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DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO 7325 S. Potomac St. Centennial, Colorado 80112	▲COURT USE ONLY▲
PEOPLE OF THE STATE OF COLORADO **v.** **JAMES EAGAN HOLMES,** **Defendant**	Case No. **12CR1522** Division: **201**

ORDER REGARDING 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) (C-208)

This matter is before the Court on the motion filed by the Denver Post ("the 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.[1] *See generally* Motion. Contrary to the Post's assertion, the Court has already granted the public and the media extensive, if not unprecedented, access to these proceedings. Indeed, the Post is the only member of the media that is apparently dissatisfied with the current arrangements and is demanding even

[1] The Court has designated the Post's motion "C-208." As he has done in the past, counsel for the Post included the wrong division number, 22, in the caption of Motion C-208. This case has been pending in division 201 for almost two years now and it has not been assigned to division 22 since April 1 of 2013.

more access. Notably, the Post's motion was filed as the Court prepares to start the ninth week of the trial. These facts strongly suggest that this is not a case of inadequate access, but rather a case of a member of the media seeking more access simply because it can.

For the reasons articulated in this Order, the motion is denied.[2] The Court lacks the time and resources to provide the additional access requested. In fact, the Court barely has sufficient time and resources to provide some of the access it has already granted. The Court has gone to great lengths to allow the public and the media as much access as reasonably possible. The Court and its staff cannot take on the additional responsibilities inherent in the relief requested by the Post. Even if the Court could provide more access, it would be inappropriate to do so. In any case, the Post's motion fails as untimely.

The Court is already providing the media with ***extraordinary*** access to this trial. The Post fails to acknowledge the extensive access it already enjoys to these proceedings.

First, the Court publishes the vast majority of written pleadings filed and Orders issued in this case on its website for the benefit of the media and the public.

[2] Based on prior briefs submitted, the Court infers that both parties oppose the Post's request. *See* Responses to Motion C-193. If the Court is incorrect, the parties may file a motion to reconsider within two days of the date of this Order.

Second, the public information officer for the Colorado Judicial Branch provides timely tweets and updates about the case to members of the media and the public.

Third, the Court has made special accommodations for the media to have staging areas, tents, and podiums in the parking lot of the courthouse during the trial. *See* Orders C-137, C-177, and C-194. In fact, the Court has reserved a large section of the parking lot for the media.

Fourth, this judicial district's administrator communicates and works with the media closely to address any logistical and scheduling issues that arise.

Fifth, the Court has made special accommodations for the media inside the Courthouse, including reserving rooms and seats in courtroom 201, as well as providing overflow rooms for remote viewing of the proceedings.

Sixth, and perhaps most significantly, the Court partially granted the media's request for expanded media coverage of the trial over the objection of the parties and most of the victims. *See* Order C-137. The Court's expanded media coverage ruling permits the media to access and broadcast the feed from the closed-circuit camera operating in the courtroom. As a result, the media and the public are able to watch and hear the testimony provided, the arguments made, and the rulings issued, as well as to view most of the trial exhibits introduced into evidence and displayed in the courtroom.

Finally, over the objection of the parties and most of the victims, on April 30, the Court agreed to provide the media timely copies of any non-graphic admitted exhibits containing written material and displayed on the screens in the courtroom.[3] In its April 30 ruling, the Court reasoned that such access was appropriate because the Court recognized that the closed-circuit camera does not effectively capture written material displayed on the screen that is within its view. *See* April 30 Minute Order (hereinafter "April 30 Order").[4] Significantly, the Court granted this additional access even though the Court knew that it would place an additional burden on its staff.

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[3] Before opening statements, the Court initially denied the media's request for "midtrial access (to make copies)" of all the non-graphic exhibits admitted into evidence and published to the jury through the three screens in the courtroom, including the largest screen, which is within view of the closed-circuit camera transmitting the proceedings. *See generally* Order C-193. The Court observed that the expanded media coverage ruling permits the media to access and broadcast the feed from the closed-circuit camera, which includes everything displayed on the screens in the courtroom because the largest screen is within the camera's view. *Id.* at p. 2. Therefore, the Court concluded that the media would have access to all non-graphic evidence admitted and published to the jury on the screens. *Id.* However, the Court stated that if an admitted exhibit published on the screens was not captured effectively by the closed-circuit camera, it would consider providing a copy or photograph of it to the media. *Id.* at p. 3. On April 29, the third day of the trial, the media filed another motion, this time seeking access to all non-graphic image exhibits admitted into evidence and displayed on the screens in the courtroom whose contents are not visible on the closed-circuit transmission sent to the public outside of courtroom 201. *See* Motion C-198. This is the motion the Court granted from the bench on April 30.

