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COLORADO SUPREME COURT

Court Address: Ralph L. Carr Judicial Center
1300 Broadway
Denver, CO 80203

Arapahoe County District Court, The Honorable Carlos A. Samour, Jr.

Case No. 12CR1522

IN RE:

PEOPLE OF THE STATE OF COLORADO

vs.

JAMES EAGAN HOLMES,

Defendant,

and VICTIMS,

BRANDON AXELROD, JOSHUA NOWLAN, DENISE TRAYNON, JERRI JACKSON, GREGORY MEDEK, RENA MEDEK, THERESA HOOVER, LYNN JOHNSON, MACHAEL SWEENEY, MALIK SWEENEY, CHICHI SPRUEL, DERICK SPRUEL, MUNIRIH GRAVELLY and ASHLEY MOSER.

COURT USE ONLY

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Case Number:

PETITION UNDER C.A.R. 21 FOR RULE TO SHOW CAUSE

COLORADO SUPREME COURT

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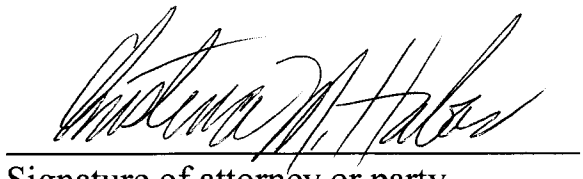
Case Number:

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, where applicable, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28, as it does not exceed 30 pages. The brief also complies with C.A.R. 21 and 32.



Signature of attorney or party

Petitioners, identified as Victims above, by their attorneys, KEATING, WAGNER, POLIDORI & FREE, P.C., hereby respectfully request this Honorable Court to issue an Order to Show Cause to the Arapahoe County District Court below as follows:

A. Identity of Petitioners and proposed Respondent:

Petitioners, named above, are "victims" pursuant to the provisions of the Colorado Victims' Rights Act, found at C.R.S. § 24-4.1-302, who have commenced a civil proceeding against Century Theatres, Inc. in the United States District Court for the District of Colorado under Consolidated Case Number 12-CV-02514-RBJ. Proposed Respondent is The Honorable Carlos A. Samour, Jr., District Court Judge in the Arapahoe County District Court in the proceedings below.

B. Identity of the Court below:

The Court below is the Arapahoe County District Court. The Case Name is People of the State of Colorado vs. James Eagan Holmes, Defendant, under Case Number 12CR1522.

C. Identity of the Persons or Entities against whom relief is sought:

The Honorable Carlos A. Samour, Jr., District Court Judge, Arapahoe County District Court.

D. Ruling or action complained of and the relief being sought:

Petitioners seek relief from the Order Regarding Certain Victims' Motion for Extension of Existing Order Sealing Certain Exhibits to Those Victims and For Release of Exhibits to Victims Under That Order (C-68-A). A copy of that Order is attached (as Exhibit 1) to this Petition.

E. Reasons why no other adequate remedy is available:

The criminal case remains pending, and trial has been postponed indefinitely. Petitioners' civil action remains pending, and a trial date has been scheduled in that matter to commence February 17, 2015, for three weeks. Petitioners are seeking access to certain exhibits that were shown in open court during the Proof Evident/Presumption Great hearing, and Petitioners are unable to wait for resolution of this criminal proceeding to obtain the information.

F. The Issues Presented:

Whether a Court may preclude named victims from obtaining copies of exhibits that were publicly displayed in open court, when the failure to provide those exhibits adversely impacts the ability of those victims to pursue civil claims, and those victims are willing to abide by the terms of the Court's Order suppressing those exhibits from public view?

G. The Facts Necessary to Understand the Issues Presented:

The underlying proceeding involves the prosecution of James Eagan Holmes who has been accused of numerous felonies arising from an attack at the Aurora Century 16 Theatre on July 20, 2012. The Petitioners are all named victims in the underlying proceedings, and have commenced a civil action against the landowner of the Theatre in the United States District Court. The civil action has been proceeding, with a trial date set to commence on February 17, 2015. In that civil action, Petitioners will be required to establish liability against the landowner of the theater where the shooting occurred.

Generally, in cases of this type, the criminal proceedings against the alleged perpetrator of the crime is concluded well before any civil litigation arising from the events is concluded. Also, generally, civil litigants would have free access to investigative materials from the criminal investigation. This case involves the very unique circumstance where certain exhibits have been suppressed from the public, but those same exhibits are important to the development and proof of the civil case. Because of the unique nature of the criminal proceedings, Petitioners have requested access only to those exhibits that have already been shown in open court.

