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DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO	Filed
Court Address: 7325 S. Potomac St. Centennial, CO 80112	APR 14 2015
Plaintiff: PEOPLE OF THE STATE OF COLORADO	CLERK OF THE COMBINED COURT ARAPAHOE COUNTY, COLORADO
vs.	▲ COURT USE ONLY ▲
Defendant: JAMES E. HOLMES	
and.	
Non-Party Movants: The Aurora Theater Shooting Trial Press Pool (comprised of ABC News; CBS News; CNN; <i>The Denver Post</i> ; 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)	
Attorneys for Movants: Steven D. Zansberg, #26634 Thomas B. Kelley, #1971 Christopher P. Beall, #28536 LEVINE SULLIVAN KOCH & SCHULZ, LLP 1888 Sherman Street, Suite 370 Denver, Colorado 80203 Phone: (303) 376-2400 FAX: (303) 376-2401 szansberg@lskslaw.com	Case No. 12-CR-1522 Division: 22
REPLY IN SUPPORT OF MEDIA PETITIONERS' MOTION FOR MID-TRIAL ACCESS (TO MAKE COPIES) OF ALL NON-GRAPHIC IMAGES EXHIBITS ADMITTED INTO EVIDENCE AND PUBLISHED TO THE JURY DURING THE TRIAL (C-193)	

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 submits this Reply in Support of its Motion for Mid-Trial Access (to make copies) of all non-graphic images exhibits admitted into evidence and published to the jury during the trial (C-193).

The Press Pool replies as follows:

1. The People's Response in opposition to the Motion sets forth five arguments: (1) that photographs of victims' sensitive body parts and other wounds sustained by non-deceased victims should not be copied; (2) that the audio recordings of 911 calls should not be copied until after the trial is completed; (3) that allowing the press to handle physical exhibits and photographs runs the risk of compromising the integrity of that evidence; (4) that the public will be provided "more than adequate" access to all exhibits admitted into evidence and shown to the jury through the Court's ceiling-mounted CCTV camera; and (5) that 51 of the 62 victims who responded to the DA's polling them objected to public release of only the photographs of injured victims and the 911 recordings of victims and survivors.¹

2. With respect to the first issue above, the members of the Press Pool have no interest in making copies of photographs of physical injuries sustained by non-decedent victims. All other similar privacy concerns raised by copying should be addressed by the Court on an exhibit-by-exhibit basis.

3. With respect to the 911 phone call recordings, the Press Pool expects that the audio portion of the EMC signal will provide sufficiently intelligible audio of whatever such recordings are played in open court so as to provide "meaningful access" to those exhibits without any need for further direct access to those audio recording exhibits. The Press Pool does seek access to any portion of any audio or video tape exhibit that is admitted into evidence but is not played in open court. *See infra* ¶ 8.

4. With respect to the People's admittedly speculative concern about threats to the integrity of physical and documentary exhibits, no credible showing has been made that court personnel are incapable of maintaining such integrity, as other courts have done, including in the recent Tsarnaev trial in Boston. Moreover, though it is self-evident, no member of the Press Pool need have *any* physical contact with *any* item of evidence in order to photograph it. *See also In re Nat'l Broad. Co., Inc.*, 635 F.2d 945, 952 (2d Cir. 1980) ("When physical evidence is in a form that permits inspection and copying *without any significant risk of impairing the integrity of the evidence* or interfering with the orderly conduct of the trial, only the most compelling circumstances should prevent contemporaneous public access to it.") (footnotes omitted) (emphasis added).

¹ Notably, the People's Response reports only the victims' polling responses regarding their views on the release of photographs of personal injuries and the 911 call recordings. The victims were apparently not asked their views on allowing the public to having "meaningful access" to all of the other exhibits admitted at trial.

5. Both parties assert that the Colorado Criminal Justice Records Act (“CCJRA”) does not provide a right to copy admitted evidence. *See* People’s Resp. ¶ 7 (denying a right to make copies “while a trial is ongoing); Def.’s Resp. ¶ 7 (contesting only right of copies of non-documentary physical evidence). The plain language of the CCJRA provides the public with the right to *make copies* of criminal justice records when those records are subject to inspection. *See* § 24-72-304(2), C.R.S. (2014) (“If the custodian does not have facilities for making copies, printouts, or photographs of records *which the applicant has the right to inspect*, the applicant *shall be granted access to the records for the purpose of making copies, printouts, or photographs.*”) (emphasis added). Similarly, CJD 05-01, entitled “Public Access to Court Records,” provides the public with the right to obtain copies of all documentary materials, regardless of form, that are made a part of the court file. *See* Mot. ¶ 3.

