

DISTRICT COURT, BOULDER COUNTY, COLORADO Court Address: 1777 SIXTH STREET P.O. BOX 4249, BOULDER, CO, 80306-4249	DATE FILED: March 30, 2021 1:20 PM
THE PEOPLE OF THE STATE OF COLORADO v. Defendant(s) AHMAD AL ALIWI ALISSA	<p style="text-align: center;">△ COURT USE ONLY △</p> Case Number: 2021CR497 Division: 13 Courtroom:
<p style="text-align: center;">Order: MOTION TO BAN ALL EXTRAJUDICIAL STATEMENTS AND DISCLOSURES BY THE DISTRICT ATTORNEY, HIS AGENTS, AND LAW ENFORCEMENT CONCERNING THE CASE OF PEOPLE V. ALISSA (D-013)</p>	

The motion/proposed order attached hereto: NO ACTION TAKEN.

DA Response due no later than April 5, 2021. No Reply is authorized at this time.

Issue Date: 3/30/2021



INGRID SEFTAR BAKKE
 District Court Judge

District Court, Boulder County, Colorado Court Address: 1776 6 th Avenue Boulder, CO 80306	<p style="text-align: center;">σ COURT USE ONLY σ</p>
THE PEOPLE OF THE STATE OF COLORADO v. AHMAD AL ALIWI ALISSA Defendant.	
Megan Ring, Colorado State Public Defender Daniel King #26129 Chief Trial Deputy State Public Defender Samuel Dunn #46901 Senior Deputy State Public Defender Kathryn Herold #40075 Supervising Deputy State Public Defender Boulder Regional Public Defenders 2555 55 TH Street D-200, Boulder, CO 80301 Phone: (303) 444-2322 Fax: (303) 449-6432 E-mail: boulder.defenders@state.co.us	Case No. 21CR497 Division 13
MOTION TO BAN ALL EXTRAJUDICIAL STATEMENTS AND DISCLOSURES BY THE DISTRICT ATTORNEY, HIS AGENTS, AND LAW ENFORCEMENT CONCERNING THE CASE OF PEOPLE V. ALISSA (D-013)	

Mr. Ahmad Al Aliwi Alissa, by and through counsel, moves this Court to enter an Order limiting the dissemination of information by the attorneys; their agents; employees and all law enforcement investigators, personnel and employees; and all court personnel concerning this case. This motion is made on the following grounds:

1. The Colorado Rules of Professional Conduct, sections 3.6 and 3.8.
2. The American Bar Association Standards for Criminal Justice, Fair Trial and Fair Press, Third Edition, sections 8-1.1, 8-2.1, 8-2.2 and 8-2.3.
3. The Due Process, Trial by Jury and Trial by a Fair and Impartial Jury Clauses of the Federal and Colorado Constitutions, *U.S. Constitution*, amendments V, VI, XIV; *Colorado Constitution*, article II, sections 23, 25.
4. Mr. Alissa is charged with ten counts of murder in the first degree and one count of attempted murder in the first degree. The prosecution is on record stating an intent to file additional charges, the number and severity of which are unknown at this time.

5. In the few days that have passed since the date of offense and the charging of Mr. Alissa with these crimes, the amount of media attention and publicity has been unprecedented and overwhelming. Local, national and international media have, at this early time, generated thousands and thousands of news reports, postings, and other publicity.
6. Additionally, much of the information about the case appearing in the media has a law enforcement source. In less than a week, the District Attorney, in his official capacity, has held or participated in at least three press conferences. In these conferences, there have been questions asked and answers given relating to Mr. Alissa's mental illness, his fitness to stand trial, whether a fair jury could ever be empaneled, what plea he might enter or what defense he might run, to name a few.
7. Compounding the problem, members of various law enforcement agencies, including the Boulder Police Department and the FBI, have held press conferences, published press releases, and released case information to the media and the public in their official capacities.
8. Mr. Alissa is guaranteed the right to a trial by jurors who are fair and impartial. *Ross v. Oklahoma*, 487 U.S. 81 (1988); *Witherspoon v. Illinois*, 391 U.S. 510, 518 (1968); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961); *People v. Sandoval*, 733 P.2d 319, 320 (Colo. 1987); *Oaks v. People*, 150 Colo. 64, 371 P.2d 433, 477 (1962); *Smith v. People*, 8 Colo. 457, 8 P.1045 (1885). Thus, while Mr. Alissa is not entitled to jurors who will be sympathetic to him, he is guaranteed the right to a trial by jurors who "will hear the matter fairly and impartially." *Edwards v. People*, 160 Colo. 395, 418 P.2d 174, 177-178 (1966). Because of the massive pre-trial publicity, this Order is necessary to help preserve and protect, to any extent that it might be possible at this stage of the proceedings, Mr. Alissa's right to a trial by jury and right to a trial by a fair and impartial jury.
9. "To safeguard the due process rights of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity." *Gannett Co. v. DePasquale*, 443 U.S. 368, 378 (1979).
10. It is now well established that a trial court has the power to restrict extrajudicial statements made by trial participants and their lawyers. *See, e.g., Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1072-73 (1991) (noting that in *Sheppard* "[w]e expressly contemplated that the speech of those participating before the courts could be limited", *id.* at 1070); ("The outcome of a criminal trial is to be decided by impartial jurors, who know as little as possible of the case ... Extrajudicial comments on, or discussion of, evidence which might never be admitted at trial and *ex parte* statements by counsel giving their version of the facts obviously threaten to undermine this basic tenet.", *id.* at 1074).
11. The power of the court to restrict extrajudicial statements is not limited to statements by attorneys. In order to protect Mr. Alissa's rights, this Court may place reasonable restrictions on the release of information to the media by any lawyer, party, witness, or court official. *Sheppard v. Maxwell*, 384 U.S. 333, 335 (1966); *People v. Bryant*, 94 P.3d