Beginning on July 20, 2012, the Court in the underlying criminal case entered several Orders to seal information relating to the investigation in this case,

beginning with an Order to Seal Search Warrants, Affidavits, Orders and Case File, entered July 20, 2012 (Exhibit 2) and an Order Re: Motion to Unseal Court File (Including Docket)/("Suppression Order")(C-4c) entered August 13, 2012. By Motion dated September 28, 2012, certain victims[1] sought access to some of the information from the criminal investigation by attempting to intervene in the criminal action for that purpose. By Order dated October 30, 2012, that Motion was denied, and the presiding Judge at that time noted:

> * * * Once the proof evident/preliminary hearing takes place, the Victims/Intervenors may wish to consider filing other appropriate requests seeking such information as the posture of this case and this issue may be different at that time. (Order, p. 2, Exhibit 3)

The Proof Evident/Presumption Great hearing took place in the Arapahoe County District Court beginning on January 7, 2013, ending on January 9, 2013. That hearing was open to the public, and a number of exhibits (including photographs and video) were presented in open court during that hearing.

The civil case filed by Petitioners has been progressing in the United States District Court. Presently, Petitioners are required to respond to a Motion for Summary Judgment pursuant to F.R.C.P. 56 seeking dismissal of all claims under the Premises Liability Act in Colorado. The exhibits shown at the Proof

[1] The named victims in that Motion were fewer in number than those involved in this Petition, since some of these victims joined the civil action at a later time.

Evident/Presumption Great Hearing are important to be presented in response to that Motion, and also at any trial of the civil case in future. Those exhibits include photographs taken from the gunman's cellphone, in which he took photos of the theater on three previous occasions prior to the shooting; video surveillance taken from the recordings of the theatre owner showing the gunman inside of the theater looking around; photographs of the weapons used by the gunman; and photographs of the interior of the theater showing the damage inside. These victims' inability to utilize those exhibits, even under a Protective Order, adversely impacts their ability to pursue their claims for damages.

On September 25, 2013, Defendant in the underlying criminal proceeding filed a Motion for Specific Procedures to Safeguard Mr. Holmes' Right to a Fair Trial by an Impartial Jury [D-180] (Exhibit 4), in which he requested that the Court suppress all transcripts of proceedings in the case. In response to that, Petitioners filed a Response and Objection dated October 4, 2013, and in the alternative, Petitioners requested that the Court disclose the exhibits to them, and that they would comply with the Court's existing Orders prohibiting further disclosure to the public (Exhibit 5). The People filed their Response (Exhibit 6), the Defendant filed his Response (Exhibit 7) and Century Theatres, Inc. also filed a Response (Exhibit 8). Petitioners filed their Reply on November 20, 2013 (Exhibit 9).

By Minute Order dated October 23, 2013 (Exhibit 10) the Court suppressed any exhibits admitted during noncapital hearings (including the Proof Evident/Presumption Great Hearing) which had not been previously released. Also, by Order dated December 4, 2013, the Court in the underlying criminal proceeding denied the Petitioners' Request. (Exhibit 11) It is that Order that forms the basis for the current Petition.

H. Argument and Points of Authority:

Under C.A.R. 21, this Court has original jurisdiction to review whether the trial court in the underlying criminal case abused its discretion when the trial court based its decision to deny these victims' request for exhibits not on any existing threats to the integrity of the criminal prosecution, but instead based that decision upon the speculation that providing those exhibits might create a situation that would impact the criminal case. This relief is appropriate when no other adequate remedy, including relief available by appeal or under C.R.C.P. 106, is available. The trial court's failure to provide these victims with the information they seek places them at a significant disadvantage in pursuing their civil claims, and there is no meaningful or timely relief available to them in the absence of this C.A.R. Petition. *See* Morgan v. Genesee Co. , 86 P.3d 388, 391 (Colo. 2004).

The underlying criminal case presents a unique situation where the Court must balance the respective rights of the parties, the victims and the public. Recognizing the difficulties inherent in resolving those issues, Petitioners sought only to obtain copies of exhibits that were displayed in Open Court, and further agreed that they would abide by the Court's Order limiting access to those materials, and prohibiting public disclosure. Petitioners wish to make it clear to this Court that they were provided an opportunity to review the exhibits at the offices of the District Attorney, and Petitioners have taken the opportunity to do so, through their counsel. Petitioners are certainly appreciative of that process.

