REDACTED

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 TO SUPPRESS MR. HOLMES' JULY 20, 2012 ALLEGED STATEMENTS TO OFFICERS SWEENEY, OVIATT, AND BLUE (D-124)	

INTRODUCTION

The defendant is charged with shooting, and killing or injuring, numerous people inside auditoriums 8 and 9 of the Century 16 Theatres in Aurora, Colorado, during the early morning hours of July 20, 2012. In Motion D-124, he moves to suppress the statements he allegedly made to Officers Jason Sweeney, Jason Oviatt, and Aaron Blue on July 20, 2012. The People oppose the motion. The Court held an evidentiary hearing on the motion on October 15, 2013. As relevant here, the following witnesses testified at the hearing: Officer Sweeney, Officer Oviatt, Officer Blue, Officer Justin Grizzle, and Sergeant Stephen Redfearn. For the reasons articulated in this Order, Motion D-124 is denied.

CREDIBILITY DETERMINATIONS

The Court observed each witness' manner, demeanor, and body language while on the stand, and considered each witness' means of knowledge, strength of memory, and opportunity for observation. With respect to each witness, the Court assessed the reasonableness or unreasonableness of the testimony, the consistency or lack of consistency of the testimony, and whether the testimony was contradicted or supported by other evidence. The Court examined whether the witnesses had a motive to lie, as well as whether bias, prejudice, or interest in the case affected their testimony. Finally, the Court took into account all other facts and circumstances shown by the evidence which affected the credibility of any of the witnesses.

The Court finds the witnesses credible. Although the witnesses' recollection of events differs in some respects, the Court nevertheless concludes that their testimony is generally reliable.[1] Based on its credibility determinations, the Court makes findings of fact. The Court's resolution of any conflicts in the testimony provided is reflected in its factual findings.[2]

[1] In Order D-125, the Court found Officer Grizzle's recollection of his interaction with the defendant insufficiently reliable. That part of Officer Grizzle's testimony is not relevant to this Order. The Court finds the rest of Officer Grizzle's testimony reliable.

[2] Although the Court relies almost exclusively on the testimony presented on October 15, 2013, without objection from the parties, the Court considers all of the evidence presented throughout the non-capital motions hearings held in October.

FINDINGS OF FACT

At approximately 12:30 a.m. on July 20, 2012, during the midnight premiere of "The Dark Knight Rises," officers from the Aurora Police Department received "a call for service" requesting them to respond to the Century 16 Theatres at 14300 East Alameda, in Aurora, Colorado. Dispatch informed officers that shots had been fired and that one person was down. An update indicated that there was an "active shooter" and that there were "multiple people down." Because of the theater's close proximity to one of the Aurora Police Department's stations, officers responded within approximately a minute of the call, with their emergency lights and sirens activated.

At the hearing, the scene was described as "mass chaos." One officer likened the scene to "a war zone," describing it as "absolutely chaotic." There was "blood all over the place," including on the sidewalk immediately outside the theater. There were injured parties covered in blood who were running out of the theater screaming. Some of them had large wounds and appeared to be victims of a shooting. Individuals who appeared to have been shot were yelling, "help me, help me."

Officer Sweeney responded approximately a minute and a half after receiving the call for service. He drove to the back side of the theater and parked on the southeast corner of the complex. As he made his way to the northeast end

of the complex, he met Officer Oviatt. Officer Oviatt had seen two people who were bleeding coming from the direction of a trail of fresh blood. The two officers followed that trail of blood south along the back side of the theater complex in an attempt to gain entry into the theater and to stop the shooting. They had their weapons drawn and were walking at a very fast pace.

Meanwhile, Officer Blue responded to the front of the theater complex. He entered the theater through one of the front exit doors and went to the lobby, where he saw dozens of people running out of the auditoriums. As he walked through the lobby, a girl pointed toward the back of the theater complex and said: "It's back in there. It's coming from back in there." A radio report mentioned that the incident was occurring in auditorium 9. Officer Blue walked past auditorium 9 and smelled what appeared to be tear gas coming from inside. Someone other than Officer Blue radioed all officers to warn them that there appeared to be gas inside auditorium 9.

As Officers Sweeney and Oviatt continued moving south on the back side of the theater complex, they observed someone they believed was a fellow officer standing next to the open driver's side door of a small, two-door, white car that was parked on the back side of the theater, near an auditorium's rear emergency exit. There were no other cars parked in the immediate vicinity, and the individual was wearing all dark clothing, as well as a Kevlar, ballistic-type helmet, and a gas

mask. Although the individual was facing the theater, when Officers Sweeney and Oviatt were approximately twenty feet away, he turned and looked at Officer Sweeney. Officer Sweeney immediately noticed that the gas mask the individual was wearing was not consistent with department-issued gas masks. Additionally, both officers observed that, unlike all of the officers at the theater—who were active, moving around, and "trying to find a way into the building or trying to deal with people who had been injured"—this individual was "just standing there," taking off his gloves. Since gas had been deployed inside auditorium 9 and this individual who was wearing a gas mask did not appear to be an officer, Officers Oviatt and Sweeney concluded, independently but almost simultaneously, that he was a suspect.

One of the officers aired over the radio that there was a possible suspect in the back of the theater and assistance was needed with containment. Officer Blue immediately exited through one of the lobby's side doors and headed toward the back of the theater complex. Officer Grizzle, who was still in his vehicle when he received this radio transmission, drove to that location.