[4] It is worth noting that these exhibits are legible in the courtroom. Further, since the prosecution started presenting its case, there have been seats available in the courtroom for the public and the media every day. Nevertheless, the Court agreed to provide daily copies of admitted exhibits with writing on them that are displayed on the screens in the courtroom because the Court recognized that such exhibits are not effectively captured by the closed-circuit camera.

Yet the Post wants to be heard to complain that the Court has denied the media and the public access to the proceedings and that such denial amounts to a partial closure of the trial. This is a preposterous assertion.[5] Even if the Post's contention were accurate, or fair, the Court lacks the time and resources to provide the type of access the Post desires. In fact, given the strain on the Court's staff to provide daily copies of all written materials shown on the screens in the courtroom, the Court has thought about rescinding its April 30 Order. However, the Court has resisted the temptation to do so because it believes that the public's interest in this case warrants going above and beyond what is required by the law to provide as much access as is reasonably possible to the proceedings, even if that means taking the extraordinary measures the Court has taken in this case.

The Post cites no authority in support of the proposition that a trial court is ***required*** to provide the media contemporaneous "access to view (and to make copies [of]) all exhibits that are admitted into evidence and published to the jury, but are not shown to the public present in the Courtroom." Motion at p. 2 (emphasis omitted). Here, the media is not only able to be present in the courtroom when the exhibits are introduced and discussed, but is also able to access the closed-circuit transmission of the proceedings and to use that

[5] The Post is represented by Steven Zansberg. This is not the first time Mr. Zansberg mischaracterizes the record in this case. *See* Order C-193 at p. 2 n.3 (finding that Mr. Zansberg engaged in a "factual mischaracterization of the expanded media coverage authorized by the Court").

transmission to create color photographs, including of the exhibits displayed on the large screen. To the extent that some exhibits are not effectively captured by the closed-circuit camera, the media receives copies of those exhibits on a daily basis.

To allow the Post to handle admitted exhibits in order to view them and make copies of them would jeopardize the integrity of the chain of custody established at trial for those exhibits. Moreover, requiring the Court's staff to post on its website or make copies of the admitted exhibits in question would create an administrative and logistical nightmare. The Court simply lacks the time and resources to grant the additional access requested.[6] There have been hundreds of pages in admitted exhibits shown to the jury but not displayed on the screens in the courtroom. The Court cannot review every page of each such exhibit to determine whether it contains any sensitive information that should be redacted from the copy of the exhibit provided to the media. There already has been an allegation in this case that, despite their best efforts, the Court's staff inadvertently failed to redact the defendant's social security number from the copy of an admitted exhibit before it was released to the media.

The Post's motion specifically requests access to the medical records of a psychiatrist who was treating the defendant shortly before the shooting. *Id.* at p. 4.

[6] The cases on which the Post relies (and on which it has relied in previous motions) are federal cases. Unfortunately, state trial courts, such as this one, have nowhere near the resources available to their federal counterparts and have a much larger caseload than their federal counterparts.

Before releasing a copy of these records to the media, the Court would have to carefully review them to determine whether any information must be redacted. Because the parties may wish to be heard on this issue, the Court would likely have to hold a hearing that could involve the psychiatrist who authored the notes. The Court may then be required to research objections raised by the parties. Given the magnitude of this case, the length of this trial, the strain on the jurors and the participants, and the many issues the Court is already addressing on a daily basis, it would be unwise and inappropriate to complicate the proceedings simply because the Post wants more information, and it wants it now.

There is another concern that militates against granting the relief requested by the Post. The Court is worried about the risk that the pervasive media coverage of the trial may taint the jurors. During the last two weeks, the Court has had to dismiss five jurors, including three who were dismissed as a result of acquiring information reported in the media about the case. Giving the media more access to admitted exhibits would only exacerbate the problem. This trial is now entering its ninth week. The Court hopes that it will be able to give the case to the jury for deliberations in a few weeks. Under the circumstances, the Court declines to

change the arrangements that have been in effect throughout this trial and that are apparently adequate for the vast majority of the members of the media.[7]

In any event, the Post's request fails as untimely. In Motion C-193, which was timely filed before the trial commenced, the Post and other members of the media had ample opportunity to include the request the Post advances now. They chose not to do so. Instead, in the reply in support of that motion, they improperly argued, for the first time, that they were requesting access to all exhibits admitted into evidence, not just admitted exhibits published to the jury on the screens in the courtroom. The Court rejected the assertion as untimely. Order C-193 at p. 2 n.2. If the assertion was untimely then, it is more untimely now, two months later. This is particularly the case given the filing of Motion C-198 almost a month after Motion C-193 was filed. In Motion C-198, the media only requested access to "non-graphic image exhibits that have been admitted into evidence and displayed in open Court whose contents are not visible to the public outside of courtroom 201." Motion C-198 at p. 1. Neither the Post nor any other member of the media requested the broader relief the Post seeks now, two months later.

