District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff v. **JAMES HOLMES,** Defendant	σ COURT USE ONLY σ
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 SUPPRESS EVIDENCE: EMAIL ACCOUNT RECORDS FROM MICROSOFT AND GOOGLE [D-120]

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 records related to certain email accounts, obtained from Google, Inc. and Microsoft Corporation, at any of the proceedings in this action on the grounds that the items were obtained as a result of an illegal seizure and search. In support, Mr. Holmes states:

1. Law enforcement in this case obtained three court orders pursuant to C.R.S. § 16-3-301.1 for production of certain email account records related to Mr. Holmes. One was issued to Microsoft Corporation related to an email address of "dsherlockb@hotmail.com" and required production of:

> Provide any and all e-mail records to include but not limited to all electronic mail stored and presently contained in, or on behalf of, the following electronic mail address and/or individual account: dsherlockb@hotmail.com. All existing printouts from original storage of all of the electronic mail, all transactional information of all activity of the electronic mail address and/or individual account described above, including log files, dates, times, methods of connecting, ports, IP addresses, dial-ups, and/or locations; all

> business records and subscriber information, in any form kept, pertaining to the electronic mail address and/or individual account described above, including applications, subscribers' full names, all screen names associated with the subscribers and/or accounts, all account names associated with the subscribers, methods of payment, telephone numbers, addresses, and detailed billing records; and all records indicating the services available to subscribers of the electronic mail address and/or individual account described above. All stored electronic communications, existing print outs, and other files reflecting communications to or from the above-referenced accounts, including electronic communications in electronic storage, any and all records reference James E. Holmes, DOB:12/13/1987, that are in actual or constructive control by Microsoft Corporation Online Services, DBA: Hotmail.com.

2. The other two were issued to Google, Inc. for production of records regarding email account "classic.jimbo@gmail.com" and email account "dsherlockb@gmail.com."

3. The order related to "classic.jimbo@gmail.com" required production of:

> Provide any and all e-mail records to include but not limited to all electronic mail stored and presently contained in, or on behalf of, the following electronic mail address and/or individual account: classic.jimbo@ gmail.com, All existing printouts from original storage of all of the electronic mail, all transactional information of all activity of the electronic mail address and/or individual account described above, including log files, dates, times, methods of connecting, ports, IP addresses, dial-ups, and/or locations; all business records and subscriber information, in any form kept, pertaining to the electronic mail address and/or individual account described above, including applications, subscribers' full names, all screen names associated with the subscribers and/or accounts, all account names associated with the subscribers, methods of payment, telephone numbers, addresses, and detailed billing records; and all records indicating the services available to subscribers of the electronic mail address and/or individual account described above. All stored electronic communications, existing print outs, and other files reflecting communications to or from the above-referenced accounts, including electronic communications in electronic storage, any and all records reference James E. Holmes, DOB: 12/13/1987, that are in actual or constructive control by Google Inc, DBA: gmail.com.

4. The order related to "dsherlockb@gmail.com" required production of:

> Provide any and all e-mail records to include but not limited to all electronic mail stored and presently contained in, or on behalf of, the following electronic mail address and/or individual account: dsherlockb@ gmail.com. All existing printouts from original storage of all of the electronic mail, all transactional information of all activity of the electronic mail address and/or individual account described above, including log files, dates, times, methods of connecting, ports, IP addresses, dial-ups, and/or locations; all business records and subscriber information, in any form kept, pertaining to the electronic mail address and/or individual account described above, including applications, subscribers' full names, all screen names associated with the subscribers and/or accounts, all account names associated with the subscribers, methods of payment, telephone numbers, addresses, and detailed billing records; and all records indicating the services available to subscribers of the electronic mail address and/or individual account described above. All stored electronic communications, existing print outs, and other files reflecting communications to or from the above-referenced accounts, including electronic communications in electronic storage, any and all records reference James E. Holmes, DOB: 12/13/1987, that are in actual or constructive control by Google Inc, DBA: gmail.com.

