DISTRICT COURT, ARAPAHOE COUNTY, COLORADO 7325 South Potomac Street Centennial, Colorado 80112	
PEOPLE OF THE STATE OF COLORADO **v.** **JAMES EAGAN HOLMES,** **Defendant**	**♦ COURT USE ONLY ♦** Case Number: **12CR1522** Division: **201**

ORDER REGARDING DEFENDANT'S MOTION FOR SPECIFIC PROCEDURES TO SAFEGUARD MR. HOLMES'S RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY (D-180-A)

INTRODUCTION

This matter comes before the Court on the defendant's Motion D-180, which seeks specific procedures to safeguard his right to a fair trial by an impartial jury. The defendant asks the Court to: 1) suppress all transcripts of the proceedings and the register of actions; and 2) remove this case from the "Cases of Interest" section of the Judicial Branch's website ("the Court's website"). The motion includes a request for a hearing. The People object to the motion. Additionally, the following nonparties oppose the motion: Jana Winter, the Reporters Committee for Freedom of the Press ("Reporters Committee"), the Colorado Press Association

("CPA"), the Colorado Freedom of Information Coalition ("the Coalition"),[1] the Media Petitioners,[2] and certain victims of the shooting who are currently pursuing a civil action against the landowners Century 16 Theatres in the United States District Court for the District of Colorado ("the victims").[3]

The Media Petitioners object to the defendant's motion in its entirety, citing constitutional concerns and the burden the relief requested would impose on the Court and the public. The Reporters Committee, the CPA, and the Coalition likewise urge the Court to deny Motion D-180 in order to avoid severely limiting the ability of journalists, particularly out-of-state journalists, to effectively report on the case. Jana Winter opposes the motion on the ground that granting the relief requested would jeopardize her ability to monitor the proceedings for developments that are relevant to her motion to quash. Similarly, the victims

---

[1] The Reporters Committee, the CPA, and the Coalition jointly filed a letter. Although the defendant correctly notes that the letter is not a pleading, the Court nevertheless accepts the letter and treats it as a pleading.

[2] The Media Petitioners is a group comprised of the following nonparties: ABC, Inc.; The Associated Press; Cable News Network, Inc.; CBS News, a division of CBS Broadcasting Inc.; CBS Television Stations, Inc., a subsidiary of CBS Corporation; *The Denver Post*; Dow Jones & Company; Fox News Network, LLC; Gannett; KCNC-TV, Channel 4; KDVR-TV, Channel 31; KMGH-TV, Channel 7; KUSA-TV, Channel 9; *Los Angeles Times*; National Public Radio; NBCUniversal Media, LLC; The New York Times Company; the E.W. Scripps Company; and *The Washington Post*.

[3] These victims are identified as Brandon Axelrod, Joshua Nowlan, Denise Traynom, Jerri Jackson, Gregory Medek, Rena Medek, Theresa Hoover, Lynn Johnson, Machael Sweeney, Malik Sweeney, Chichi Spruel, Derick Spruel, Munirih Gravelly, and Ashley Moser.

express concern that limiting their access to information, including transcripts, would hinder their civil claims against the landowners of the theater.[4]

For the reasons articulated in this Order, Motion D-180 is denied without a hearing. To the extent the motion repeats contentions previously rejected, it is denied as successive. To the extent the motion sets forth new arguments, it is denied as untimely and lacking merit.

PROCEDURAL HISTORY

This case has now been pending for sixteen months, and it is undisputed that it has received extensive media coverage. At the outset of the case, the Court suppressed all orders, search warrants, affidavits in support of search warrants, and the case file. *See* Order P-1. Over the ensuing months, however, the Court gradually unsealed or unsuppressed documents as required or permitted by Colorado case law and the Colorado Criminal Justice Records Act ("CCJRA"), section 24-72-301, C.R.S. (2013), *et seq.* *See* Order C-4c (ruling that the register of actions and specified pleadings and orders should be unsuppressed); Order C-12 (ruling that the court file should be unsuppressed with certain exceptions); Order C-13 (ruling that the names of victims should be unredacted from the complaint and pleadings); Order C-24 (ruling that the affidavits of probable cause in support of all search and arrest warrants and any requests seeking the production of records

[4] The remaining assertions in the victims' filing will be addressed in Order C-68.