6. Moreover, this Court has previously recognized a right of the public under the First Amendment to the Constitution of the United States to have access to all judicial records, including to obtain copies (as are provided on the Court’s website and at the clerk’s office), and that the right of public access accrues as soon as the records are filed with the Court. *See also id.* at 952 (“[T]here is a significant public interest in affording th[e] opportunity [to see and hear actual video tape exhibits] contemporaneously with the introduction of the tapes into evidence in the courtroom, when public attention is alerted to the ongoing trial.”) (citations omitted). Neither party has made the showing necessary to overcome that strong presumption of contemporaneous public access (including copies) to the documentary trial exhibits.

7. Both parties express their view that providing the public with access to all trial exhibits via the court’s wide-angle fixed position CCTV camera “will be more than adequate for the media to cover the trial and inform the public.” (People’s Resp. ¶ 12; Def.’s Resp. ¶ 9). To the contrary, as demonstrated in the Motion, the public has a right to observe the exhibits *in the same manner that the jury is observing them*, not merely from the ceiling of the courtroom through a low-resolution lens that renders the ability to actually *read* the documents all but impossible in many cases. As the Motion demonstrates, the ability to peruse the myriad documentary exhibits that will be presented at this four-month-long trial will not be provided to members of the public through the wide-angle, fixed focus view of the Court’s ceiling-mounted CCTV camera.

8. Furthermore, it is wrong to presume that every page of every admitted documentary exhibit will be published to the jury on the video monitor in the courtroom. Documents properly authenticated (or by stipulation) may be admitted and *made available to the jury for consideration in their deliberations* without ever being displayed in open court. *See, e.g.,* Manual for Complex Litigation (4th), at 158 § 12.435 (Fed. Jud’l Ctr. 2004) (stating that all evidence admitted at trial should be provided to the jury, for its review, with exception of items such as currency, narcotics, weapons and explosive devices). To properly assess the performance of the Court (including the trier of fact) in this historical capital murder case, the public must be provided “meaningful access” to *all of the evidence* that will serve as the basis for the jury’s verdict. *See In re Nat’l Broad Co.*, 653 F.2d 609, 614 (D.C. Cir. 1981) (finding trial court abused its discretion by denying access, post-verdict, to videotapes admitted into evidence

during the trial: “the tapes contain only admissible evidence, were introduced for the purpose of proving the guilt of the defendants, and were obviously relied upon by the jury in finding the defendants guilty of the offenses charged. Thus, releasing the tapes will promote the integrity of the judicial process [. . . by permitting the public] *to consider for themselves the merits of the jury’s verdict. . . .*”) (emphasis added).

9. Although the Press Pool’s Motion was erroneously captioned as seeking access only to exhibits that were *both* admitted *and* displayed in open court, the Press Pool hereby clarifies that it seeks access to *all* exhibits admitted into evidence, even (and especially) those portions of admitted exhibits that are NOT displayed on the video monitor in open court. (This, too, renders irrelevant the fact that this trial will be subject to EMC, unlike the cases cited in the Motion that were conducted in federal court.)

10. Both parties express concern that requiring court personnel to make copies of the documentary exhibits will unduly burden, and interfere with the vital functions of, the court’s personnel. (People’s Resp. ¶ 12; Def.’s Resp. ¶13.) Having the court staff post the exhibits to the court’s website, as they have done with the myriad pleadings filed to date, is merely one of the methods by which the Court may provide the “meaningful access” to which the public is entitled. Another is for the Court to enter an order directing each party to provide the Court with a scan of all documentary exhibits at the end of each day’s trial proceedings to be distributed to the press or posted to the court’s website. *See* Minute Order in *United States v. Ted Stevens*, 08-CR-231 (D.D.C. Sept. 18, 2008) (“[T]he Court directs the parties to file on a daily basis via the Electronic Case Filing system copies of all documents admitted into evidence during that day’s proceedings. Exhibits shall be filed by no later than 6:00 p.m.”).²

11. Another alternative, also mentioned in the Motion, is to allow two Press Pool representatives (one still camera, one video) to photograph/record each of the exhibits following the completion of trial proceedings. *See In re Nat’l Broad Co., Inc.*, 635 F.2d at 952 n.7 (“Judge Pratt’s procedure for an opportunity to copy the tapes at the end of court sessions was an appropriate accommodation of the right of public access to judicial records with the orderly conduct of the trial.”).

12. Equally conjectural as the possible destruction of the evidence is the Defendant’s concern that allowing the public meaningful access to the admitted exhibits will make it more likely that sequestered witnesses will disobey the Court’s sequestration order. Def.’s Resp. ¶ 12. Indeed, applying the common law’s strong presumption of access to court records, the Ninth

² The Motion cited to a press report of Judge Emmett Sullivan’s order directing the U.S. Department of Justice to post to its website all trial exhibits admitted in the prosecution of Senator Ted Stevens. Mot. at ¶ 11. Judge Sullivan rescinded that order on September 19, 2008 in a Minute Order directing both parties to file all admitted exhibits by 6:00 p.m., and the Court thereafter made those exhibits available via PACER. *See* Mike Scarcella, *Judge Reverses: DOJ Not Obligated to Post Defense Trial Exhibits*, Blog of the Legal Times (Sept. 19, 2008) available at <http://legaltimes.typepad.com/blt/2008/09/judge-reverses.html>.