5. The records produced include subscriber information and: (1) for the dsherlockb@gmail.com account, emails and their contents going back as far as 2009; (2) for the classic.jimbo@gmail.com account, emails and their contents from 2012; and (3) for the dsherlockb@hotmail.com account, emails and their contents going as far back as 2006.

6. Mr. Holmes asserts that the orders were invalid and evidence seized as a result should be suppressed. Mr. Holmes asserts the court orders for production were facially invalid, and the affidavits in support of the orders were 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.

7. 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

8. Mr. Holmes asserts that he has a reasonable expectation of privacy in his email accounts and records that is protected under both the Fourth Amendment to the United States Constitution and the Colorado Constitution article II, section 7.

9. "Given the fundamental similarities between email and traditional forms of communication, it would defy common sense to afford emails lesser Fourth Amendment protection." *United States v. Warshak*, 631 F.3d 266, 286 (6th Cir. 2010) citing *City of Ontario v. Quon*, ---U.S. ----, 130 S.Ct. 2619, 2631, 177 L.Ed.2d 216 (2010) (implying that "a search of [an individual's] personal e-mail account" would be just as intrusive as "a wiretap on his home phone line") and *United States v. Forrester*, 512 F.3d 500, 511 (9th Cir.2008) (holding that "[t]he privacy interests in [mail and email] are identical").

> Email is the technological scion of tangible mail, and it plays an indispensable part in the Information Age. Over the last decade, email has become "so pervasive that some persons may consider [it] to be [an] essential means or necessary instrument[ ] for self-expression, even self-identification." *Quon*, 130 S.Ct. at 2630. It follows that email requires strong protection under the Fourth Amendment; otherwise, the Fourth Amendment would prove an ineffective guardian of private communication, an essential purpose it has long been recognized to serve.

Warshak, 631 F.3d at 286.

10. Thus, "[i]t only stands to reason that, if government agents compel an ISP to surrender the contents of a subscriber's emails, those agents have thereby conducted a Fourth Amendment search, which necessitates compliance with the warrant requirement absent some exception." *Warshak*, 631 F.3d at 286. Therefore, Mr. Holmes asserts that the emails in these accounts and their contents are protected under the United States and Colorado constitutions.

11. Further, even if this Court were to determine that certain information – such as basic subscriber information – is not protected under the federal constitution, Mr. Holmes asserts that it is protected under Article II, Section 7 of the Colorado Constitution. As the Colorado Supreme Court recently stated:

> Unlike the Supreme Court's construction of the Fourth Amendment, we have in the past interpreted our own constitution to protect as reasonable even privacy interests necessarily exposed to third-party businesses or service providers in the course of using of their commercial service. *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);

> *Charnes v. DiGiacomo,* 200 Colo. 94, 612 P.2d 1117 (1980) (finding reasonable expectation of privacy in bank transactions, despite their necessary disclosure to, and recording by, bank personnel).

People v. Esparza, 272 P.3d 367, 369 (Colo. 2012). The information here deserves similar protection. For instance in *Forrester, supra*, the federal court held that – for Fourth Amendment purposes – certain data related to email transmission was the constitutional equivalent of pen register information. Since pen register information is constitutionally protected under the Colorado Constitution, *see e.g. Sporleder, supra*, then similar information related to email transmissions should likewise be constitutionally protected under the Colorado Constitution, to the extent it may not be protected under the Fourth Amendment.

12. 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 such as bank records, 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.

13. 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.

14. The court orders at issue here, unlike the subpoena at issue in *Mason*, do 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.

15. The court orders here lack sufficient particularity and are unconstitutionally overbroad, and the affidavits fail to adequately establish a nexus between the information sought and the crimes charged.

16. In addition, the information regarding the existence of the email accounts was the result of illegal searches of Mr. Holmes' iPhone and car. Consequently, these records are the fruits of the poisonous tree.

A. Lack of Particularity

17. Since the emails and their contents are subject to Fourth Amendment protections, any court order for their production must satisfy the constitutional requirements for a search

warrant. In addition, under *Mason*, *supra*, a court order for documentary evidence protected by the Colorado constitution must likewise establish probable cause for any search and seizure.