Officers Sweeney and Oviatt approached the suspect from the passenger's side of the white vehicle. Both officers pointed their guns at him and Officer Sweeney ordered him to put his hands up. The suspect, who was still wearing the gas mask and the helmet, complied. Since the tint on the white vehicle's windows

was very dark, the officers could not see if there were other occupants in the car. Officer Oviatt moved around the front of the car and held the suspect at gunpoint. Officer Sweeney, who still had his gun drawn, moved around the back of the vehicle to attempt to see if anyone else was inside and to fend off any other threat. Through the open driver's side door, he observed a large, plastic-like rifle case in the back seat. He immediately called out to Officer Oviatt that there was a rifle case in the car. At that point, Officers Sweeney and Oviatt ordered the suspect face down on the ground. The suspect appeared to understand the commands and complied with them.

Officer Sweeney was holding the suspect at gunpoint when Officer Grizzle arrived. Officer Oviatt holstered his weapon, checked the small of the suspect's back for weapons, and, with Officer Grizzle's assistance, put handcuffs on him and placed him under arrest.[3] The individual arrested was later identified as James Eagan Holmes, the defendant in this case. The defendant does not dispute that this was a lawful arrest.

Officer Oviatt was concerned that there were additional suspects. Officer Sweeney was equally concerned about the potential for multiple shooters. In the wake of recent mass shootings around the country—including the one at

---

[3] Officer Oviatt explained that he checked the small of the suspect's back for weapons because that would be the location where the individual's hands would be placed incidental to handcuffing.

Columbine High School, which involved two perpetrators—and based on their training and experience, these officers were keenly aware that mass shootings often involve multiple assailants.[4] Further, they lacked "clear information" at that point "about the number of suspects" and they knew there were multiple people who had been shot.[5]

To obtain "some cover and some concealment from any other suspects that were still inside the theater," Officers Sweeney and Oviatt grabbed the defendant by his armpits and elbows and dragged him approximately eight to ten feet from the side of the white vehicle to an area next to a dumpster.[6] Officer Oviatt removed the defendant's helmet and gas mask, and Officer Sweeney asked the defendant "if there was anybody else with him." Without delay or hesitation, and without any indication that he did not understand the question, the defendant provided a clear response: "no, it's just me."

---

[4] Officers are taught from day one at the academy that "if you have one shooter, there [are] possibly two," and officers should "look for two."

[5] Later on, Officer Oviatt received "radio traffic" about a potential second suspect. Officer Grizzle also recalled that at some point he received conflicting reports regarding the number of shooters.

[6] The location where the defendant was handcuffed was between the white vehicle and a brick or concrete dumpster enclosure, which was approximately ten yards from the rear emergency exit to auditorium 9. Officer Sweeney referred to the area as a "fatal funnel" because the officers were limited in their movement, there was no cover, and they were vulnerable to being ambushed by another suspect. Officer Oviatt expressed a similar concern; he realized while handcuffing the defendant that he had his back to the theater, the theater was dark, and that another suspect could come out of the theater and shoot at them.

Officer Sweeney believed that he used a conversational tone of voice with the defendant, although he admitted that everyone was very excited. As Officer Sweeney questioned the defendant, neither his firearm nor that of any other officer standing nearby was drawn.

Officers conducted a pat-down search for weapons "and for anything that would make [the defendant] still a threat." Officer Blue arrived at that time and provided assistance with the pat-down search of the defendant. During the search, officers recovered "a couple of pocket knives and a magazine for a handgun." They also retrieved a brown wallet from the defendant's pocket. Because of the armor the defendant was wearing, however, they were not able to conduct a sufficiently thorough search to be certain that he was not armed.

Pursuant to Officer Sweeney's request, Sergeant Redfearn drove his marked police car to the location where the defendant was being detained. Officers Oviatt and Blue then placed the defendant in the back seat of the patrol car and stayed with him while other officers attempted to evacuate victims from the theater. Officer Oviatt observed that there was a lot of blood and that injured people continued leaving the theater with the assistance of officers. Likewise, Officer Blue noticed that the scene continued to be chaotic and that there were a number of gunshot victims outside the theater.

Because Officer Blue wanted to learn the defendant's identity, he opened the defendant's wallet and took out a driver's license.[7] The photograph on the license matched the defendant's physical appearance.

While the defendant was in the back seat of the patrol car, Officer Oviatt monitored him by leaning into the car through the open rear driver's side door, while Officer Blue monitored him from the opposite side by leaning into the car through the open rear passenger's side door. Sergeant Redfearn initially sat in the driver's seat of the patrol car. However, because officers started to become "inundated with victims," he ended up taking a supervisory role over the "triage" of the injured individuals being brought out through the rear emergency exit to auditorium 9.

Immediately after the pat-down search of the defendant, Officer Blue became concerned because the search had yielded no firearms. He believed it was important to find out where the weapons were. As he explained at the hearing: "I'm at a shooting call with people that have been shot, and there's no guns. I didn't see any guns." He elaborated during the following exchange on direct examination:

[7] The Court is aware that Officer Oviatt testified that Officer Blue gave him the wallet, and that he opened it, and pulled out the defendant's driver's license.

PROSECUTOR: Now, you indicated that you felt that you were concerned because you hadn't located any guns and yet you had gunshot victims.

OFFICER BLUE: Correct.

PROSECUTOR: Can you be more specific about what your concerns were with regard to that?