As the underlying Court noted, the exhibits sought by Petitioners qualify as "criminal justice records" under the Colorado Criminal Justice Records Act (CCJRA) found at C.R.S. § 24-72-301, *et seq.* As this Court has noted, "Except for records of official actions, . . . all other criminal justice records, at the discretion of the official custodian, may be open for inspection by any person at reasonable times, except as otherwise provided by law." *See*, 24-72-304(1), 7 C.R.S. (1999); Office of the State Court Adm'r v. Background Info. Servs., Inc., 994 P.2d 420, 427 (Colo. 1999). Further, the custodian is "authorized to make such rules and regulations as are reasonably necessary for the protection of the records and the prevention of unnecessary interference with the regular discharge

of duties." Id. Under that Act, the custodian of those records just conduct a balancing test, "taking into account relevant public and private interests." Harris v. Denver Post Corp., 123 P.3d 1166, 1170 (Colo. 2005). Under the unique circumstance of this case, the Court acted as "custodian" for purposes of balancing those competing interests.

A district court must balance the competing interests in determining whether criminal records should be sealed, and a court's decision will not be overturned absent an abuse of discretion. People v. Bushu, 876 P.2d 106, 107 (Colo.App. 1994); People v. Whittle, 628 P.2d 169 (Colo.App. 1981). In making this determination, this Court has directed the custodian of the records to balance pertinent factors, "which 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." Bushu, *supra.* at 107, cited by this Court in Harris, *supra.*

Because the District Court acted in the capacity of a "custodian" of these records, the Court was required to articulate the basis for its balancing in sufficient

detail to allow meaningful review of the decision. First, the District Court concluded that the interests of Petitioners in obtaining copies of those exhibits, even while under a strict order prohibiting further public dissemination, was outweighed by the People's interest in preserving the integrity of the prosecution of the case and the defendant's constitutional right to a fair trial. In reaching that conclusion, however, the Court did not identify how such limited disclosure would threaten those interests in sufficient detail to allow for meaningful review.

In Huspeni v. El Paso County Sheriff's Dep't (In re Freedom Colo. Information, Inc.), 196 P.3d 892 (Colo. 2008), this Court stated that in order to review a denial of inspection of records under an abuse of discretion standard, a reviewing court requires examination of the basis for the final determination to assure that the action was justified. Accordingly, the custodian must articulate the grounds for the decision with sufficient detail to enable the reviewing court to determine whether the custodian considered the relevant factors and made a reasonable choice. Huspeni, *supra.*, at 903. (*citing* Bd. of County Comm'rs of County of Adams v. Isaac, 18 F.3d 1492, 1497 (10th Cir. 1994)). In Huspeni, this Court specifically noted the "in-depth balancing process" used by the Jefferson County Sheriff in denying access to certain criminal justice records arising from the Columbine shootings as standing in "stark contrast" to the "lack of analysis"

before the Court in Huspeni. Similarly, in the instant case, there was no in-depth analysis of the unique nature of Petitioners' request. Instead, the sole basis for the underlying Court's decision was the speculation that other parties might request access, and that would risk compromising the integrity of the proceedings. There was no articulated basis as to why restricted access to exhibits that had already been publicly discussed would result in that compromised integrity.

In weighing the interests of continuing to suppress the exhibits, the Court noted that, "the reality is that [the victims] are unlikely to complete their civil action before the trial in this case." (Order, Exhibit 11, p. 8) However, soon after the Court issued that Order, the Court also postponed the criminal trial in the underlying case indefinitely.[2] The Court also speculated that other evidence would be made public in the criminal trial that would be "just as relevant" as the exhibits sought by the Petitioners. The underlying Court's decision not to reschedule the criminal trial until after determination of other Motions that will not be heard until late January, 2014, nearly guarantees that the trial of the underlying criminal case will not occur until well after Petitioners' civil trial, and it certainly will not occur until well after Petitioners are required to defend against a Motion for Summary Judgment in the civil action -- Petitioners' Response to an existing Motion for

[2] This Order was contained in the Court's Register of Actions, dated November 21, 2013, (attached as Exh. 12).

