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DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO

Court Address: 7325 S. Potomac St.
Centennial, CO 80112

Plaintiff: PEOPLE OF THE STATE OF COLORADO

vs.

Defendant: JAMES E. HOLMES

and,

Non-Party Movants: The Aurora Theater Shooting Trial Press Pool (comprised of ABC News; CBS News; CNN; *The Denver Post*; KCEC-TV, Channel 50; KCNC-TV, Channel 4; KDEN-TV, Channel 25; KDVR-TV, Channel 31; KMGH-TV, Channel 7; KUSA-TV, Channel 9; KWGN-TV, Channel 2; and NBC News

▲ COURT USE ONLY ▲

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Case No. 12-CR-1522

Division: 22

**MOTION BY MEDIA PETITIONERS
FOR MID-TRIAL ACCESS (TO MAKE COPIES) OF ALL NON-GRAPHIC IMAGES
EXHIBITS ADMITTED INTO EVIDENCE AND PUBLISHED TO THE JURY DURING
THE TRIAL**

Movants, "The Aurora Theater Shooting Trial Press Pool", comprised of ABC News; CBS News; CNN; *The Denver Post*; KCEC-TV, Channel 50; KCNC-TV, Channel 4; KDEN-TV, Channel 25; KDVR-TV, Channel 31; KMGH-TV, Channel 7; KUSA-TV, Channel 9; KWGN-TV, Channel 2; and NBC News (collectively, the "Press Pool"), by and through their

undersigned counsel at Levine Sullivan Koch & Schulz, LLP, hereby respectfully move this Honorable Court for Mid-Trial Access to Exhibits Admitted into Evidence and published to the jury during the trial. As grounds for this Application, the Press Pool states as follows:

1. As members of the news media, and as members of the public, the Press Pool and its constituent members have standing to seek access to judicial records on file in this Court. *Star Journal Publ'g Corp. v. Cnty. Court*, 591 P.2d 1028 (Colo. 1979); *Globe Newspaper Co. v. Superior Court for Norfolk Cnty.*, 457 U.S. 596, 609 n.25 (1982); *Times-Call Publ'g Co. v. Wingfield*, 410 P.2d 511 (Colo. 1966). *See also* Order Regarding Media Petitioner's Motion to Unseal Affidavits of Probable Cause in Support of Arrest and Search Warrants and Requests for Orders for Production of Documents (C-24) at 5-6 (Apr. 4, 2013) (holding that members of the news media have standing to seek access to records filed in this proceeding) (hereinafter "Order Unsealing Affidavits").

2. The Press Pool respectfully request that the Court grant them access, to make copies, of all Non-Graphic Images exhibits¹— including, but not limited to, audio and video tapes, photographs, documents, and physical evidence² -- that are admitted and published to the jury, pursuant to Colorado's Criminal Justice Records Act, § 24-72-301, *et seq.*, C.R.S., as well as the First Amendment to the Constitution of the United States.

3. Colorado's Criminal Justice Records Act declares this Court to be a "custodian" of its "criminal justice records," *see* § 24-72-302(3), C.R.S. That statute provides that members of the public who wish to inspect "criminal justice records" are also afforded **the right to obtain copies** of such records. *See* § 24-72-306, C.R.S. *See also* Colo. Judicial Dep't, *Public Access to Court Records* § 3.20 (Sept. 2014) ("Public access" means that the public may inspect **and obtain a copy** of information in a court record." (emphasis added)); *see id.* § 3.10(a) (including within the definition of "court record" any "document, information, or other item that is collected, received, or maintained by a court or clerk of court in connection with a judicial proceeding").

4. "It is clear that courts of this country recognize a general right [of the public] to inspect *and copy* public records and documents, including judicial records and documents." *Nixon v. Warner Commc'ns*, 435 U.S. 589, 597 (1978) (emphasis added).

5. As this Court has previously recognized, in *Star Journal Publ'g Corp. v. Cnty. Court*, 591 P.2d 1028, 1030 (Colo. 1979), Colorado's Supreme Court "cited with approval ABA

¹ The Press Pool does not seek to make a copy of any of the "Graphic Images" exhibits that were the subject of P-118 and P-118B, and of the Court's Order on same (March 24, 2015).

² Although physical evidence is not a "writing" subject to the CCJRA, courts have provided the press with access to such exhibits, for purposes of photography, under the public's First Amendment and common law rights to inspect and copy trial exhibits. *See infra* ¶ 12.

Standard 8-3.2” governing public access to judicial records. Order Unsealing Affidavits at 7. Notably, the most recent version of those ABA Standards (approved in 2013) provides that:

Standard 8-5.2. Public Access to Judicial Proceedings and Related Documents *and Exhibits*

- (a) Subject to the limitations set forth below, in any criminal matter, the public presumptively should have access to all judicial proceedings, related documents *and exhibits*, and any record made thereof not otherwise required to remain confidential. A court may impose reasonable time, place and manner limitations on public access.

ABA Standard on Fair Trial and Free Press (2013), available at http://www.americanbar.org/groups/criminal_justice/standards/crimjust_standards_fairtrial_blk.html#3.2 (emphasis added).