OFFICER BLUE: I'm on a shooting. There's multiple victims outside . . . . and I don't have any weapons on the guy I'm dealing with right here.

PROSECUTOR: Did you consider it to be a safety issue?

OFFICER BLUE: Yes.

Like Officers Sweeney, Oviatt, and Grizzle, Officer Blue was also worried that there were other suspects. This was another safety consideration for him, as he was aware that officers were searching for other suspects inside the theater.

Officer Blue's concerns were exacerbated less than a minute after the defendant was placed in the patrol car, as both he and Sergeant Redfearn observed the defendant "fidgeting around," possibly trying to "get to something." Since no firearms had been found and there were multiple gunshot victims, Officer Blue was worried that the defendant had a weapon on him.

In light of the circumstances confronting him, Officer Blue asked the defendant if he had any weapons on him. The defendant replied that he had "four guns." He added that "he didn't have any bombs [at the theater], but [that] he had improvised explosive devices at his house" that would not "go off unless [police officers] set them off." Officer Blue inquired whether the defendant's address was the address on the driver's license recovered, 1690 Paris Street, Apartment 10. The defendant answered "yes." Officer Blue then asked the defendant whether anybody else was with him. The defendant stated, "no." Officer Blue did not know that a few minutes earlier Officer Sweeney had asked the defendant whether anyone else was with him, and that the defendant had responded: "no, it's just me."

Officer Oviatt overheard part of Officer Blue's conversation with the defendant. He understood the defendant's comments to mean that he had "booby-trapped" the Paris Street apartment.

The exchange between Office Blue and the defendant took place approximately a minute after the defendant was placed in the patrol car. The defendant appeared to understand the questions asked by Officer Blue. Officers Blue and Oviatt did not have their guns drawn as Officer Blue questioned the defendant. Officer Blue's tone of voice was conversational, albeit excited, and neither he nor any other officer threatened the defendant or made any promises to persuade him to answer questions. There was no indication that the defendant was

confused by the questions or that he did not understand them. The defendant was calm and his tone of voice was monotone. Although the defendant at times appeared to be distant or disoriented—looking straight ahead or staring off into the distance—nothing about his behavior led officers to believe that he was under the influence of any substance.[8]

Two to five minutes after the defendant was placed in the back seat of the patrol car, Officers Oviatt and Blue removed him from the car in order to conduct a more thorough search of his person. The officers did so for different safety reasons. Officer Blue remained very concerned that there were multiple gunshot victims and officers had not yet located any guns. He was also mindful that he had observed the defendant fidgeting around just moments earlier. Officer Oviatt, on the other hand, had planned on conducting a more thorough search all along because the armor the defendant was wearing prevented a full search, which made the officer question whether the defendant "was actually disarmed." Although Officer Oviatt had intended to wait until the scene was under control, two factors convinced him to do otherwise: (1) the defendant's comment to Officer Blue that there were bombs in the Paris Street apartment led the officer to suspect that the defendant might have explosives on his person; and (2) the chaotic atmosphere that

persisted led him to conclude that the scene was not likely to be under control any time soon.

During the second search of the defendant's person, the officers took off the "full body armor" ballistic gear he was wearing, including a bulky black jacket, a ballistic vest, a ballistic throat protector, ballistic leggings, and windbreaker pants.[9] After this search was completed, the defendant, who was then only wearing his underwear and t-shirt, was placed back in the patrol car.

Around the time when Officers Oviatt and Blue were conducting the second search of the defendant, Officers Sweeney and Grizzle saw what they believed to be a green laser beam coming from the greenbelt behind the theater. The officers realized that the greenbelt could have been a relay position for an additional shooter or a location where the defendant had stashed weapons or explosives. Because they feared that there was another suspect or that there were additional weapons or explosives, they decided to investigate the source of the green laser beam. They eventually discovered that it was coming from a handgun on top of the roof of the white vehicle.[10]

---

[9] An officer noted at the hearing that the defendant was wearing what "a SWAT officer might wear." A SWAT officer is a Special Weapons and Tactics officer.

[10] The Court realizes that Officer Oviatt testified on cross-examination that this weapon was visible to him as he went around the front of the white vehicle before the defendant was arrested.

Sergeant Redfearn was made aware of this handgun. Because the injuries he was observing were not consistent with one handgun, he remained concerned that there were other weapons and another shooter. Officers subsequently recovered an assault-type rifle on the ground by the rear exit door to auditorium 9, as well as a shotgun inside auditorium 9. Sergeant Redfearn saw a fourth firearm in the passenger's side door pocket of the white vehicle. No other suspects were found.

ANALYSIS

The defendant argues that his statements to Officers Sweeney and Blue must be suppressed because they were obtained in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and were involuntarily made. Motion at pp. 1-2. The People concede that the officers violated the holding in *Miranda*, but urge the Court to nevertheless find the defendant's statements admissible pursuant to the public safety exception to the *Miranda* rule established in *New York v. Quarles*, 467 U.S. 649, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984). The People further contend that the statements were voluntarily made. Because the Court agrees with the People, it denies Motion D-124.

The Court first addresses the People's contention that the public safety exception justifies the custodial interrogations of the defendant by Officers Sweeney and Blue before a *Miranda* advisement. The Court then analyzes whether the defendant's statements were voluntarily made.

