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<p><b>DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO</b></p> <p>Court Address: 7325 S. Potomac St. Centennial, CO 80112</p> <hr/> <p><b>Plaintiff:</b> PEOPLE OF THE STATE OF COLORADO</p> <p><b>vs.</b></p> <p><b>Defendant:</b> JAMES E. HOLMES</p> <p>and,</p> <p><b>Non-Party Movants:</b> The Denver Post</p>	<p>JUN 19 2015</p> <p>CLERK OF THE COMBINED COURTS ARAPAHOE COUNTY, COLORADO</p> <p>▲ COURT USE ONLY ▲</p>
<p><b>Attorneys for Movants:</b> Steven D. Zansberg, #26634 Thomas B. Kelley, #1971 Christopher P. Beall, #28536 LEVINE SULLIVAN KOCH &amp; SCHULZ, LLP 1888 Sherman Street, Suite 370 Denver, Colorado 80203 Phone: (303) 376-2400 FAX: (303) 376-2401 szansberg@lskslaw.com</p>	<p>Case No. 12-CR-1522</p> <p>Division: 22</p>
<p><b>MOTION BY THE DENVER POST FOR ACCESS TO VIEW (AND COPY) ALL EXHIBITS ADMITTED INTO EVIDENCE AND PUBLISHED TO THE JURY DURING THE TRIAL BUT NOT SHOWN TO THE PUBLIC IN ATTENDANCE IN THE COURTROOM (PARTIAL TRIAL CLOSURE</b></p>	

Movant *The Denver Post* by and through its undersigned counsel at Levine Sullivan Koch & Schulz, LLP, hereby respectfully moves this Honorable Court for access to view all exhibits admitted into evidence and published to the jury during the trial but not shown to the public in attendance in the courtroom. As grounds for this Application, *The Denver Post* states as follows:

1. As a member of the news media, and as a member of the public, Movant has standing to seek access to judicial records on file in this Court, and to attend judicial

proceedings, including the trial. *Star Journal Publ'g Corp. v. Cty. Ct.*, 591 P.2d 1028 (Colo. 1979); *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 609 n.25 (1982); *Times-Call Publ'g Co. v. Wingfield*, 410 P.2d 511 (Colo. 1966).

2. Movant respectfully requests that the Court grant it, as a member of the public, access to view (and to make copies), all exhibits that are admitted into evidence and published to the jury, but are **not shown to the public** present in the Courtroom, 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. Jud. 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.*, 591 P.2d at 1030, Colorado's Supreme Court "cited with approval ABA 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 Criminal Justice Standard on Fair Trial and Free Press, Standard 8-5.2 (2014), available at [http://www.americanbar.org/groups/criminal\\_justice/standards/crimjust\\_standards\\_fairtrial\\_blk.html#3.2](http://www.americanbar.org/groups/criminal_justice/standards/crimjust_standards_fairtrial_blk.html#3.2) (emphasis added). As the ABA has recognized:

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 Fair Trial and Free Press, Standard 8-3.2 (3d ed. 1992) (emphases added).

6. 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) (emphasis added) (quoting *In re Nat'l Broad. Co.*, 635 F.2d 945, 952 (2d Cir. 1980)):

There is a presumption in favor of public inspection and copying of any item entered into evidence at a public session of a trial.

*See also United States v. Guzzino*, 766 F.2d 302, 303-04 (7th Cir. 1985); *Valley Broad. Co. v. U.S. Dist. Ct.*, 798 F.2d 1289, 1293 (9th Cir. 1986); *In re CBS, Inc.*, 828 F.2d 958 (2d Cir. 1987); *In re Phila. Newspapers, Inc.*, 746 F.2d 964 (3d Cir. 1984); *In re Nat'l Broad. Co.*, 635 F.2d 945, 952 (2d Cir. 1980).

7. Previously, the People moved the Court to allow certain “graphic images” exhibits be admitted into evidence and shown to the jury, but not made available to members of the public attending the trial. The Court emphatically denied that unopposed request, holding that **to deny the public attending the trial to view exhibits submitted to the jury would constitute a “partial closure” of the trial**, which could only be ordered upon the entry of findings, on the record, that such closure was justified by a “compelling and overriding interest that outweighs . . . the public’s and media’s right of access to the proceedings under the First Amendment”:

[B]ecause the People have not presented a compelling and overriding interest that outweighs the defendant's Sixth Amendment right to a public trial and the public's and the media's right of access to the proceedings under the First Amendment, the Court denies the request to conceal the Graphic Images from public view.