6. Although the ABA has not yet approved for publication the Commentary to the 2013 version of the Fair Trial Free Press Standards, the 1992 version contained this informative commentary on the meaning of the term “access”:

The central purpose of the right of access is not simply to maintain an open courtroom. The point is for the public, not just those attending a proceeding, to be able to gain information relevant to an assessment of the judicial authority. *The nature of information will often dictate the most appropriate form of the genuinely public access.* For instance, *exhibits presented in open court which are either show, read, or played to the jury are not thereby necessarily accessible to the public, even those attending the trial, in any meaningful way.* Such exhibits may need to be made available to the public outside the courtroom for purposes of reading or viewing in order to facilitate informed and accurate dissemination of that information.

ABA Standards for Criminal Justice 8-3.2 (3d ed. 1992) (emphasis added).

7. Here, the Court has authorized Expanded Media Coverage of the entire trial, via a fixed-position “bird’s eye” video camera mounted on the ceiling of the courtroom. Thus, the exhibits displayed to the jury on a video screen in the courtroom (with the exception of the “Graphic Images” exhibits) will, technically, be “visible” to the public observing the proceedings via the EMC video feed. However, as the commentary to the ABA Standard recognizes, the information contained in documentary exhibits displayed in open court are not “necessarily accessible . . . *in any meaningful way*” to those who are “attending the trial” either in person, or via remote viewing. Particularly given the image quality produced by the Court’s CCTV video camera, its lack of zooming in on the exhibits display monitor, and the “fine print” in various documentary exhibits that will be presented at trial (*see, e.g.*, 4-page “Client Summary” submitted as Attachment to Supplement to D-15, available at https://www.courts.state.co.us/userfiles/file/Court_Probation/18th_Judicial_District/18th_Courts/12CR1522/001/Supplement%20to%20D-15.pdf), the public will be denied “meaningful” access

to the documentary exhibits admitted into evidence and published to the jury unless the Press Pool is permitted to provide the public³ with an actual copy of those exhibits.

8. Numerous courts throughout the country have recognized a right of the press and the public, under the common law, to obtain copies of exhibits that have been admitted into evidence and have been shown to the jury in a criminal trial. *See, e.g., In re Griffin Television*, 7 Media L. Rep. (BNA) 1947, 1948 (W.D. Okla. 1981) (quoting *In re Nat'l Broad. Co.*, 635 F.2d 945, 952 (2d Cir. 1980)) (emphasis added):

There is a presumption in favor of public inspection and *copying* of any item entered into evidence at a public session of a trial. Once the evidence has become known to the members of the public, including representatives of the press, through their attendance at a public session of court, it would take the most extraordinary circumstances to justify restrictions on the opportunity of those not physically in attendance at the courtroom to see and hear the evidence, when it is in a form that readily permits sight and sound reproduction.

See also United States v. Guzzino, 766 F.2d 302, 303-04 (7th Cir. 1985) (stating that “the common law right of the public to inspect and copy judicial records . . . includes the right of the media to copy audio and video tapes which have been admitted into evidence in a criminal trial”); *Valley Broad. Co. v. United States Dist. Court*, 798 F.2d 1289, 1293 (9th Cir. 1986) (granting request by the press to make copies of audio and video tapes introduced into evidence **at the close of each day of trial**); *In re CBS, Inc.*, 828 F.2d 958 (2d Cir. 1987); *In re Philadelphia Newspapers, Inc.*, 746 F.2d 964 (3d Cir. 1984); *In re Nat'l Broad. Co.*, 635 F.2d 945, 952 (2d Cir. 1980).

9. In *In re Associated Press*, 172 F. App'x 1, 4 (4th Cir. 2006), the United States Court of Appeals for the Fourth Circuit held that **it was reversible error for the trial court to wait until the end of the trial to provide access to trial exhibits that had been admitted into evidence**, in a trial that was open to the public, and the appeals court granted a writ of mandamus directing the district court to provide the media with one copy of each exhibit admitted into evidence and published to the jury “as soon as practically possible, but in no event later than 10:00 a.m. on the day after the exhibit is published to the jury.”

³ Alternatively, as discussed further below, the Court may provide the public with copies of the admitted exhibits directly, by posting them to a special section of the Court's website. This process has proved successful in providing “meaningful” access to trial exhibits in other high-profile criminal cases. *See Robert T. Reagan, Sealing Court Records and Proceedings: A Pocket Guide* at 14-15 (Federal Judicial Center 2010) (“In high-profile cases, courts work with the parties to make copies of exhibits that are entered into evidence available to news media, to the extent practical, and courts often post these exhibits on their websites.”)