be unsealed and released). In doing so, the Court found that the public and the media have a First Amendment right to access the Court file, and that the defendant had failed to demonstrate an overriding and compelling state interest that justifies curtailing that right of access. *See* Order C-24 at pp. 8-9; *see also* C-4c at pp. 3-4; Order C-12 at p. 1. Further, the Court determined that much of the suppressed information had already been released to the public through media reporting, pleadings, and pretrial hearings—including the three-day preliminary hearing in January 2013—and that continued suppression of that information was not likely to eliminate any risk to the fairness of the trial. *See* Order C-4c at p. 7; Order C-12 at pp. 1-2; Order C-13 at pp. 8-9, 11; Order C-24 at pp. 9-10.[5]

ANALYSIS

A. Standard of Review

In *Star Journal Publishing Corp. v. County Court*, 591 P.2d 1028, 1030 (Colo. 1979), the Colorado Supreme Court explained that First Amendment rights to information may only be curtailed by a showing of an overriding and compelling state interest. The Court cited with approval ABA Standard 8-3.2, which states that a court may properly suppress documents if three criteria are met: 1) unrestricted access would pose a substantial probability of harm to the fairness

[5] For instance, the Court previously considered the issue of whether the alleged victims' names should be redacted from the original complaint in the public file and on the Court's website. *See generally* Order C-13. In resolving that issue, the Court found that, given the information already made public, redacting the names of victims and witnesses would have been "largely symbolic and [would] have [had] very little practical effect." *Id.* at p. 9.

of the trial; 2) suppression would effectively prevent such harm; and 3) there is no less restrictive alternative reasonably available. *Id.*[6]

B. Request to Suppress Transcripts and the Register of Actions

The defendant avers that allowing the public and the media to access the transcripts and the register of actions "is likely to have a significant and detrimental impact on [his] ability to obtain due process and a fair trial by an impartial jury." Motion at p. 4. Specifically, the defendant asserts that allowing the media to have access to transcripts and the register of actions will increase the public's ability to obtain first-hand information about what transpires in the courtroom, including information about bench conferences to which the public would ordinarily not be privy. *Id.* at pp. 4-5. He further contends that "[p]rospective jurors who may have viewed a news account summarizing the activities and evidence presented in the courtroom with some degree of skepticism will instead have the opportunity to easily access and read for themselves first-hand precisely what transpired in the courtroom." *Id.* at p. 4.

The People have no objection to transcripts remaining available to the public, as long as the parties have an opportunity to file a motion to suppress or redact sensitive information. Response at p. 2. The response does not address the

[6] This practice standard is now Standard 8-5.2, "Public Access to Judicial Proceedings and Related Documents and Exhibits."

defendant's request to suppress the register of action, presumably because the People have no objection to it. *See generally* Response.

As a preliminary matter, the media coverage of the case has not been "unabated," as the defendant claims. Motion at p. 2. The media cannot report on matters which the Court suppresses or redacts, and throughout these proceedings the Court has, either *sua sponte* or at a party's request, suppressed and redacted numerous pleadings and other filings. Indeed, to date, neither the notebook collected by law enforcement nor the evaluation submitted by the Colorado Mental Health Institute at Pueblo have been made public. Moreover, the Court has granted every request to file a pleading suppressed, and both the parties and the Court have redacted pleadings and orders when appropriate before they were uploaded onto the Court's website.

Bench conferences have also allowed the parties and the Court to communicate during hearings about matters that should remain confidential. The Court recently issued an order suppressing the transcripts of all bench conferences. *See* Order C-72 at p. 2. Thus, no transcripts of bench conferences may be obtained by the public or the media.

As for the transcripts of any other proceedings, those proceedings are open to the public and the media.[7] The media has extensively reported on almost every hearing the Court has held. Given that the defendant does not urge the Court to close the proceedings to the public and the media—nor would such a request have merit—it would defy logic and common sense to suppress the transcripts of those proceedings. As the People aptly note, the transcripts simply "document what is said in open court" and provide "an accurate means of recording what the media [and the public] are already capable of hearing." Response at p. 2.

The defendant's prediction that prospective jurors without access to transcripts will somehow be more skeptical regarding news accounts of courtroom events than prospective jurors who are able to read the transcripts themselves is unpersuasive. First, the defendant presents no factual basis in support of this contention. Second, the parties will be able to ask prospective jurors during voir dire whether they have viewed any transcripts of the proceedings, and if so, whether viewing the transcripts has led them to form any opinions about the case.