A. Miranda And The Public Safety Exception

1. Law

The Fifth Amendment to the United States Constitution states that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. To protect a suspect's Fifth Amendment right against self-incrimination, the United States Supreme Court held in *Miranda* that the prosecution is prohibited "from introducing in its case-in-chief any statement, whether inculpatory or exculpatory, procured by custodial interrogation, unless the police precede their interrogation with certain warnings." *People v. Matheny*, 46 P.3d 453, 462 (Colo. 2002) (citing *Miranda*, 384 U.S. at 444, 86 S.Ct. 1602). Specifically, the police must advise the subject that he has the right to remain silent; that anything he says may be used against him; that he has the right to have an attorney present during questioning; and that if he cannot afford an attorney, one will be appointed for him. *Id. Miranda* applies to the states. *People v. Taylor*, 41 P.3d 681, 689 (Colo. 2002) (citing *Dickerson v. United States*, 530 U.S. 428, 432, 438-39, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000)).

The Fifth Amendment does not contain a general ban against incriminating admissions. *Quarles*, 467 U.S. at 654, 104 S.Ct. 2626. "Absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions." *United States v. Washington*, 431 U.S. 181, 187, 97

S.Ct. 1814, 52 L.Ed.2d 238 (1977). However, the Court in *Miranda* "presumed that interrogation in certain custodial circumstances is inherently coercive and held that statements made under those circumstances are inadmissible unless the suspect is specifically informed of his *Miranda* rights and freely decides to forgo those rights." *Quarles*, 467 U.S. at 654, 104 S.Ct. 2626. The warnings required by *Miranda* are prophylactic and are "not themselves rights protected by the Constitution but [are] instead measures to insure that the [constitutional] right against compulsory self-incrimination [is] protected." *Id.* (quoting *Michigan v. Tucker*, 417 U.S. 433, 444, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974)).

In *Quarles*, the Court carved out a "narrow exception" to *Miranda*'s prophylactic warnings when police officers face a situation that poses a threat to public safety. *Id.* at 657-58, 104 S.Ct. 2626. There, two police officers on road patrol encountered a young woman who informed them that she had just been raped. *Id.* at 651, 104 S.Ct. 2626. In addition to providing a description of the perpetrator and his clothing, the woman told the officers that he was carrying a gun and that he had just entered a nearby supermarket. *Id.* at 651-52, 104 S.Ct. 2626. After the officers drove the woman to the supermarket, one of them entered the store, while the other remained outside to radio for assistance. *Id.* at 652, 104 S.Ct. 2626. The officer who entered the store quickly spotted the defendant, who matched the description provided by the woman. *Id.* As the officer frisked the

defendant, he noticed that the defendant's shoulder holster was empty. *Id.* The officer handcuffed the defendant and, before reading him his *Miranda* rights, asked him where the gun was. *Id.* The defendant nodded in the direction of some empty cartons and responded: "the gun is over there." *Id.* The officer retrieved a loaded gun from an empty carton and formally placed the defendant under arrest. *Id.*

The issue before the Court was whether the officer was justified in failing to afford the defendant the procedural safeguards required by *Miranda*. *Id.* at 654-55, 104 S.Ct. 2626. The Court held that, under the circumstances before it, "overriding considerations of public safety justif[ied] the officer's failure to provide *Miranda* warnings before he asked questions devoted to locating the abandoned weapon." *Id.* at 651, 104 S.Ct. 2626. The Court concluded that the "kaleidoscopic situation" confronting the officer, "where spontaneity rather than adherence to a police manual [was] necessarily the order of the day," warranted a "public safety" exception to *Miranda*, and that the availability of the exception should not depend on "post hoc findings at a suppression hearing" about the subjective motivation of the individual officer involved. *Id.* at 655-56, 104 S.Ct. 2626. The Court explained that, whatever motivation the officer may have had, "the doctrinal underpinnings of *Miranda*" should not require its application "in all its rigor" where a police officer's questions are "reasonably prompted by a concern for the public safety." *Id.* at 656, 104 S.Ct. 2626.

In applying the exception to the facts before it, the Court reasoned as follows:

> The police in this case, in the very act of apprehending a suspect, were confronted with the immediate necessity of ascertaining the whereabouts of a gun which they had every reason to believe the suspect had just removed from his empty holster and discarded in the supermarket. So long as the gun was concealed somewhere in the supermarket, with its actual whereabouts unknown, it obviously posed more than one danger to the public safety: an accomplice might make use of it, a customer or employee might later come upon it.
>
> ***In such a situation, if the police are required to recite the familiar Miranda warning before asking the whereabouts of the gun, suspects in Quarles' position might well be deterred from responding.*** Procedural safeguards which deter a suspect from responding were deemed acceptable in *Miranda* in order to protect the Fifth Amendment privilege; when the primary social cost of those added protections is the possibility of fewer convictions, the *Miranda* majority was willing to bear that cost. ***Here, had Miranda warnings deterred Quarles from responding to [the officer's] question about the whereabouts of the gun, the cost would have been something more than merely the failure to obtain evidence useful in convicting Quarles.*** [The officer] needed an answer to his question not simply to make his case against Quarles but to insure that further danger to the public did not result from the concealment of the gun in a public area.
>
> ***We conclude that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination.***

Id. at 657, 104 S.Ct. 2626 (emphasis added).