624 (Colo. 2004). Prior restraints may be used in order to mitigate prejudicial pretrial publicity from effecting potential jurors. *Id.*

12. The Supreme Court has recognized that “the measures a judge takes or fails to take to mitigate the effects of pretrial publicity ... may well determine whether the defendant receives a trial consistent with the requirements of due process.” *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 555 (1976).
13. In *Sheppard*, the seminal United States Supreme Court case warning of the danger of pretrial publicity to fair trials, the Court noted that “due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused.” 384 U.S. at 362.
14. Furthermore, the Court held that the trial court’s duty to put into effect “remedial measures that will prevent the prejudice at its inception” arises when there is “reasonable likelihood” that pretrial publicity – in the form of news reports or extrajudicial comments by trial participants and their attorneys – will prevent a fair trial. 384 U.S. at 363; *see also United States v. Tijerina*, 412 F.2d 661, 666 (10th Cir. 1969) (rejecting argument that pretrial publicity order was invalid: “the order is based on a ‘reasonable likelihood’ of prejudicial news which would make difficult the impaneling of an impartial jury and tend to prevent a fair trial. We believe that reasonable likelihood suffices.”; *United States v. McVeigh*, 931 F. Supp. 756, 760 (D. Colo. 1996) (prohibiting extrajudicial disclosure of information “about this criminal proceeding...if there is a reasonable likelihood that such disclosure will interfere with a fair trial of the pending charges or otherwise prejudice the due administration of justice”).
15. In *Gannett*, the United States Supreme Court reiterated that the threshold for such “remedial measures” is minimal. To “minimize the effects of prejudicial pretrial publicity” on the accused’s due process rights, the Court held “a trial judge may surely take protective measures even when they are not strictly and inescapably necessary.” 443 U.S. at 378.
16. In addition, the District Attorney, his agents, and other participating attorneys are required to follow the Colorado Rules of Professional Conduct. These rules create a guideline for statements that can be made to the press and public by the District Attorney, his agents, and any participating attorneys.
17. C.R.P.C. 3.6(a) states: “A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.”

18. In the comments to Rule 3.6, our Supreme Court has said that criminal jury trials are the most sensitive to extrajudicial speech. C.R.P.C. 3.6. Moreover, "there are certain statements that are more likely than not to have a material prejudicial effect on a proceeding." *Id.* These subjects relate to:
- a. the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;
 - b. in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;
 - c. the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
 - d. any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;
 - e. information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or
 - f. the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.
19. Even those statements authorized by C.R.P.C. Rule 3.6 would interfere with Mr. Alissa's right to a fair trial. Public comments by law enforcement officials can add nothing to the public record. Indeed, such comments can only serve to further prejudice Mr. Alissa and deprive him of his right to an impartial venire, a fair trial, and due process of law.
20. Additionally, prosecutors have special responsibilities with respect to extrajudicial statements. C.R.P.C. 3.8 (f) states: "The prosecutor in a criminal case shall... (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's actions and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other person assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule."

21. In sum, the federal and state constitutions, case law, statutes, and the rules of professional conduct all support the curtailment of extrajudicial statements by participants and pretrial publicity.
22. The continuing media coverage has begun to taint any potential jury pool. There is no legitimate purpose, at this stage of the proceedings, for the District Attorney, his agents, or law enforcement agencies to be making any public statements concerning the case and its participants. Any further or continuing statements made by these participants only fuels an increase in media coverage which adds to the likelihood of a tainted venire.

WHEREFORE, Mr. Alissa hereby moves this Court to ban all extrajudicial statements and disclosures by the District Attorney, his agents, and all law enforcement agencies and their employees and agents concerning the above-captioned case. Such statements and disclosures violate Mr. Alissa's rights under the United States and Colorado Constitutions. U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 25. Mr. Alissa requests a hearing on this motion.

MEGAN A. RING
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Chief Trial Deputy State Public Defender



Samuel Dunn #46901
Senior Deputy State Public Defender



Kathryn Herold #40075
Supervising Deputy State Public Defender

Certificate of Service

I hereby certify that on March 29, 2021, I served the foregoing document by E filing same to all opposing counsel of record.

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Dated: March 29, 2021