. . . the defendant has not executed a voluntary, knowing, and intelligent waiver of his constitutional right to a public trial. Nor have defense counsel waived such right on the defendant's behalf as a strategic decision in this case. And, **in the end, the law imposes an independent duty on the Court to ensure this trial is public.**

**To conceal the Graphic Images from the public and the media would be to partially close the trial.** This is problematic. As another Court recently recognized, “ours is an open judicial system.” *In re Spokesman-Review*, 569 F. Supp. 2d 1095, I 105 (D. Idaho 2008). **Closure of any part of the trial can only be justified by “a compelling interest that outweighs the lengthy history of public access to open court proceedings.”** *Id.*

... In sum, as much as the Court understands and respects the family members’ desire for privacy, under the law, *this is not a compelling and overriding interest that outweighs the defendant’s constitutional right to a public trial or the public’s and the media’s right of access to open proceedings.*

Order Regarding People's Motion to Limit the Public Display of Some Admitted Exhibits, Specifically Autopsy Photographs, Crime Scene Photographs Containing Images of Homicide Victims, and Crime Scene Videos Containing Images of Homicide Victims, and to Limit Viewing to the Parties, to the Court and to the Jury (P-118-B) (Mar. 24, 2015) (emphasis added) (hereinafter “March 24 Order”).<sup>1</sup>

8. Upon information and belief, during the testimony of Dr. Lynn Fenton, certain written notes she had made of her meetings and other interactions with the defendant were admitted into evidence as documentary exhibits and shown to the jury (prior to the jurors submitting their own questions to Dr. Fenton), but those documentary exhibits were not shown to the public attending the trial. Undersigned counsel and the Denver Post are not aware of any order the Court entered making the requisite findings prior to effectuating the partial closure of the trial.<sup>2</sup>

9. In order to cure any partial closure of the trial that was not preceded by the constitutionally required findings, and to fully comply with the First and Sixth Amendment standards the Court acknowledged and adopted in the March 24 Order, the public must be provided access to view *all* exhibits that have been admitted into evidence and published to the jury, including, but not limited to Dr. Fenton’s notes, that were not shown to the public who attended the trial. In addition, the public and press should be provided access to these exhibits for purposes of making copies thereof.<sup>3</sup>

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<sup>1</sup> Because the Graphic Images exhibits were visible to members of the public who attended the trial in the courtroom, those exhibits are not subject to this motion.

<sup>2</sup> Obviously the Defendant’s psychiatrist-patient privilege that may have once existed with respect to Dr. Fenton’s note, is no longer extant, as a result of his having placed his mental condition at issue in this proceeding.

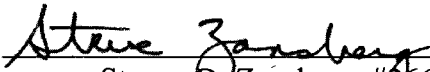
<sup>3</sup> In its ruling on C-193, the Court deemed untimely the Press Pool’s request *to make copies* of all documentary exhibits that are admitted into evidence and published to the jury (but

10. 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 (2nd 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. 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.”).<sup>4</sup>

WHEREFORE, the Denver Post respectfully asks that the Court enter an Order directing the Clerk of the Court to make available for viewing and copying (or provide a copy) of all exhibits that are admitted into evidence and published to the jury that are not shown to the public in attendance at the trial.

Respectfully submitted this 19th day of June, 2015, by:

LEVINE SULLIVAN KOCH & SCHULZ, LLP

  
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not shown on the courtroom's video monitor). The present motion, presented mid-trial, and after such exhibits have actually been admitted into evidence and shown to the jury, without any public viewing of such exhibits, is timely.

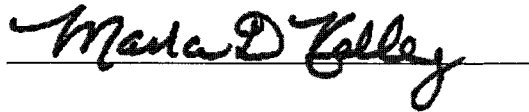
<sup>4</sup> *See also Associated Press v. U.S. Dist. Ct.*, 705 F.2d 1143, 1147 (9th Cir. 1983) (even a 48-hour delay in access constituted “a total restraint on the public's first amendment right of access even though the restraint is limited in time”); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 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”).

**CERTIFICATE OF MAILING**

I hereby certify that on this 19th day of June, 2015, a true and correct copy of this **MOTION BY *THE DENVER POST* FOR ACCESS TO VIEW (AND COPY) ALL EXHIBITS ADMITTED INTO EVIDENCE AND PUBLISHED TO THE JURY BUT NOT SHOWN TO THE PUBLIC IN ATTENDANCE AT THE TRIAL (PARTIAL TRIAL CLOSURE)** was delivered via email to the attorneys below and was deposited in the U.S. Mail, postage prepaid, correctly addressed to the following:

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