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	JUN - 3 2013 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: IPHONE [D-119]

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 evidence obtained from the search and seizure of his iPhone at any of the proceedings in this action on the grounds that any such evidence was obtained as a result of an illegal search and seizure. In support, Mr. Holmes states:

The Search Warrant

1. Law enforcement obtained a search warrant that authorized a search of "black colored Apple iPhone, telephone number [redacted], subscribed to by James Holmes" that was seized from Mr. Holmes' car.

2. The warrant authorized a search of that item for:

> Any information contained in the memory of the cellular telephone, to include, but not limited to, the cellular numbers, cellular service providers, caller identifications displaying sent calls, received calls, dialed calls, missed calls, text messages received, text messages sent, text messages drafted, pictures taken, pictures received, pictures saved, videos taken, videos received, videos saved, audio taken, audio saved, emails sent, emails

received, emails drafted, phone books displaying names, addresses, phone numbers, forwarding information and dates and times associated with the aforementioned information.

3. The Fourth Amendment to the United States Constitution provides: "[N]o warrant shall issue, but upon probable cause, supported by oath or affirmation." U.S. Const. amends. IV, XIV; Colo. Const. art. II, § 7. It is thus fundamental under the constitutions that in order to support the issuance of a search warrant the issuing magistrate must be apprised of sufficient underlying facts and circumstances to support a finding of probable cause. *Illinois v. Gates*, 462 U.S. 213 (1983); *People v. Padilla*, 182 Colo. 101, 511 P.2d 480 (1973); *People v. Brethauer*, 174 Colo. 29, 482 P.2d 369 (1971). In determining whether the affidavit is sufficient, the magistrate must look only within the four corners of the affidavit. *Padilla, supra*; *Brethauer, supra.*

4. In addition, any search warrant must describe the items to be seized with sufficient particularity, and the scope of the search must be confined to that authorized by the warrant. A search pursuant to a warrant "may nevertheless violate the constitutions if it exceeds the scope of the authority provided in the warrant." *People v. King*, 292 P.3d 959, 961 (Colo.App. 2011) citing *Horton v. California,* 496 U.S. 128, 140, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990).

5. Here, the search warrant was invalid on its face, the affidavit in support of the warrant was insufficient and failed to establish probable cause for this particular search, and/or the warrant was illegally executed. 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.

6. Consequently, all evidence and information obtained as a result of the illegal searches and seizures should be suppressed. In addition, all fruits and derivatives of those illegal searches and 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).

Lack of Particularity

7. This search warrant is unconstitutionally overbroad in violation of the Fourth Amendment to the United States Constitution and Colo. Const. art. II, sec. 7 and, therefore, any evidence seized or recovered pursuant to the warrant must be suppressed.

8. The Fourth Amendment to the United States Constitution requires not only that warrants be supported by probable cause, but also that they "particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV; *see also* Colo. Const. art. II, sec. 7 ("no warrant to search any place or seize any person or things shall issue without describing the place to be searched, or the person to be seized, as near as may be…");

People v. Roccaforte, 919 P.2d 799, 802 (Colo. 1996); *People v. Donahue*, 750 P.2d 921 (Colo. 1988) (A warrant specifying the place to be searched, but not the items to be seized, is invalid on its face for lack of particularity.). A search warrant must "identify or describe, as nearly as may be, the property to be searched for, seized, or inspected." § 16-3-303(1)(b); Crim.P.Rule 41(d)(1)(II). "The policy behind the requirement is to prevent officers from conducting a 'general, exploratory rummaging in a person's belongings.'" *Roccaforte, supra*, quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971).

9. The particularity requirement "ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Maryland v. Garrison,* 480 U.S. 79, 84, 107 S.Ct. 1013, 94 L.Ed.2d 72 (1987). *See also Marron v. United States,* 275 U.S. 192, 196, 48 S.Ct. 74, 72 L.Ed. 231 (1927) ("The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.").

10. The particularity requirement is more stringently applied in cases involving the seizure of books, documents, personal papers or other items with First Amendment value. *Stanford v. Texas*, 379 U.S. 476 (1965).