18. Thus, these orders for production must satisfy the particularity requirements that apply to search warrants. *See e.g.* Motion to Suppress Evidence: iPhone [D-119], Motion to Suppress Evidence: iPod Touch [D-118] and Motion to Suppress Evidence: Computers And Computer-Related Hardware [D-116] for discussion of constitutional particularity requirements for search warrants, which Mr. Holmes incorporates herein.

19. The court orders here seek "any and all e-mail records" for the specified accounts. The orders make no attempt to meaningfully limit such broad language. They do not contain any date restrictions. They do not limit the search to evidence of a specific crime or crimes.

20. The orders are 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 these orders must be suppressed.

B. Lack of Probable Cause

1. <u>All Three Orders</u>

21. All three orders 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 Evidence : iPod Touch [D-118] and Motion to Suppress Evidence: Computers And Computer-Related Hardware [D-116] for discussion of constitutional probable cause and nexus requirements for search warrants, which Mr. Holmes incorporates herein.

22. The affidavits detail 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 affidavits 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 any of the email records seized here were the instrumentality of any crime or contained evidence of any crime.

23. The affidavits merely contain 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 affidavits say, essentially, is that Mr. Holmes was connected to a crime or crimes and these were those of his email accounts. That is insufficient to establish probable cause to seize and search all records in these accounts.

2. **The Microsoft Hotmail Order**

24. The Order for Production to Microsoft Corporation required production of any and all e-mail records regarding the email account "dsherlockb@hotmail.com." However, the only Hotmail address referenced in the supporting affidavit is "dsherlock@hotmail.com" (without a "b"). Thus, even assuming arguendo that the affidavit established probable cause in relation to a Hotmail account, that account is not the one set forth in the Court Order. The affidavit referenced one Hotmail account ("dsherlock") but the order authorized production of records for a different Hotmail account ("dsherlockb"). As such, the affidavit failed to establish probable cause to seize and search the records for the email account of "dsherlockb@hotmail.com."

C. The Orders and Affidavits Were Based Upon Illegally Obtained Information

25. Lastly, Mr. Holmes alleges that knowledge of these email accounts was obtained by the illegal search and seizure of his iPhone. *See* Motion to Suppress Evidence: iPhone [D-119] Further, the affidavits in support of these orders contain information obtained as a result of the illegal searches and seizure of the iPhone, as well as the following illegally obtained information:

- Information illegally obtained from Mr. Holmes' wallet – *see* Motion to Suppress Evidence: Wallet [D-114]
- Information obtained from an illegal warrantless entry into Mr. Holmes' apartment at 1690 N. Paris St. #10 – *see* Motion to Suppress Evidence: Searches of 1690 N. Paris Street #10 [D-123]
- Information obtained from an illegal warrantless search of Mr. Holmes' car – *see* Motion to Suppress Evidence: Searches of White Hyundai [D-115].

26. Therefore, these orders themselves and any information obtained based upon them are fruit 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).

27. For all the foregoing reasons, Mr. Holmes moves to suppress the prosecution's use of records related to these email accounts, obtained from Google, Inc. and Microsoft Corporation, at any of the proceedings in this action.

Request for a Hearing

28. 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

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff v. **JAMES HOLMES,** Defendant	σ COURT USE ONLY σ
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: [redacted]@coloradodefenders.us	Case No. **12CR1522** Division 26
ORDER re: MOTION TO SUPPRESS EVIDENCE: EMAIL ACCOUNT RECORDS FROM MICROSOFT AND GOOGLE [D-120]	

Defendant's motion is hereby GRANTED _____ DENIED _____.

BY THE COURT:

_____ _____

JUDGE Dated

I hereby certify that on June 3, 2013, I

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

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

George Brauchler
Jacob Edson
Rich Orman
Karen Peterson
Office of the District Attorney
6450 S. Revere Parkway
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_____ Alias