The *Quarles* Court acknowledged that the "narrow exception to the *Miranda* rule" it was recognizing would reduce the desirable clarity of the rule. *Id.* at 658, 104 S.Ct. 2626. However, the Court also believed that the exception would lessen

police officers' need to conduct an "on-the-scene balancing" analysis. *Id.* The Court predicted that it would not be difficult for officers to apply the exception "because in each case it will be circumscribed by the exigency which justifies it." *Id.* As the Court observed, "[w]e think police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect." *Id.* at 658-59, 104 S.Ct. 2626. Thus, "far from complicating the thought processes and the on-the-scene judgments of police officers," the public safety exception "will simply free them to follow their legitimate instincts when confronting situations presenting a danger to the public safety." *Id.* at 659, 104 S.Ct. 2626.

Application of the public safety exception does not necessarily hinge on the amount of time between the defendant's arrest and questioning by law enforcement. As the Court commented in *United States v. Ferguson*, a case involving a charge of possession of a firearm by a felon:

> We recognize that, in certain circumstances, the passage of time between an arrest and an interrogation, among other considerations, may diminish the immediacy of the threat posed by an unaccounted-for firearm. Nonetheless, because this case clearly falls within the public safety exception, and because the immediacy of threats to

> public safety is highly context-dependent, we need not speculate about when that exception would not apply.

702 F.3d 89, 95-96 (2d Cir. 2012) (citation omitted). Although the interrogation of the defendant in *Ferguson* occurred approximately an hour to an hour and a half after his arrest, and approximately two to two and a half hours after he fired the gun in question into the air, the Court concluded that those "amounts of time did not diminish the officers' objectively reasonable need to protect the public from the realistic possibility that [the defendant] had hidden his gun in public, creating an imminent threat to public safety." *Id.* at 96. Therefore, the Court held that the public safety exception applied. *Id.*

In *People v. Allen*, the Colorado Court of Appeals observed that "our caselaw indicates that the public safety exception applies most readily in the context of immediate, on-scene investigations of crime." 199 P.3d 33, 36 (Colo. App. 2007) (citation omitted). However, the Court acknowledged that "courts elsewhere have applied the public safety exception in other contexts as well." *Id.* (citation omitted). Consistent with the analysis in *Ferguson*, the Court explained that "[t]he determinative question is whether the officer's questioning related to an objectively reasonable need to protect the police or the public from immediate danger associated with a weapon." *Id.* (citing *Quarles*, 467 U.S. at 655, 104 S.Ct. 2626; and *People v. Ingram*, 984 P.2d 597, 605 (Colo. 1999)).

Courts have applied the public safety exception to situations involving danger to law enforcement. For example, in *United States v. Lackey*, 334 F.3d 1224, 1227-28 (10th Cir. 2003), the Court noted that it is "irrelevant," for purposes of the public safety exception, that the primary danger is "the risk of injury to the officers or Defendant himself, rather than ordinary members of the 'public.'" This is so because "the concern of the public-safety doctrine extends beyond safety to civilians." *Id.* at 1228. It "undoubtedly extends to officers' 'questions necessary to secure their own safety.'" *Id.* (quoting *Quarles*, 467 U.S. at 659, 104 S.Ct. 2626). *See also Allen*, 199 P.3d at 36 ("The determinative question" under the public safety exception "is whether the officer's questioning related to an objectively reasonable need to protect the police or the public from immediate danger associated with a weapon") (citing *Quarles*, 467 U.S. at 655, 104 S.Ct. 2626; and *Ingram*, 984 P.2d at 605).

Additionally, the public safety exception is not limited to questions about weapons; it also applies to questions about other suspects who may pose a danger to the public or law enforcement. In *People v. Askew*, 632 N.Y.S.2d 287 (N.Y. App. Div. 1995), the Court rejected the defendant's claim that the trial court erred in refusing to suppress his statement, "no, I am in here myself," which was provided "in response to the police query of whether anyone else was in the building." *Id.* at 287. The Court reasoned that the question was asked "while a

police officer was securing defendant in a closed, darkened restaurant, where he was found behind the refrigerator, and obviously was prompted by the officer's concern for his own and his fellow officers' safety." *Id.* (citation omitted). *See also Fleming v. Collins*, 954 F.2d 1109, 1113-14 (5th Cir. 1992) (in a bank robbery case, the officer's questions relating to other suspects and weapons fell within the public safety exception); *United States v. Udey*, 748 F.2d 1231, 1240 n.4 (8th Cir. 1984) (noting that the rationale employed in *Quarles* provided an alternative ground upon which to uphold the lower court's denial of the defendants' motion to suppress statements made in response to law enforcement officers' questions about the presence of others in their home); *Commonwealth v. Clark*, 730 N.E.2d 872, 884-85 (Mass. 2000) (in a case involving the shooting of a law enforcement officer, the defendant's statement, that he was by himself, made in response to a police officer's question about whether he was alone, was covered by the public safety exception because the officer's question was posed out of legitimate concern for public safety since the shooting took place near a residential neighborhood, civilians had begun gathering at the scene, and no weapon had been found); *Crook v. United States*, 771 A.2d 355, 358 (D.C. 2001) ("we think that the questioning here falls within the 'public safety' exception . . . since they were directed at dealing with the danger created by the possible presence of other armed and dangerous individuals in the immediate vicinity").

The public safety exception has also been extended to circumstances related to explosives. *See e.g., United States v. Hodge*, 714 F.3d 380, 387 (6th Cir. 2013) ("statements [the defendant] made about the pipe bomb were properly admitted under *Quarles*" because once the defendant admitted that there was a bomb in his home, the officers' questions were acceptable even though there was no evidence that a third party could access the bomb); *United States v. Khalil*, 214 F.3d 111, 121 (2d Cir. 2000) (questioning of the suspect without *Miranda* warnings about bombs was permissible under *Quarles*); *United States v. Spoerke*, 568 F.3d 1236, 1249 (11th Cir. 2009) (the public safety exception applied because the officer's questions "were designed to discern the threat the bombs presented to the officer and the nearby public").