---

[7] The parties do not dispute that the transcripts and the register of actions qualify as criminal justice records subject to discretionary disclosure under the CCJRA. *See* § 24-72-302(4), C.R.S. (2013) ("'Criminal justice records' means all books, papers, cards, photographs, tapes, recordings, or other documentary materials, regardless of form or characteristics, that are made, maintained, or kept by any criminal justice agency in the state for use in the exercise of functions required or authorized by law"). When determining whether documents subject to discretionary disclosure should be released to the public, custodians of criminal justice records should use a balancing test, taking into account relevant public and private interests. *Harris v. Denver Post Corp.*, 123 P.3d 1166, 1170 (Colo. 2005).

Thus, the defendant's concerns can be adequately addressed through careful questioning of prospective jurors during voir dire. *See Skilling v. United States*, 561 U.S. 358, 130 S.Ct. 2896, 2917-23, 177 L.Ed.2d 619 (2010) (concluding voir dire was sufficient to detect juror bias created by adverse pretrial publicity).

With respect to the register of actions, it contains little information that is not already public. The register of actions tracks a case's activity by summarizing all the proceedings and keeping a log of all pleadings and orders. Contrary to the defendant's contention, minute orders do not "include descriptions of *in camera* proceedings or conversations conducted at the bench that were properly shielded from earshot of the public during the proceedings themselves," Motion at pp. 4-5. The Court reviews all minute orders before they are released to ensure that they do not reflect any *in camera* or bench conference proceedings. Indeed, the defendant does not point to any instance where a minute order has improperly included descriptions of such proceedings. *See id.*[8]

In short, the defendant has not asserted any overriding or compelling state interest that warrants suppression of the transcripts and the register of actions. Nor

[8] The Court previously addressed the issue of suppression of the register of actions and concluded that unrestricted access to the register of actions should be granted. *See* Order C-4c at p. 5. In making this determination, the Court took into account relevant public and private interests, and also weighed the likelihood that unrestricted access would pose a substantial probability of harm to the fairness of the trial, whether suppression would effectively prevent such harm, and whether a less restrictive alternative was reasonably available to prevent the harm. *Id.* The Court stands by Order C-4c.

has the defendant demonstrated that public access to the transcripts and the register of actions poses a substantial probability of harm to the fairness of the trial. Moreover, in light of the "extensive media coverage" of this case, Motion at p. 2, the defendant has not shown that suppression of the transcripts and the register of actions at this stage of the proceedings would effectively prevent the public, and particularly prospective jurors, from accessing information regarding the case. Indeed, as the defendant recognizes, during the past sixteen months, "the vast majority of information in this case [has] been made public." *Id.*

The Court remains steadfastly committed to ensuring that the defendant receives both due process and a fair trial by an impartial jury. However, the public and the media also have an important interest in monitoring the proceedings in this case. The Court's present procedures—suppressing the transcripts of all *in camera* proceedings and bench conferences, as well as allowing the redaction and suppression of particular documents (including their titles) when appropriate—adequately address the issues raised in the defendant's motion. Accordingly, the defendant's request to suppress the register of actions and transcripts going forward is denied.

C. Removal of the Case from the Court's Website

The defendant's request to remove the case from the Court's website is equally unconvincing. Significantly, the defendant does not ask the Court to make

the proceedings in this case confidential. Instead, he asks the Court to make it harder on the public and the media to have access to the case. *See* Motion at p. 5. According to the defendant, "making the pleadings and register of actions in this case publicly available on the internet for the entire world to access with the click of a forefinger ensures that this case will receive the maximum amount of media attention it can possibly receive, in as great a detail as possible." *Id.* The defendant also contends that making the pleadings and register of actions publicly available on the Court's website often causes speculative and unnecessary reporting, all of which "has undoubtedly had a deleterious effect on Mr. Holmes's constitutional rights . . . ." *Id.* The Court disagrees.

The defendant's motion incorrectly assumes that his constitutional rights and the link to this case on the Court's website cannot coexist. While it is true that the media and the public do not have a constitutional right to access this case on the Court's website, and that the website is, indeed, a courtesy, the defendant has failed to present any legal authority or evidence to support the assertion that the website has, or will, prevent him from obtaining due process or a fair trial by an impartial jury. The Court concurs with the following observation by the Reporters Committee:

> Removing online access to court filings and suppressing the transcripts and register of actions will serve no constructive purpose . . . . It is tempting to believe, as the defendant seems to, that access to the trial and to the record at the courthouse is somehow conceptually

> distinct from the act of "publicizing" these same records and transcripts through electronic access. But this is a false dichotomy. Electronic access is simply a more efficient and meaningful level of the access that has long been considered a bedrock principle of public justice and openness in this country. It allows public access in ways that were formerly restricted simply because of the burdens of limited time, travel capabilities, and other resources.