10. In response to the Writ of Mandamus issued by the Fourth Circuit, U.S. District Court Judge Leonie Brinkema directed the clerk of the court to post all admitted exhibits, with the exception of seven exhibits either classified or otherwise under seal, to the Court's website. See Jerry Markon, *Federal Court Posts Online Nearly All Evidence From Moussaoui Trial*, Wash. Post, Aug. 1, 2006 http://www.washingtonpost.com/wp-dyn/content/article/2006/07/31/AR2006073100866_pf.html; see also Trial Exhibits in United States v. Zacarias Moussaoui, United States District Court Easter District of Virginia, <http://www.vaed.uscourts.gov/notablecases/moussaoui/exhibits/index.htm> (last visited March 31, 2015).

11. *United States v. Moussaoui* is not the only high-profile criminal case that has employed a public website as the means of making admitted trial exhibits available to the public shortly after they are displayed in open court. See also Peter Dujardin and Ashley Speed, *In Unusual Move, Trial Exhibits Posted Online in McDonnell Case*, The Daily Press, Aug. 17, 2014, http://articles.dailypress.com/2014-08-17/news/dp-nws-crime-notebook-0817-20140817_1_trial-exhibits-trial-documents-martinovich; Mike Scarcella, *DOJ Ordered to Post Williams & Connolly Defense Exhibits Online*, The Blog of LegalTimes, (Sept. 18, 2008), <http://legaltimes.typepad.com/blt/2008/09/doj-ordered-to.html> (during the federal trial against Senator Ted Stevens).

12. In the recent trial of accused Boston marathon bomber Dzhokhar Tsarnaev, in federal court in Boston, the judge allowed the news media to photograph all physical evidence exhibits – including clothing and fragments of the pressure-cooker bombs – following the completion of each day's court proceedings, and each afternoon the Court provided members of the news media with DVDs containing all admitted documents, photos, audio and video exhibits. See, e.g., Andy Thibault and Tom Winter, *Boston Marathon Bombing Trial: Feds Not Sure Where Bombs Made*, <http://www.nbcnews.com/storyline/boston-bombing-trial>; see also <http://www.nbcnews.com/storyline/boston-bombing-trial/blood-stained-notes-scrawled-tsarnaevs-boat-hideout-n320901>; <http://www.nbcnews.com/storyline/boston-bombing-trial/boston-bombing-trial-video-shows-carjack-victims-daring-escape-n322536>.

13. Although the Court's posting the admitted exhibits to the Court's website may be the most efficient means to provide meaningful public access to the trial exhibits, the Press Pool would also be willing to arrange for the posting of all trial exhibits admitted into evidence, if a Pool representative is provided access to the exhibits, at the end of each day's session, in a secure, ancillary courtroom, to photograph each admitted exhibit, under supervision by court staff.

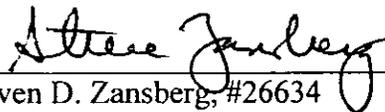
14. The public's right to access judicial records is a right of *contemporaneous* access. *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 126-27 (2d Cir. 2006) ("Our public access cases and those in other circuits emphasize the importance of *immediate* access when a right to access is found." (emphasis added) (citations omitted)); *Grove Fresh Distribs. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (noting that access to court documents "should be immediate and contemporaneous"); see also *Daily Press, Inc. v. Commonwealth of Virginia*, 739

S.E.2d 636, 640 (Va. 2013) (with respect to trial exhibits: “to work effectively, public access must be contemporaneous—the public must be able to scrutinize the judicial process as it takes place. . . . [The press provides] immediate descriptions of events as they unfold. . . . To delay or postpone disclosure undermines the benefits of public scrutiny and may have the same result as complete suppression.”).⁴

WHEREFORE, the Press Pool respectfully asks that the Court enter an Order directing the Clerk of the Court to make available for copying (or provide a copy) of all non-Graphic Image exhibits that are published to the jury in open court and/or admitted into evidence in the course of this trial.

Respectfully submitted this 3rd day of April,
2015, by:

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*Attorneys for Aurora Theater Shooting Trial
Press Pool*

⁴ *see also Associated Press v. United States Dist. Court*, 705 F.2d 1143, 1147 (9th Cir. 1983) (even a 48-hour delay in access constituted “a total restraint on the public’s first amendment right of access even though the restraint is limited in time”); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 507 (1st Cir. 1989) (“even a one to two day delay impermissibly burdens the First Amendment”); *Courthouse News Serv. v. Jackson*, 38 Media L. Rep. (BNA) 1890, 1893 (S.D. Tex. 2009) (24 to 72 hour delay in access to civil case-initiating documents was “effectively an access denial and is, therefore, unconstitutional”). As the Supreme Court observed in *Nebraska Press Ass’n v. Stuart*, “[d]elays imposed by governmental authority” are inconsistent with the press’ “traditional function of bringing news to the public promptly.” 427 U.S. 539, 560-61 (1976).

CERTIFICATE OF MAILING

I hereby certify that on this 3rd day of April, 2015, a true and correct copy of this **MOTION BY PRESS POOL FOR MID-TRIAL ACCESS (FOR COPYING) OF NON-GRAPHIC IMAGES EXHIBITS ADMITTED INTO EVIDENCE AND PUBLISHED TO THE JURY** was delivered via FACSIMILE to the attorneys below and was deposited in the U.S. Mail, postage prepaid, correctly addressed to the following:

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