2. Application

The officers in this case received a call for service related to an active shooting with multiple casualties at the Century 16 Theatres during the midnight premiere of a popular movie. Upon arrival, they encountered a bloody and extremely chaotic scene, the likes of which they had never seen before. There were dozens of people running out of the auditoriums screaming, some of whom appeared to have gunshot injuries. Shortly after responding, officers were informed that gas had been used in auditorium 9. A fresh trail of blood outside the theater led Officers Sweeney and Oviatt to the defendant, who was wearing a gas

mask and full body armor ballistic gear. Once they determined that the defendant was a suspect and placed him under arrest, they were confronted with the immediate and urgent necessity of ascertaining whether other suspects were involved. The exigencies present demanded that the officers promptly find out whether the defendant was alone or whether he had accomplices. If other suspects were involved, they posed an immediate and grave danger to the public and the officers. Indeed, the officers were so concerned about the danger presented by other suspects that they quickly moved the defendant from the area next to the white vehicle to the area by the dumpster enclosure.

Under these circumstances, the Court concludes that Officer Sweeney's question about whether anybody was with the defendant was "reasonably prompted by a concern for the public safety" and the safety of the officers. *Quarles*, 467 U.S. at 656, 104 S.Ct. 2626. Officer Sweeney "needed an answer to his question . . . to insure that further danger to the public [and the police] did not result . . . ." *Id.* at 657, 104 S.Ct. 2626. The Court notes that it was night, law enforcement lacked clear information about the number of suspects involved, and the officers were aware that there were many locations inside and outside the theater where suspects could be hiding. In fact, at the time of Officer Sweeney's question, there were officers actively looking for suspects. The officers were also aware—based on their training, experience, and knowledge of the Columbine High

School shooting and similar incidents around the country—that mass shootings often involve multiple assailants. Because there was an objectively reasonable need to protect the public and the police, "overriding considerations of public safety" justify Officer Sweeney's failure to provide *Miranda* warnings before he questioned the defendant. *Id.* at 651, 104 S.Ct. 2626.

A few minutes after Officer Sweeney's question, Officer Blue faced a different, but equally immediate and grave, danger. A search of the defendant's person yielded no firearms. Inasmuch as the officers had responded to an active shooting where they had observed blood and multiple individuals with gunshot wounds, this was understandably troubling. Officer Blue's concern was magnified when he and Sergeant Redfearn observed the defendant fidgeting around in the back seat of the patrol car, possibly attempting to reach for a weapon. Because the defendant was wearing bulky body armor, the officers had been unable to conduct a thorough search of his person before placing him in the back seat of the patrol car. Without reciting the *Miranda* warnings, Officer Blue asked the defendant if he had any weapons on him. For the same reasons that the officer's pre-*Miranda* question about the whereabouts of the gun in *Quarles* was justified, the Court finds that this question falls within the "public safety" exception to the *Miranda* rule. *Id.* at 656-58, 104 S.Ct. 2626. In fact, the exigent threats to the safety of the public and the officers were much more extreme here than in *Quarles*.

After stating, in response to Officer Blue's question, that he had "four guns," the defendant added that he had improvised explosive devices in his residence that would not go off unless the officers set them off.[11] Given this statement, Officer Blue asked the defendant whether his address was the address on the driver's license officers had previously found in the wallet seized during the pat-down search.[12] The threat posed by improvised explosive devices in the defendant's apartment "outweigh[ed] the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." *Id.* at 657, 104 S.Ct. 2626.

Officer Blue needed to confirm that the residence the defendant was claiming to have "booby-trapped" was 1690 Paris Street, Apartment 10. His question was "reasonably prompted by a concern for the public safety." *Id.* at 656, 104 S.Ct. 2626. He needed an immediate answer to his question in order to prevent further danger to the public. *Id.* at 657, 104 S.Ct. 2626. Because there was an objectively reasonable need to protect the public, Officer Blue was justified in

---

[11] "[P]urely spontaneous or volunteered statements . . . are admissible as '[t]he Fifth Amendment protects defendants from improper forms of police interrogation, not from their own impulses to speak'" *People v. Wood*, 135 P.3d 744, 749 (Colo. 2006) (quoting *People v. Gonzales*, 987 P.2d 239, 243 (Colo. 1999)). Because the prosecution does not argue that this statement was not the result of "interrogation" under *Miranda*, *see generally* Response, the Court assumes, without deciding, that it was elicited by Officer Blue's question, not volunteered by the defendant.

[12] In Order D-114, the Court denied the defendant's motion to suppress the searches of the wallet.

asking the defendant about his address before reading him his *Miranda* rights.[13] In light of his observations at the scene, had Officer Blue failed to take seriously the defendant's disclosure and to immediately confirm the defendant's address, he would have been derelict in his duty to protect the public.