11. "The principal means of effectuating the [particularity] requirement is to suppress all evidence seized pursuant to an overbroad, general warrant." *Roccaforte, supra.*

12. Here, the warrant authorized a general search of "any information contained in the memory" of the iPhone, which is equivalent to a computer hard drive. Numerous courts have concluded that individuals have a reasonable expectation of privacy in the data contained in their cellphones or similar electronic data storage devices. *See e.g. United States v. Wurie,* --- F.3d ---, 2013 WL 2129119 (1st Cir. May 17, 2013) (and cases discussed therein); *People v. Taylor*, 296 P.3d 317 (Colo. App. 2012); *State v. Boyd*, 295 Conn. 707, 721, 992 A.2d 1071, 1081 (Conn.,2010) (defendant had reasonable expectation of privacy in cell phone); *State v. Smith,* 920 N.E.2d 949, 956 (Ohio App. 2009); *Hawkins v. State*, 704 S.E.2d 886, 891-92 (Ga. App. 2010); *see also People v. Schutter,* 249 P.3d 1123 (Colo. 2011) (accepting without analysis that defendant had reasonable expectation of privacy in contents of cell phone (an iPhone)).

13. The blanket search authorization here was unconstitutionally overbroad, and lacking in the particularity required by the state and federal constitutions.

14. The Tenth Circuit has stated:

> The underlying premise in [*United States v. Carey,* 172 F.3d 1268, 1271 (10th Cir.1999)] is that officers conducting searches (and the magistrates issuing warrants for those searches) cannot simply conduct a sweeping, comprehensive search of a computer's hard drive. Because computers can hold so much information touching on many different areas of a person's life, there is a greater

> potential for the "intermingling" of documents and a consequent invasion of privacy when police execute a search for evidence on a computer.... Thus, when officers come across computer files intermingled with irrelevant computer files, they may seal or hold the computer pending approval by a magistrate of the conditions and limitations on a further search of the computer.... Officers must be clear as to what it is they are seeking on the computer and conduct the search in a way that avoids searching files of types not identified in the warrant.

United States v. Walser, 275 F.3d 981, 986 (10th Cir.2001) (internal quotations and citations omitted). The same is true for modern "smartphones" like the iPhone, which are essentially mini-computers.

15. The Tenth Circuit specifically addressed a search warrant employing similar language in a computer search, and determined the language was unconstitutionally overbroad and the warrant invalid:

> The modern development of the personal computer and its ability to store and intermingle a huge array of one's personal papers in a single place increases law enforcement's ability to conduct a wide-ranging search into a person's private affairs, and accordingly makes the particularity requirement that much more important. *See, e.g. United States v. Riccardi,* 405 F.3d 852, 863 (10th Cir.2005) (warrant authorizing general search of computer invalid as it permitted officers to search anything "from child pornography to tax returns to private correspondence"); *United States v. Carey,* 172 F.3d 1268, 1272 (10th Cir.1999) (computer search for files pertaining to distribution of controlled substances uncovered child pornography). Because of this, our case law requires that "warrants for computer searches must *affirmatively limit* the search to evidence of specific federal crimes or specific types of material." *Riccardi,* 405 F.3d at 862 (emphasis added).
>
> *Wisely, the government does not contest that a warrant authorizing a search of "any and all information and/or data" stored on a computer would be anything but the sort of wide-ranging search that fails to satisfy the particularity requirement.*

United States v. Otero, 563 F.3d 1127, 1131 -1132 (10th Cir. 2009) (emphasis added).

16. Further, the warrant here makes no attempt to meaningfully limit such broad language. It does not contain any date restrictions. It does not limit the search to evidence of a specific crime or crimes. It does not even limit the search to information related to Mr. Holmes.

17. The warrant is therefore unconstitutionally overbroad under the Fourth Amendment to the United States Constitution and Colo. Const. art. II, sec. 7. Even if this Court were to attempt to impart a narrowing construction to this warrant, the search has already occurred under the unconstitutionally broad paramaters set forth in the warrant. As already noted, "[t]he principal means of effectuating the [particularity] requirement is to suppress all evidence seized pursuant to an overbroad, general warrant." *Roccaforte, supra.* Consequently, any evidence seized or recovered pursuant to this warrant must be suppressed.

Lack of Probable Cause

18. This search warrant and supporting affidavit fail to establish sufficient probable cause to search the named items, in violation of the Fourth Amendment to the United States Constitution and Colo. Const. art. II, sec. 7 and, therefore, any evidence seized or recovered pursuant to the warrant must be suppressed.