Summary Judgment is now due on February 14, 2014. Thus, without providing Petitioners access to those exhibits, the underlying Court has prohibited them from utilizing exhibits that are very important in their civil action.

The Court also expressed a concern that:

> "[G]ranting [the Motion] would open the proverbial floodgates. Other nonparties could assert an interest in the preliminary hearing exhibits and other exhibits. Granting access to all the exhibits to an ever-widening group of nonparties would be unwise, as it would unnecessarily risk compromising the integrity of the proceedings and the defendant's right to a fair trial." (Order, Exhibit 11, p. 8)

First, there was no evidence presented to the District Court that any other member of the public was seeking disclosure of those exhibits -- the District Court merely speculated that this "could" occur. There was no evidence cited by the District Court in its Order supporting such speculative. Further, that concern directly contradicts the nature of the Petitioners' agreement to abide by any Protective Order entered to protect the integrity of those proceedings. In fact, Petitioners advised the underlying Court that The Honorable Michael E. Hegarty, United States Magistrate Judge, expressly indicated that he would enforce the terms of a restrictive Protective Order to ensure that the exhibits would not be publicly disseminated. *See*, Exhibit 9, ¶ 4.

Instead of considering the unique circumstances presented by Petitioners, the Court chose to review the Petitioners' request in the context of members of the

public seeking full disclosure of those exhibits. The limited nature of Petitioners' request, and Petitioners' express intention to continue to abide by any Protective Order prohibiting further disclosure distinguished their request from those made by any member of the public. Because the District Court based its decision in large part on its speculation that allowing Petitioners limited and controlled access to those exhibits might cause others to request access, and thus may compromise the integrity of the case, it failed to conduct a sufficient analysis as custodian of those criminal justice records, and its Order constitutes an abuse of discretion.

The District Court also concluded that Petitioners had no right to access those exhibits under the provisions of the Victims Rights Act, found at §§ 24-4.1-301, *et seq.* (2008). Petitioners agree that the VRA does not itself provide them with an independent right to obtain the exhibits, however, Petitioners urge this Court to consider the legislative intent behind the VRA in considering the value of Petitioners' interests in obtaining the requested exhibits.

I. List of Supporting Documents:

The following documents are attached to this Petition as an Appendix:

1. Order to Seal Search Warrants, Affidavits, Orders and Case File, entered July 20, 2012;

2. Order Re: Motion to Unseal Court File (Including Docket)/("Suppression Order")(C-4c) entered August 13, 2012;

3. Motion to Intervene dated September 28, 2012;

4. Order Denying Motion to Intervene entered October 30, 2012;

5. Motion for Specific Procedures to Safeguard Mr. Holmes' Right to a Fair Trial by an Impartial Jury [D-180] dated September 25, 2013;

6. Certain Victims' Response and Objection to Defendant's Motion for Specific Procedures and Motion for Extension of Existing Order Sealing Certain Exhibits to Those Victims and For Release of Exhibits to Victims Under That Order dated October 4, 2013;

7. Court's Minute Order entered October 23, 2013 suppressing exhibits;

8. People's Response to Certain Victims' Motion dated November 8, 2013;

9. Defendant's Response to Certain Victims' Motion dated November 8, 2013;

10. Century Theatres, Inc.'s Response to Certain Victims' Motion dated October 9, 2013;

11. Certain Victims' Reply dated November 13, 2013;

12. Order Regarding Certain Victims' Motion for Extension of Existing Order Sealing Certain Exhibits to Those Victims and For Release of Exhibits to Victims Under That Order (C-68-A) entered December 4, 2013;

13. Minute Order, Registry of Actions, November 21, 2013.

J. Listing of Attorneys:

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WHEREFORE, Petitioners respectfully request that this Court issue an Order to Show Cause to the Arapahoe County District Court, The Honorable Carlos A. Samour, Jr., as to why its Order Regarding Certain Victims' Motion for Extension of Existing Order Sealing Certain Exhibits To Those Victims and For Release of Exhibits to Victims Under That Order (C-68-A) should not be reversed, and Petitioners granted access to those Exhibits under a Protective Order.

Respectfully submitted this 3RD day of January, 2014.

Respectfully submitted,

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POLIDORI FREE, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on this 3RD day of January, 2014, a true and correct copy of the above and foregoing Petition for Order to Show Cause was served upon the following parties of record:

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