

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	JUN - 3 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 REDACTED Division 26
MOTION TO SUPPRESS EVIDENCE: CELLULAR PHONE RECORDS [D-113]	

CERTIFICATE OF CONFERRAL

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

James Holmes, through counsel, moves to suppress the prosecution's use of any records related to cellular telephone number [REDACTED] obtained from Cellco Partnership dba Verizon Communications at any of the proceedings in this action on the grounds that the records were obtained as a result of an illegal seizure and search. In support, Mr. Holmes states:

1. Law enforcement in this case obtained a court order pursuant to C.R.S. § 16-3-301.1, directed to Cellco Partnership dba Verizon Communications, ordering production of:

All records pertaining to Cellco Partnership dba Verizon Communications, serviced cellular phone number [REDACTED], to include, but not limited to, billing, toll numbers, the name, address and telephone numbers of the subscriber; incoming and outgoing telephone numbers, to include dates, times and duration of the calls, voice-mail messages, text messages, cellular site locations associated with the calls, an area cell site listing of the cell site locations, RTI data, SMS and data connections, SMS content for this cellular telephone, all subscriber information for incoming and outgoing calls belonging to or serviced by Cellco

Partnership dba Verizon Communications, and any division thereof, any other pertinent information that may be helpful in the investigation; and other data associated with the account or account holder, from May 22, 2012 through July 20, 2012.

2. Mr. Holmes asserts that the order was invalid and evidence seized as a result should be suppressed. Mr. Holmes asserts the court order for production was facially invalid, and the affidavit in support of the order was insufficient and failed to establish probable cause for production. U.S. Const. amends. IV, XIV; Colo. Const. art. II, sec. 7; *Illinois v. Gates*, 462 U.S. 213 (1983); *People v. Pannebaker*, 714 P.2d 904 (Colo.1986); *People v. Padilla*, 182 Colo. 101, 511 P.2d 480 (1973); Crim P. 41; C.R.S. § 16-3-301.1.

3. Consequently, all evidence and information obtained as a result of the illegal seizures should be suppressed. In addition, all fruits and derivatives of those illegal seizures should also be suppressed, since any direct or indirect use of those fruits or derivatives would likewise violate the rights of Mr. Holmes. U.S. Const. amends. IV, XIV; Colo. Const. art. II, §§ 7, 25; *Wong Sun v. United States*, 371 U.S. 471 (1963); *Deeds v. People*, 747 P.2d 1266 (Colo. 1987); *People v. Sparks*, 748 P.2d 795 (Colo. 1988); *People v. Lowe*, 616 P.2d 118, 123 (Colo. 1980) (overruled in part on other grounds).

Argument

4. Mr. Holmes asserts that he has a reasonable expectation of privacy in these records. Mr. Holmes asserts that such records are protected by both the Fourth Amendment to the United States Constitution and the Colorado Constitution article II, section 7. Consequently, any search and seizure of such records pursuant to a court order must at least satisfy the same constitutional demands as required for a search warrant.

5. Mr. Holmes further asserts that much of the information sought by the order is specifically protected under the Colorado Constitution. *See, e.g., People v. Corr*, 682 P.2d 20 (Colo.1984) (finding reasonable expectation of privacy in telephone toll records, despite that information necessarily being available to service provider); *People v. Sporleder*, 666 P.2d 135 (Colo.1983) (same for out-going calls monitored by pen-registers).

6. In addition, several courts have recognized that historical cellular site location data is subject to protections under the Fourth Amendment of the United States Constitution. *See e.g. In the Application of the United States for Historical Cell Site Data*, 747 F.Supp.2d. 827, 837–40 (S.D.Tex.2010); *In the Application of the United States of America For and [sic] Order: (1) Authorizing the Use of a Pen Register and Trap and Trace Device; (2) Authorizing Release of Subscriber and Other Information; and (3) Authorizing the Disclosure of Location-Based Services*, 727 F.Supp.2d 571, 583–84 (W.D.Tex.2010). Further, Mr. Holmes asserts that even if such information were not protected by the United States Constitution, it is the type of information that would be independently protected under the Colorado Constitution. *E.g. Corr, supra; Sporleder, supra; People v. Oates*, 698 P.2d 811, 818–19 (Colo.1985) (holding that the warrantless installation of an electronic tracking device in a drum of chemicals prior to sale

violated the purchaser's right to protection against unreasonable searches under the Colorado Constitution).

7. Under Colorado law, a subpoena *duces tecum* or court order may be used by the prosecution in place of a warrant in order to obtain certain documentary evidence, so long as the defendant is given an opportunity to challenge that subpoena or order for lack of probable cause. *In re Mason*, 989 P.2d 757 (Colo. 1999). If the State seeks to compel production of information in which the defendant has a reasonable expectation of privacy by means of a court order, it must first demonstrate that probable cause exists for a search of the records. The Court in *Mason* specifically stated that, “[i]n defining probable cause in this context, we draw on the standard for obtaining a valid search warrant” – including that there is a sufficient “nexus between the materials and the charges against the defendant” – and in the absence of such a showing, compelled production under the subpoena violates Article II § 7 of the Colorado Constitution. *Id.* at 761.

