

REDACTED

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	JUN 13 2013 COURT USE ONLY
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff v. JAMES HOLMES, Defendant	
DOUGLAS K. WILSON, Colorado State Public Defender Daniel King (No. 26129) Tamara A. Brady (No. 20728) Chief Trial Deputy State Public Defenders 1300 Broadway, Suite 400 Denver, Colorado 80203 Phone (303) 764-1400 Fax (303) 764-1478 E-mail: state.pubdef@coloradodefenders.us	Case No. 12CR1522 Division 26
MOTION TO EXCLUDE ANY IN-COURT OR OUT-OF-COURT IDENTIFICATIONS OF MR. HOLMES BY [REDACTED] [D-097]	

CERTIFICATE OF CONFERRAL

The District Attorney states that they object to the motion, and that they will file a response.

Mr. Holmes moves this Court for an order excluding any in-court or out-of-court identifications of Mr. Holmes by [REDACTED] and, in support, states:

1. [REDACTED] claims that he saw two males at Byers Canyon Range in a white car in the month before July 20, 2012. [REDACTED] contacted law enforcement because he believed that it was perhaps Mr. Holmes at the range. [REDACTED] was shown a photographic lineup containing a photo of Mr. Holmes, and did not identify Mr. Holmes as one of the men he saw at the range.

2. An accused is denied due process of law when an in-court identification is based upon an out-of-court identification which is so unnecessarily suggestive as to render the in-court identification unreliable. *Manson v. Brathwaite*, 432 U.S. 98 (1977); *Stovall v. Denno*, 388 U.S. 293 (1967); *People v. Mack*, 638 P.2d 257 (Colo. 1981). U.S. Const. amend. V, XIV; Colo. Const. art. II, §16.

3. An out-of-court identification procedure is impermissibly suggestive when there is substantial likelihood of misidentification based on the totality of the circumstances. *Manson*, 432 U.S. 98; *People v. Borrego*, 668 P.2d 21 (Colo. App. 1983). Some factors to be considered in evaluating these circumstances are the witness' opportunity to view the criminal; the witness' degree of attention; the accuracy of any prior description; the witness' level of certainty demonstrated at the confrontation; and the time elapsed between the time and the confrontation.

Manson, 342 U.S. 98. A one-on-one showup is undoubtedly suggestive. *Moore v. Illinois*, 434 U.S. 220 (1977); *People v. Staten*, 746 P.2d 1362 (Colo. App. 1987).

4. When a constitutional violation is established, an in-court identification by the witness is permissible only if the prosecution proves by clear and convincing evidence that the in-court identification is not the product of the unconstitutional procedure but, rather, is based upon an independent source. *Foster v. California*, 394 U.S. 440 (1969); *People v. Madonna*, 651 P.2d 378 (Colo. 1982).

5. Any identification of Mr. Holmes would be the product of a procedure so unnecessarily suggestive and conducive to irreparable mistaken identification as to render the identification unreliable.

6. Additionally, it is clear that [REDACTED] has since been exposed to the many pictures of Mr. Holmes in the media in relation to this case. *See e.g. Green v. Loggins*, 614 F.2d 219 (9th Cir. 1980) (holding that accidental pre-trial encounter between defendant and witness was impermissibly suggestive and thus witness' identification testimony should have been suppressed at trial); *see also United States v. Bouthot*, 878 F.2d 1506 (1st Cir. 1989) (witness' pre-trial exposure to defendant at a court hearing, at which witness was a spectator was impermissibly suggestive, and witness' identification was properly suppressed); *United States v. Monsour*, 893 F.2d 126 (6th Cir. 1990) (witness' exposure to defendant's picture in newspaper, brought to witness' attention by a co-worker, was unduly suggestive; however, witness demonstrated "sufficient independent indicia of reliability to keep the identification from becoming fatally tainted").

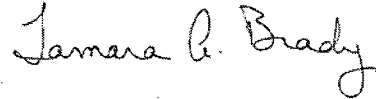
Request for a Hearing

7. Mr. Holmes moves for an evidentiary hearing on this motion.


Mr. Holmes files this motion, and makes all other motions and objections in this case, whether or not specifically noted at the time of making the motion or objection, on the following grounds and authorities: the Due Process Clause, the Right to a Fair Trial by an Impartial Jury, the Rights to Counsel, Equal Protection, Confrontation, and Compulsory Process, the Rights to Remain Silent and to Appeal, and the Right to be Free from Cruel and Unusual Punishment, pursuant to the Federal and Colorado Constitutions generally, and specifically, the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitutions, and Article II, sections 3, 6, 7, 10, 11, 16, 18, 20, 23, 25 and 28 of the Colorado Constitution.



Daniel King (No. 26129)
Chief Trial Deputy State Public Defender



Tamara A. Brady (No. 20728)
Chief Trial Deputy State Public Defender



Kristen M. Nelson (No. 44247)
Deputy State Public Defender

Dated: June 3, 2013

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THE PEOPLE OF THE STATE OF COLORADO, Plaintiff v. JAMES HOLMES, Defendant	σ COURT USE ONLY σ
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ORDER RE: MOTION TO EXCLUDE ANY IN-COURT OR OUT-OF-COURT IDENTIFICATIONS OF MR. HOLMES BY [REDACTED] [D-097]	

Defendant's motion is hereby GRANTED _____ DENIED _____.

BY THE COURT:

_____ JUDGE

_____ Dated

