately ordered the registry of actions to be suppressed in its entirety. See *In re People of the State of Colorado v. Sir Mario Owens*, Case No. 13SA161, "Petition for Original Proceeding and Issuance of Rule to Show Cause under C.A.R. 21," available (with proper log-in information) at: <https://www.jbits.courts.state.co.us/icces/web/document/77872/view.htm?cn=500|S|2013|SA|161>

7. The rule imposed by the trial court suppressing all transcripts in the *Owens* case remains in effect, some five years after the conclusion of the trial. Notably, the Colorado Supreme Court recently declined to reverse this order in response to a petition filed pursuant to Rule 21 requesting such relief by post-conviction counsel for Mr. Owens. See *Id.*

8. If the trial court in *Owens* was persuaded that the public's common law right of access to judicial transcripts needed to yield to Mr. Owens's right to a fair trial – and if the Colorado Supreme Court has concluded that these same concerns require the continued suppression of information in that case – the same concerns must undoubtedly lead this Court to an identical conclusion in Mr. Holmes's case, particularly given that the media coverage of the *Owens* case pales in comparison to the volume and intensity of the media coverage in this case.

9. Mr. Holmes therefore respectfully requests this Court to enter an order suppressing all transcripts, as well as the register of actions, in this case.

10. The public's right to access judicial records, including the transcripts of a criminal proceeding 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).

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<sup>2</sup> C.R.S. § 24-72-302(4) defines "criminal justice records" as "all books, papers, cards, photographs, tapes, recordings, or other documentary materials, regardless of form or characteristics, that are made, maintained, or kept by any criminal justice agency in the state for use in the exercise of functions required or authorized by law or administrative rule . . . ."

11. 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”).

12. To determine whether suppression of transcripts and the register of actions is warranted, 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.*

13. 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).

14. The public’s right of access to the transcripts in these proceedings and the register of actions is clearly outweighed by Mr. Holmes’s constitutional right to a fair trial by an impartial jury under these circumstances. *Hickey*, 767 F.2d at 708.

15. First, as the defense has previously noted, 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). As the case moves forward and this Court continues to hear motions and argument on substantive issues that will have a significant impact on the evidence introduced at trial and the way that the trial will be conducted, allowing the media to have access not only to the proceedings itself but to a physical copy of the transcripts is likely to have a significant and detrimental impact on Mr. Holmes’s ability to obtain due process and a fair trial by an impartial jury.

16. While the media will no doubt continue to attend the proceedings, allowing the press to have access to the physical transcripts of these proceedings in this digital age will exponentially increase the public’s ability to access detailed information about what took place, as the press can and undoubtedly will publish links to these transcripts online. Prospective jurors who may have viewed a news account summarizing the activities and evidence presented in the courtroom with some degree of skepticism will instead have the opportunity to easily access and read for themselves first-hand precisely what transpired in the courtroom.

17. Moreover, 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 proceedings themselves. The same is true, of course, for the transcripts themselves.

18. Increased media scrutiny and widespread publication of these transcripts and the register of actions is likely to increase the risk of the disclosure of information to the public that may be confidential, privileged, or ultimately otherwise inadmissible at trial. Because unfettered public access to the court file would potentially “have the deleterious effect of making publicly available incriminating evidence” that this Court may ultimately conclude “may not be considered in assessing the defendant’s guilt,” suppressing transcripts generated in this case, as well as the register of actions is warranted. *McVeigh*, 119 F.3d at 814.

19. The Court has kept the proceedings in this case open to the media and the public, and has even granted expanded media coverage of hearings several times at various points during the proceedings, allowing both video cameras and still photography in the courtroom. That is all that is required to satisfy the constitutional concerns of the media and the public. See *Press-Enterprise v. Superior Court*, 476 U.S. 1, 13 (1986) (“*Press-Enterprise IP*”) (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).

20. In addition to suppressing the transcripts and the register of actions in this case going forward, Mr. Holmes also requests that this Court remove access to the pleadings in his case from the Court’s website under the “Cases of Interest” section. This action is necessary to preserve and safeguard Mr. Holmes’s rights to due process and a fair trial by an impartial jury under the federal and state constitutions to all extents possible. Indeed, the Court has explicitly stated that there is nothing about this procedure that is required, and that it is merely being doing as a “courtesy” to the media and the public because of the high level of interest in this case. Surely, this “courtesy” must yield to Mr. Holmes’s constitutional rights.

21. While the court file containing redacted versions of pleadings may still be made available to members of the public who appear in person and request to see the file, making the pleadings and register of actions in this case publicly available on the internet for the entire world to access with the click of a forefinger ensures that this case will receive the maximum amount of media attention it can possibly receive, in as great a detail as possible. Indeed, it is common for the local media in particular to provide hyperlinks to the copies of the pleadings filed in this case in connection with articles published.

22. The Court’s publication of the pleadings, orders, and register of actions on this website has ensured that this case has remained front and center in the media. For example, the Court’s recent publication of its order informing the parties that the report from the CMHIP sanity examination was available to the parties sparked a flurry of articles about the case in the media that were speculative and completely unnecessary. The “Cases of Interest” website has undoubtedly had a deleterious effect on Mr. Holmes’s constitutional rights to due process and a fair trial by an impartial jury, and the defense therefore respectfully requests that this practice come to an end.

## Request for a Hearing

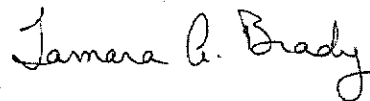
23. Mr. Holmes moves for a hearing on this motion.

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.



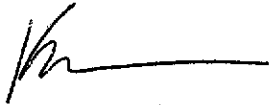
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Tamara A. Brady (No. 20728)  
Chief Trial Deputy State Public Defender



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Kristen M. Nelson (No. 44247)  
Deputy State Public Defender

Dated: September 25, 2013

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff  v.  <b>JAMES HOLMES,</b> Defendant	σ COURT USE ONLY σ
DOUGLAS K. WILSON, Colorado State Public Defender Daniel King (No. 26129) Tamara A. Brady (No. 20728) Chief Trial Deputy State Public Defenders 1300 Broadway, Suite 400 Denver, Colorado 80203 Phone (303) 764-1400 Fax (303) 764-1478 E-mail: <a href="mailto:state.pubdef@coloradodefenders.us">state.pubdef@coloradodefenders.us</a>	Case No. <b>12CR1522</b>      Division 26
<b>ORDER RE: MOTION FOR SPECIFIC PROCEDURES TO SAFEGUARD MR. HOLMES'S RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY [D-180]</b>	

Defendant's motion is hereby GRANTED \_\_\_\_ DENIED \_\_\_\_.

BY THE COURT:

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JUDGE

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Dated

I hereby certify that on September 25, 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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Jacob Edson  
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Nora Zuhartson