Finally, Officer Blue asked the defendant if anybody else was with him. The Court has already found that questioning the defendant about other suspects shortly after he was contacted and arrested was justified under *Quarles*. The Court acknowledges that this question had been asked by Officer Sweeney moments earlier. However, Officer Blue was not aware of that fact. More importantly, there continued to be an objectively reasonable need to protect the public and the police from the immediate danger associated with other potential suspects. Given the

---

[13] The prosecution does not argue that Officer Blue's question related to the defendant's address does not constitute "interrogation" for purposes of *Miranda*. *See generally* Response. Therefore, the Court assumes, without deciding, that the defendant's response was elicited by custodial interrogation. The Court notes, however, that law enforcement officers were entitled to confirm the defendant's address as part of the booking process without regard to the *Miranda* rule. Indeed, they did so here. *See* D-PT-1 at 1:12:00 (videotape of a portion of the booking process). The defendant does not move to suppress the identifying data and biographical information subsequently elicited by law enforcement officers at the police station. *See id*; P-PT-14 (videotaped interview). Nor would such a motion have merit. Words or actions by the police "normally attendant to arrest and custody" do not constitute interrogation for purposes of *Miranda*. *See People v. Madrid*, 179 P.3d 1010, 1014 (Colo. 2008) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 300-01, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980)). Thus, asking a defendant for his address as part of the routine booking process does not constitute interrogation under *Miranda*. *People v. Anderson*, 837 P.2d 293, 296 (Colo. App. 1992) ("the request for defendant's address, without more, [did] not constitute interrogation despite the fact that the address was relevant to an offense charged"); *Allen*, 199 P.3d at 36 ("Under the booking question exception to *Miranda*, as part of the booking process, police ordinarily may question a suspect who has not received *Miranda* warnings about his or her basic identifying data (for example, name, age, address, and marital status)"); *People v. Blankenship*, 30 P.3d 698, 704 (Colo. App. 2000) ("preliminary questions" about "age, address, and whether [the defendant] was a runaway" did not amount to interrogation under *Miranda*).

pandemonium that persisted at the theater, the lack of clear information about whether there were additional suspects, and the immediate and grave danger that other potential suspects still presented to the safety of the public and the officers, Officer Blue was as justified in asking the question without advising the defendant of his *Miranda* rights as was Officer Sweeney. Under the circumstances, it is not surprising that, amidst the mass chaos, two different officers asked the defendant this question within minutes of initially contacting him and placing him under arrest.[14]

In sum, the Court concludes that the questions propounded to the defendant by Officers Sweeney and Blue were justified by an objectively reasonable need to protect the public and officers from immediate and grave dangers. Had the officers read the defendant his *Miranda* rights before asking about other potential shooters and weapons at the theater or about explosives at the defendant's apartment, the defendant may well have been deterred from responding. And had *Miranda* warnings deterred the defendant from answering the officers' questions, "the cost [could] have been something more than merely the failure to obtain evidence useful in convicting [him]." *Id.* at 657, 104 S.Ct. 2626. Given the magnitude of the dangers posed by the situation, the need for answers to the officers' questions

---

[14] The defendant provided similar answers to both officers' questions.

far outweighed the need for the prophylactic *Miranda* warnings to protect the defendant's Fifth Amendment privilege against self-incrimination. *Id.*

At the October 21 oral argument on Motion D-127, the defendant suggested that the holding in *Quarles* has lost considerable luster because in *Dickerson v. United States*, 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000), the United States Supreme Court declared that it no longer views *Miranda* as merely establishing prophylactic measures, but rather, as announcing a constitutional rule. Therefore, asserted the defendant, the ruling in *Dickerson* must be equated with the proposition that a failure to provide *Miranda* warnings prior to a custodial interrogation is itself a violation of the suspect's Fifth Amendment rights. The Court disagrees.

In *United States v. Patane*, 542 U.S. 630, 636, 124 S.Ct. 2620, 159 L.Ed.2d 667 (2004), the Court rejected a similar interpretation of *Dickerson*, and reaffirmed that "the *Miranda* rule is a prophylactic employed to protect against violations of the Self-Incrimination Clause." Because the Self-Incrimination Clause is not implicated by the admission of nontestimonial fruit of a voluntary, but unwarned, statement, the Court found no justification to extend the *Miranda* rule to exclude such evidence. *Id.* The Court disagreed with the Tenth Circuit's conclusion that, under *Dickerson*, "the taking of unwarned statements violates a suspect's constitutional rights." *Id.* at 642, 124 S.Ct. 2620. The Court explained that

nothing in *Dickerson*'s characterization of *Miranda* "as a constitutional rule" lessens "the need to maintain the closest possible fit between the Self-Incrimination Clause and any judge-made rule designed to protect it." *Id.* at 643, 124 S.Ct. 2620. The Court added that "[t]he *Miranda* rule is not a code of police conduct, and police do not violate the Constitution (or even the *Miranda* rule, for that matter) by mere failures to warn." *Id.* at 637, 124 S.Ct. 2620.

Notably, the Court in *Patane* cited *Quarles* with approval. *Id.* at 639, 124 S.Ct. 2620 (citing *Quarles* as an example of a situation in which "the Court has declined to extend *Miranda*" even though "it has perceived a need to protect the privilege against self-incrimination"); *see also id.* at 644-45, 124 S.Ct. 2620 (Kennedy, J., concurring) (explaining that in *Quarles*, "evidence obtained following an unwarned interrogation was held admissible . . . based in large part on [the Court's] recognition that the concerns underlying the [*Miranda*] rule must be accommodated to other objectives of the criminal justice system," and agreeing that *Dickerson* "did not undermine [this] precedent[] and, in fact, cited [it] in support"). Thus, contrary to the defendant's implied contention, *Dickerson* did not strip the decision in *Quarles* of its full and binding effect.