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[7] The arrangements in place have worked well throughout this litigation, including throughout the trial. With one exception involving a member of Yahoo news, the members of the media have acted professionally and responsibly, and have complied with all of the Court's rules. The only other media issue the Court recalls involved the media's attorney, Mr. Zansberg, when he disregarded an Order in May 2013. *See* 5/13/13 Tr. at pp. 57-58 (admonishing Mr. Zansberg on the record for violating the Court's Decorum Order).

The Post's reliance on Order P-118-B is misplaced. Quoting language out of context, the Post argues that the denial of the requested additional access would amount to a partial closure of the proceedings. Motion at pp. 3-4. The Post misunderstands Order P-118-B and the law. In Order P-118-B, the Court addressed the prosecution's attempt to prevent the public and the media in the gallery and watching the broadcast of the proceedings from viewing a large number of graphic photographs and the crime scene video. *See generally* Order P-118-B.[8] In stark contrast, the exhibits the Post seeks access to are all documentary exhibits which have been discussed in open court during the trial. For example, the psychiatrist who authored the medical notes the Post requests testified at length about the contents of those notes. Both parties questioned her about the notes. Counsel and the witness actually read portions of the notes. Thereafter, a second psychiatrist who acted as a consultant, was also questioned about the contents of the notes. The public, the Post, and other members of the media were present in the courtroom when both witnesses testified. Other members of the public and the media attended the proceedings through the broadcast of the closed-circuit transmission.

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[8] At the request of the prosecution, and without objection, the Court ruled in Order P-118-B that graphic images admitted into evidence may only be displayed on the screens in the courtroom that are not within view of the closed-circuit camera. *See generally* Order P-118-B.

No closure, partial or otherwise, occurred simply because the lawyers opted to publish the psychiatrist's medical records by distributing a copy of them to each juror instead of displaying each page on the screens in the courtroom. If the Post's position were correct, the Court would be required to have counsel display on the screens in the courtroom every single page of every documentary exhibit introduced into evidence. That would amount to thousands of pages. Not only would this substantially delay this lengthy trial, it would interfere with counsel's presentation of the evidence and it would risk confusing the jury.

Importantly, the Post and other members of the media did not oppose the prosecution's motion to conceal from all of the public and the media numerous graphic photographs and the crime scene video, even though the prosecution's proposed procedure would have amounted to a partial closure of the trial. *Id.* Yet now, in what can only be characterized as the height of irony, the Post protests its lack of access to the exhibits in question and avers that the Court must grant the relief requested in order to avoid a partial closure of the proceedings. The Post has it backwards. It failed to object when it should have objected (to protect the public's right of access), and it objects when it has no legal or factual basis to do so.

In sum, because the Court lacks the means to provide the relief requested, the Post's untimely motion fails. Even if the Court could make the necessary

arrangements to allow the Post the additional access it seeks, it concludes that it would be unwise and inappropriate to do so. The parties' rights, including each party's right to a fair trial, take precedence over the Post's tardy request for more access than the extraordinary access it already enjoys.

After these proceedings are completed, if the Post still wishes to have access to any admitted exhibits not displayed on the screens in the courtroom, it may file a motion requesting such access. In the meantime, the Post must comply with all of the arrangements currently in effect, which all other members of media are doing without protest.[9]

Dated this 22nd day of June of 2015.

BY THE COURT:

Carlos A. Samour, Jr.
District Court Judge

[9] Motion C-208 is the third motion the Post has filed since the beginning of April. Part of the motivation for establishing the arrangements that are currently in effect was to avoid being distracted during the trial with motions by the media. If the Court has to continuously resolve motions filed by the Post or other members of the media, it makes no sense to have any arrangements in place allowing the media access to the feed from the closed-circuit camera, reserved space in the parking lot, a reserved room in the Courthouse, and reserved seats in the courtroom.

CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2015, a true and correct copy of the **Order regarding 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) (C-208)** was served upon the following parties of record:

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