8. In *Mason, supra*, the Colorado Supreme Court held that the issuance of a subpoena *duces tecum* for bank records was permissible, as long as adequate probable cause was established, because “a subpoena *duces tecum* offers greater protection to defendants” and therefore “may effectively substitute for the issuance of a search warrant.” *Id.* at 761.

9. The court order at issue here, unlike the subpoena at issue in *Mason*, does not appear to provide any greater protections to defendants than a search warrant and, consequently, must meet at least the same standards as a search warrant to be constitutional.

10. The court order here lacks sufficient particularity and is unconstitutionally overbroad, and the affidavit fails to adequately establish a nexus between the information sought and the crimes charged.

Lack of Particularity

11. The same particularity requirements that apply to search warrants should apply to this court order. *See e.g.* Motion to Suppress Evidence: iPhone [D-119], Motion to Suppress Evidence: Search of iPod [D-118] and Motion to Suppress: Computers And Computer-Related Hardware And Drives [D-116] for discussion of constitutional particularity requirements for search warrants, which Mr. Holmes incorporates herein; *see also Mason, supra*.

12. The court order here seeks “All records pertaining to...” the cellular phone number and account. The order makes little attempt to meaningfully limit such broad language. While it contains a date range, such range is overbroad and appears arbitrary not tied to any particular information in the affidavit. The order does not limit the search to evidence of a specific crime or crimes.

13. The order is therefore unconstitutionally overbroad under the Fourth Amendment to the United States Constitution and Colo. Const. art. II, sec. 7. “The principal means of effectuating the [particularity] requirement is to suppress all evidence seized pursuant to an

overbroad, general warrant.” *People v. Roccaforte*, 919 P.2d 799 (Colo. 1996). Therefore, any evidence seized or recovered pursuant to the order must be suppressed.

Lack of Probable Cause

14. Likewise, this order must be supported by probable cause establishing the requisite nexus between the materials sought and the offense charged. *See e.g.* Motion to Suppress Evidence: iPhone [D-119], Motion to Suppress: Search of iPod [D-118] and Motion to Suppress: Computers And Computer-Related Hardware and Drives [D-116] for discussion of constitutional probable cause and nexus requirements for search warrants, which Mr. Holmes incorporates herein; *see also Mason, supra*.

15. The affidavit details facts surrounding the incident at the Century 16 theaters and the arrest of Mr. Holmes, as well as the details surrounding the initial search and examination of 1690 N. Paris Street, #10. While the affidavit may have sufficed to establish probable cause that crimes had been committed, and connected Mr. Holmes to those crimes, there is no factual information in the probable cause affidavits to establish sufficient probable cause to believe that the records seized here were an instrumentality of any crime or contained evidence of any crime.

16. The affidavit merely contains speculative, conclusory opinions from the affiant, but no actual facts providing probable cause to believe that the items sought were relevant to this crime. All the affidavit says, essentially, is that Mr. Holmes is believed to have committed a crime or crimes and this cellular phone number belonged to him. That is insufficient to establish probable cause to seize and search all the requested records and information.

The Order and Affidavit Was Based Upon Illegally Obtained Information

17. Lastly, Mr. Holmes alleges that the affidavit in support of this order contain information obtained as a result of other illegal searches; *see* Motion to Suppress Evidence: Searches of 1690 N. Paris Street # 10 [D-123]; Motion to Suppress Evidence: Searches of White Hyundai [D-115].

18. Therefore, the order and any information obtained based upon it are fruits of prior illegal searches and/or seizures and any resulting evidence must be suppressed. U.S. Const. amends. IV, XIV; Colo. Const. art. II, §§ 7, 25; *Wong Sun v. United States*, 371 U.S. 471 (1963); *Deeds v. People*, 747 P.2d 1266 (Colo. 1987); *People v. Sparks*, 748 P.2d 795 (Colo. 1988); *People v. Lowe*, 616 P.2d 118, 123 (Colo. 1980) (overruled in part on other grounds); *see also United States v. Wanless*, 882 F.2d 1459, 1465-66 (9th Cir.1989); *United States v. Gray*, 302 F.Supp.2d 646, 653 (S.D.W.Va.2004).

19. For all the foregoing reasons, Mr. Holmes moves to suppress the prosecution’s use of these records and information at any of the proceedings in this action.

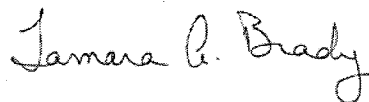
Request for a Hearing

20. 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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Defendant's motion is hereby GRANTED _____ DENIED _____.

BY THE COURT:

JUDGE

Dated

I hereby certify that on June 3rd, 2013, I

mailed, via the United States Mail,
 faxed, or
 hand-delivered

a true and correct copy of the above and foregoing document to:

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Jacob Edson
Rich Orman
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Mora Luhatan