

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	FILE JUN - 5 2008 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 Division 26
MOTION TO SUPPRESS EVIDENCE: SEARCH AND SEIZURE OF BANK RECORDS [D-122]	

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 his banking records obtained from USAA Federal Savings Bank and Point Loma Credit Union at any of the proceedings in this action on the grounds that the items were obtained as a result of an illegal search and seizure. In support, Mr. Holmes states:

1. Law enforcement in this case obtained two court orders pursuant to C.R.S. § 16-3-301.1 for production of bank records related to Mr. Holmes. One was issued to USAA Federal Savings Bank and required production of:

All bank records in the possession of USAA Federal Savings Bank, in the name of James Eagan Holmes, DOB: 12-13-87, USAA Platinum Master Card account# [REDACTED] to include but not limited to customer's name on bank account, identification used to open this account, customers address, banking records to include checking account statements, locations of safety deposit boxes, loan records, customer account information and records of credit card transactions.

2. The other was issued to Point Loma Credit Union and required production of:

All bank records in the possession of Point Loma Credit Union, in the name of James Eagan Holmes, DOB: 12-13-87, under account# [REDACTED] to include but not limited to customer's name on bank account, identification used to open this account, customers address, banking records to include checking account statements, money market account statements, locations of safety deposit boxes, loan records, customer account information and records of credit card transactions.

3. In response, law enforcement was provided bank records from Point Loma Credit Union dating back to December, 2003, and from USAA Federal Savings Bank dating back to November, 2006.

4. 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.

5. 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

6. Mr. Holmes asserts that he has a reasonable expectation of privacy in his banking records that is protected under both the Fourth Amendment to the United States Constitution and the Colorado Constitution article II, section 7. *But see United States v. Miller*, 425 U.S. 435 (1976) (holding that bank customers do not have reasonable expectations of privacy under the Fourth Amendment in banking transactions), subsequently limited by statute as recognized in, *e.g.*, *Lopez v. First Union Nat. Bank of Florida*, 129 F.3d 1186, 1190 (11th Cir. 1997); *see also McDonough v. Widnall*, 891 F.Supp. 1439, 1447 (D. Colo. 1995). 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.

7. Even if Fourth Amendment protections are determined not to apply, the Colorado Supreme Court has specifically held that bank customers have a constitutionally protected reasonable expectation of privacy in their bank records under Article II, Section 7 of the Colorado Constitution. *See In re Mason*, 989 P.2d 757 (Colo. 1999); *Charnes v. DiGiacomo*, 200 Colo. 94, 612 P.2d 1117 (1980); Colo. Const. art. II, sec. 7.

8. 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 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.

9. 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.

10. 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.

11. 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.

12. In addition, the information regarding the existence of the bank accounts was the result of illegal searches of Mr. Holmes’ wallet, his apartment, and computer(s). Consequently, these records are the fruits of the poisonous tree.

Lack of Particularity

13. Under *Mason, supra*, and *Charnes, supra*, the same particularity requirements that apply to search warrants should apply to these court orders. *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.

14. The court orders here seek “all bank records” for these 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.

15. 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). Consequently, any evidence seized or recovered pursuant to this warrant must be suppressed.

Lack of Probable Cause

16. Likewise, as specifically noted in *Mason, supra*, such 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.

17. The affidavits here 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 the records seized here were an instrumentality of any crime or contained evidence of any crime.

18. 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 two of his bank accounts. That is insufficient to establish probable cause to seize and search all bank record in these accounts.

The Orders and Affidavits Were Based Upon Illegally Obtained Information

19. Lastly, Mr. Holmes alleges that knowledge of these bank accounts was obtained by the illegal search and seizure of his wallet and his computer(s). Further, the affidavits in support of these orders contain information obtained as a result of those illegal searches and seizures. Therefore, these orders themselves and any information obtained based upon them 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).

20. For all the foregoing reasons, Mr. Holmes moves to suppress the prosecution’s use of any bank records obtained from these accounts at any of the proceedings in this action.

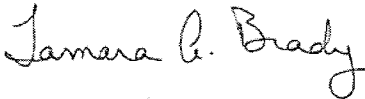
Request for a Hearing

21. 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
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ORDER RE: MOTION TO SUPPRESS EVIDENCE: SEARCH AND SEIZURE OF BANK RECORDS [D-122]	

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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