19. When establishing probable cause to search, the burden is on the prosecution to prove more than just some nexus between a person and criminal activity. *See Massachusetts v. Upton*, 466 U.S. 727 (1984); *People v. King*, 16 P.3d 807, 813 (Colo. 2001). Rather, probable cause to search requires the prosecution to provide an affidavit that demonstrates a "sufficient nexus between criminal activity, the things to be seized, and the place to be searched." *People v. Kazmierski*, 25 P.3d 1207, 1211 (Colo. 2001); *People v. Randolph*, 4 P.3d 477 (Colo. 2000). Police are required to "use in the affidavit for the search warrant current information they have available, or may obtain, to establish the link between the place to be searched and the existence of criminal activity or contraband there. Establishing this link is at the heart of Fourth Amendment protections." *People v. Miller*, 75 P.3d 1108, 1117 (Colo. 2003); *People v. Leftwich*, 869 P.2d 1260 (Colo. 1994); *People v. Titus*, 880 P.2d 148 (Colo. 1994); *People v. Pannebaker*, 714 P.2d 904, 907 (Colo. 1986); *Illinois v. Gates*, 462 U.S. 213, 238 (1983)); *Moreno v. People*, 491 P.2d 575 (Colo. 1971) (citing *Giordenello v. United States*, 357 U.S. 480 (1958)).

20. The affidavit here fails to establish an adequate nexus to believe that evidence related to crimes would be found in this item. 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 affidavit to establish sufficient probable cause to believe that the item seized here was an instrumentality of any crime or contained evidence of any crime.

> An affidavit is considered "bare-bones," and therefore an officer cannot reasonably rely on it, where the affidavit fails to establish a "minimally sufficient nexus between the illegal activity and the place to be searched." *United States v. Carpenter,* 360 F.3d 591, 596 (6th Cir.2004). Often, a bare-bones affidavit is one that consists substantially of conclusory statements, *see, e.g., United States v. Laury,* 985 F.2d 1293, 1311 n. 23 (5th Cir.1993), but this is not always the case. An affidavit that provides the details of an

> investigation, yet fails to establish a minimal nexus between the criminal activity described and the place to be searched, is nevertheless bare-bones. *See, e.g., United States v. West,* 520 F.3d 604, 610–11 (6th Cir.2008); *United States v. Weber,* 923 F.2d 1338, 1346 (9th Cir.1990) (holding that the affidavit, which failed to establish any nexus between the place searched and criminal activity, was a bare-bones affidavit despite copious expert testimony).

People v. Gutierrez, 222 P.3d 925, 941 -942 (Colo. 2009).

21. The affidavit merely contains speculative, conclusory opinions from the affiant, but no actual facts providing probable cause to believe that these items or information on them was relevant to a crime. The main "fact" is essentially that this item was recovered from Mr. Holmes' car, and Mr. Holmes was believed to have committed a crime. That is insufficient to establish probable cause to search these particular items. Rather, any purported basis to search these items is only set forth in the conclusory statements and the personal opinions of the affiant, which do not provide a proper evidentiary basis for the establishment of probable cause. *People v. Padilla,* 511 P.2d 480 (Colo. 1973).

22. The warrant and affidavit seeks "any information" on the device, but fails to establish a sufficient nexus or probable cause for such a general exploratory search.

23. The lack of a sufficient nexus or probable cause to search this item is further demonstrated by the affiant's unconstitutionally overbroad request to search, as discussed above. Since the affiant had no information to establish a nexus between this item and any offense, the affiant was unable to identify any evidence to be seized with particularity and, instead, intended to conduct a general exploratory search in the hopes of finding evidence.

24. Under these circumstances, the affidavit failed to establish probable cause for issuance of the warrant and, consequently, the warrant was invalid and any evidence seized or recovered must be suppressed.

The iPhone Was Illegally Obtained

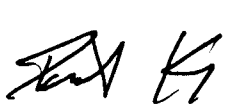
25. Further, Mr. Holmes argues that this iPhone was illegally seized as part of an unconstitutional search of Mr. Holmes' car, as argued in a separate motion. *See* Motion to Suppress Evidence: Searches of White Hyundai [D-115]. Consequently, the iPhone itself is the fruit of the poisonous tree of an unconstitutional search, and any evidence obtained as a result 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).

26. For all the foregoing reasons, Mr. Holmes moves to suppress the prosecution's use of any evidence obtained from the search of his iPhone at any of the proceedings in this action.

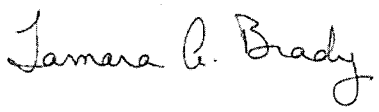
Request for a Hearing

27. 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



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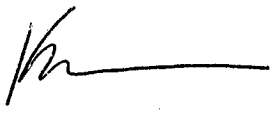

Kristen M. Nelson (No. 44247)
Deputy State Public Defender

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: state.pubdef@coloradodefenders.us	Case No. **12CR1522** Division 26
ORDER RE: MOTION TO SUPPRESS EVIDENCE: IPHONE [D-119]	

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:

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