The Court holds that the public safety exception to the *Miranda* rule applies to the questions posed to the defendant by Officers Sweeney and Blue.

Accordingly, the defendant's request to suppress his statements to those officers is denied.

B. Voluntariness

1. Law

The Due Process of law guaranteed by the United States Constitution prohibits the admission into evidence of involuntary statements. *People v. Humphrey*, 132 P.3d 352, 360 (Colo. 2006) (citations omitted). A defendant is entitled to this constitutional protection, "regardless of whether [he] was in custody at the time the statement was made, and regardless of whether the statement is inculpatory." *Id.* (citation omitted). A *Miranda* advisement preceding a challenged statement does not insulate the statement from an inquiry into whether it was voluntarily given. *Id.* The prosecution has the burden of establishing by a preponderance of the evidence that the statement was voluntarily made under the totality of the circumstances. *Id.*

"Coercive conduct is a necessary predicate to the finding that a confession is not voluntary . . . and must play a significant role in inducing a confession or an inculpatory statement." *Id.* (internal quotation marks and citations omitted). Governmental coercion may be physical or psychological. *Id.* at 360-61. The deliberate exploitation of a suspect's weakness by psychological intimidation can, under certain circumstances, constitute a form of governmental coercion and may

render a statement involuntary. *Id.* at 361. "Ultimately, the test of voluntariness is whether the individual's will has been overborne." *Id.* (quotation omitted).

In order for a statement to be deemed involuntary, the government's "official misconduct must be causally related to the confession or statement." *Id.* (citation omitted). Even if such a causal connection exists, however, "it does not automatically follow that there has been a violation of the Due Process Clause." *Id.* (quotation and citations omitted).

In deciding whether the defendant was induced into incriminating himself by governmental coercion, the Court must weigh "the circumstances of pressure against the power of the [defendant's] resistance." *Id.* (quotation omitted). Among the circumstances the Court may consider are the following: 1) whether the defendant was in custody and was aware of his situation; 2) whether *Miranda* warnings were given prior to the interrogation and whether the defendant understood and waived his rights; 3) whether the defendant had the opportunity to confer with counsel or anyone else prior to the interrogation; 4) whether the challenged statement was made during the course of an interrogation or whether it was volunteered; 5) whether any overt or implied threat or promise was directed to the defendant; 6) the method and style employed by the interrogator in questioning the defendant and the length and place of the interrogation; and 7) the defendant's mental and physical condition immediately prior to and during the interrogation, as

well as his educational background, employment status, and prior experience with law enforcement and the criminal justice system. *People v. Gennings*, 808 P.2d 839, 844 (Colo. 1991).

2. Application

Here, based on the totality of the circumstances, the Court concludes that the defendant's statements to Officers Sweeney and Blue were voluntarily made. The People have demonstrated by a preponderance of the evidence that there was no governmental coercion, physical or psychological, and that the defendant's statements were not induced as a result of his will being overcome.

The Court recognizes that there are circumstances that weigh in favor of a finding of involuntariness. Specifically, the defendant was in custody at the time of the interview and was aware of his situation; the defendant was not read his *Miranda* rights before he was questioned; the defendant did not have an opportunity to confer with counsel or anyone else prior to being questioned; the defendant's statements were made during the course of interrogations; and the defendant's statements were in response to questions, not volunteered.[15]

However, other relevant circumstances tip the scale in favor of a finding of voluntariness. Among such circumstances are the following: the defendant's

[15] As indicated earlier, the Court assumes, without deciding, that the defendant's statement related to improvised explosive devices in his apartment was elicited by one of Officer Blue's questions.

interrogations were very brief—one officer asked a single question and the other asked three questions, including one which simply sought confirmation of the defendant's address and another which had previously been asked by a different officer; the questioning took place outside the theater and in the back of a patrol car, not at the police station; although the officers were excited, they used a conversational tone of voice; none of the questions was accusatory; no officer in the defendant's vicinity had his weapon drawn as he was questioned; neither officer made threats or promises to convince the defendant to answer questions; while the defendant at times appeared to be distant or disoriented, nothing about his behavior led officers to believe that he was under the influence of any substance, that he was confused, or that he did not understand the questions; all of the defendant's answers were appropriate and responsive to the questions; and the defendant was calm, not distraught or emotional, and his tone of voice was monotone.[16]

In the end, there was no governmental coercion and the defendant's will was not overborne. In weighing the circumstances of pressure against the power of the defendant's resistance, the Court finds that the defendant was not induced into incriminating himself by governmental coercion or otherwise. To the extent that the defendant made any incriminating statements, he made such statements

[16] There is no information in the record about the defendant's educational background, employment status, or prior experience with law enforcement and the criminal justice system.

because he deliberately and voluntarily chose to do so. Accordingly, the Court rules that the People have established by a preponderance of the evidence that the defendant's statements were voluntarily made.

CONCLUSION

For all the foregoing reasons, the Court concludes that Motion D-124 lacks merit. Accordingly, it is denied.

Dated this 1st day of November of 2013.

BY THE COURT:

Carlos A. Samour, Jr.
District Court Judge

<u>CERTIFICATE OF SERVICE</u>

I hereby certify that on November 1, 2013, a true and correct copy of the **Order regarding motion to suppress Mr. Holmes' July 20, 2012 alleged statements to Officers Sweeney, Oviatt, and Blue (D-124)** 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)