Reporters Committee Letter at p. 1. Further, as Jana Winter recognizes, "the media and the public are just as capable of scanning and posting documents to the internet as is the Court clerk's office." Winter Response at p. 6. As a result, removal of the Court's website will do little, if anything, to prevent the dissemination of the parties' pleadings and the Court's orders on the internet.

Given the interest in this litigation, the Court's website has become a necessity. If the Court were to grant the defendant's request, members of the public, including the media, would be forced to come to the courthouse and request documents in person. Statistics gathered by the district's administrator show that, from the time the first pleadings were posted on the Court's website in July 2012 through October 8, 2013, the case had more than 110,000 hits. On average, the "Cases of Interest" section receives more than 5,000 hits per month. Further, on average, there are 500 pages filed in this case per month (the public file alone has more than 8,000 pages already). Assuming that only 10% of those people visiting the Court's website would physically come to court for copies of filings, that would translate into 250,000 copies per month. Using a very conservative

estimate, if the case's link were removed from the website, the Court would have to hire at least four new full-time staff members and purchase at least two more copiers and the corresponding supplies just to respond to the requests for records related to this case. Additionally, the clerk's office would likely have to invoke the three-day statutory timeframe for record requests.

The defendant's speculative assertion about the case's hyperlink interfering with his constitutional rights does not warrant the additional time and expense that would be spent in fulfilling record requests. The Court has an obligation to make these proceedings accessible to the public as efficiently as possible, and the Court's website does this by allowing the public and the media easy access to records, while minimizing the time Court employees must spend handling requests for records. Removal of the case's hyperlink from the Court's website would prove unnecessarily burdensome and unmanageable for the public, the media, and the clerk's office.

Even if the defendant's concerns had some validity, it is too late to advance them at this point, sixteen months after the case's hyperlink was added to the Court's website. This is particularly the case, considering that the Court cannot delete the information about the case already on the internet and given that the preliminary hearing in January and the non-capital motions hearings in October

received extensive media coverage. Under the circumstances, to take down the case's hyperlink from the Court's website now would be pointless.

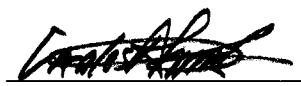
In any event, by suppressing or redacting certain pleadings and orders, the parties and the Court can control what information is posted on the website. The remainder of defendant's concerns regarding pretrial publicity will be properly addressed during the jury selection process.

CONCLUSION

For all the foregoing reasons, Motion D-180 is denied without a hearing. To the extent that the motion repeats arguments previously rejected, it is denied as successive. To the extent that the motion raises new arguments, it is denied as untimely and lacking merit.

Dated this 22nd day of November of 2013.

BY THE COURT:



Carlos A. Samour, Jr.
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2013, a true and correct copy of the **Order regarding defendant's motion for specific procedures to safeguard Mr. Holmes's right to a fair trial by an impartial jury (D-180-A)** was served upon the following parties of record:

Karen Pearson
Amy Jorgenson
Rich Orman
Dan Zook
Jacob Edson
Lisa Teesch-Maguire
George Brauchler
Arapahoe County District Attorney's Office
6450 S. Revere Parkway
Centennial, CO 80111-6492
(via e-mail)

Sherilyn Koslosky
Rhonda Crandall
Daniel King
Tamara Brady
Kristen Nelson
Colorado State Public Defender's Office
1290 S. Broadway, Suite 900
Denver, CO 80203
(via e-mail)

Christina M. Habas
Keating Wagner Polidori Free, P.C.
1290 Broadway, Suite 600
Denver, CO 80203
(via e-mail)

Thomas G. Tasker
Hillyard, Wahlberg, Kudla, Sloane, and Woodruff, LLP
4601 DTC Blvd., Suite 950
Denver, CO 80237
(via e-mail)

Steven D. Zansberg
Levine Sullivan Koch & Schulz, LLP
1888 Sherman Street, Suite 370
Denver, CO 80203
(via e-mail)

Michael C. Theis
Christopher O. Murray
Dori Ann Hanswirth
Hogan Lovells US LLP
One Tabor Center, Suite 1500
1200 Seventeenth Street
Denver, CO 80202
(via e-mail)

Bruce D. Brown
Reporters Committee for Freedom of the Press
1101 Wilson Blvd., Suite 1100
Arlington, VA 22209
(via e-mail)

Cheryl Kolousar