Circuit has considered each of the objections raised by the parties herein, and held that a trial court had abused its discretion when it denied the press' request to obtain copies of videotape exhibits admitted into evidence at trial:

The district court held that three considerations militated against disclosure of the tapes. First, the court gave substantial weight to the administrative inconvenience of providing the media with accurate replicas of the tapes on a day-by-day basis as they were submitted into evidence. The court noted specifically the danger of loss or erasure of the original copies of the exhibits. . . . [T]hough it discounted the possibility as unlikely, the court gave some weight to the risk that empanelled jurors would disobey its instructions to avoid trial publicity and be tainted by exposure to media reports broadcasting the edited tapes and editorial comment upon them.

Valley Broad. Co. v. Dist. Ct., 798 F.2d 1289, 1295 (9th Cir. 1986). As to the first concern, the Ninth Circuit held, in light of the procedures the press had put in place to make copies of the tapes at no cost to the court, "the district court should have given little, if any, weight to its administrative burdens in this case."). *Id.* And, because "duplicates of the original exhibits are in the possession of the FBI . . . there is no danger of loss or destruction of the original exhibits in the files of the district court." *Id.* Even in cases where there is a credible concern about maintaining the integrity of trial exhibits, "we encourage the district court to consider other mechanisms to provide the public with access. The court may, for example, require the government to file duplicates of [the] exhibits . . ." *Id.*

13. As to the second concern raised by the Defendant herein, that sequestered witnesses might become tainted by press reports of the admitted evidence if they disobey court orders to avoid all press coverage of these proceedings, the Ninth Circuit held (there concerning sequestered jurors, akin to sequestered witnesses):

[T]he curious [witness] who disobeys [the court's order] by watching a televised report on the trial will be contaminated *whether or not the report airs footage from the tapes in evidence*. The trial court is entitled to consider and weigh the likelihood of irregular [sequestered witness] behavior whenever to do so is not purely conjectural. However, here the district court speculated that [sequestered witnesses] might not only violate [the court's sequestration order] but be incrementally prejudiced by the tapes themselves. *Without articulable facts, such speculation was conjecture*, and we hold that the district court abused its discretion by weighing this conjectural factor in its analysis.

Id. at 1297 (emphasis added). The very same analysis applies in this case and yields the same result.

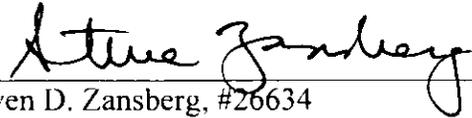
14. Notwithstanding the selective excerpts of individual victims' opinions (regarding only the non-fatality "Graphic Images" and 911 call recordings) in the People's Response, this Court has previously held that the victims' personal preferences do not trump the Defendant's

Sixth Amendment right to a public trial nor the First Amendment rights of the public to have access to these proceedings and to the records of this Court.³

WHEREFORE, the Press Pool respectfully asks that this Honorable Court grant its motion and enter an order providing it, as representatives of the public, to have meaningful access (*i.e.*, to legible and intelligible copies) of all non-Graphic Images documentary exhibits admitted into evidence, with the exceptions noted above, whether or not such exhibits are displayed in open court. In addition, the Press Pool respectfully asks the Court to enter an order allowing for a single Press Pool photographer to take photographs of all non-documentary physical evidence that is admitted into evidence, at the close of each day's trial session.

Respectfully submitted this 13th day of April,
2015, by:

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³ Remarkably, despite this Court's prior orders holding, expressly, that the names of the victims, must *not* to be redacted from public court filings, *see, e.g.* Order Re: Media's Motion To Unseal Redacted Information (Victims' Identities) (C-13) at 9 (Oct. 25, 2012), and Order Granting People's Request To Suppress P-98, P-99, and P-102, and Denying People's Request To Suppress P-100 and P-101 (C-167) at 1-2 (Dec. 12, 2014), as well as the fact that all of those names are a matter of public record (*see* P-20, P-21, P-26, P-27 and P-100), the People have redacted all victims' names from its April 8, 2015 REDACTED filing of its List of Charges. (P-110a).

CERTIFICATE OF MAILING

I hereby certify that on this 13th day of April, 2015, a true and correct copy of this **REPLY IN SUPPORT OF MEDIA PETITIONERS' MOTION FOR MID-TRIAL ACCESS (MAKE COPIES) OF ALL NON-GRAPHIC IMAGES EXHIBITS ADMITTED INTO EVIDENCE AND PUBLISHED TO THE JURY DURING THE TRIAL (C-193)** was delivered via electronic mail to the attorneys below and was deposited in the U.S. Mail, postage prepaid, correctly addressed to the following:

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