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District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	<p style="text-align: center;">FILED JUN - 9 2013 DISTRICT COURT</p> <p style="text-align: center;">σ COURT USE ONLY σ</p>
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 SUPPRESS EVIDENCE: SEARCH AND SEIZURE OF COMPUTERS AND COMPUTER-RELATED HARDWARE AND DRIVES [D-116]	

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 evidence obtained from the search and seizure of any of the ten (10) items discussed below 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 to authorize a search of the following ten (10) items seized from Mr. Holmes' apartment:

1) Black NZXTeCyberpower tower PC, model number: 8C-T2NL 1-WWR, serial number: C11420301361; containing one Seagate 2TB HDD, model number: 8T2000DM001, serial number: W2402PJ8. (FBI evidence marked item: 1)

2) Black *Lenovo* tower PC, model number: IdeaCentre K230, serial number: 8809244663; containing one Western Digital 640GB

HDD, model number: WD6400AAKS, serial number: WMAS¥4742554. (FBI evidence marked item:5)

3) Silver *Toshiba* laptop, model number L505D, serial number: 1A.029002Q; containing one Toshiba 250 HOD, model number: MK2555GSX, serial number: Z98FCGA2T, with power adapter. (FBI evidence marked item: 11)

4) Black *LePan* tablet PC, model number: TC970, serial number: no serial number visible; containing one 2GB San Disk Micro SD Flash card, one box labeled with the TC970 serial number ZBTC976DFL 12191 and also containing charging adapter. (FBI evidence marked item: 3 & 83)

5) Black and gray metal, unknown manufacture, unknown size, USB thumb drive labeled with "Denver Anshutz Medical Campus Graduate School, ucdenver.edu/graduateschool." (FBI evidence marked item: 88)

6) Black *Motorola* cable modem, model number: SB5101, serial number:166958915902902401011107. (FBI evidence marked item: 32)

7) Black USB *Netgear*wireless network adapter, model number: PTVU1000, serial number: 2RT1194MOOEAB. (FBI evidence marked item: 2)

8) Black USB *Netgear* Push2TV wireless adapter base unit, model number: PTVU1000, serial number: 2RT1194MOOEAB (Note: Unit has same model number and serial number as previous listed item but is actually a different evidence item); containing one Black USB *Netgear* wireless network adapter, model number: PTVU1000, serial number: 2RT1194MOOEAB. (FBI evidence marked item: 42)

9) Black *DANE ELEC* 500MB USB thumb drive, unknown model number or serial number. (FBI evidence marked item: 96)

10) Gray and red *PNY*256 MB, model Attache USB thumb drive, no serial number. (FBI evidence marked item: 96)

2. The warrant authorized a search of those items for:

Any and all Information and data stored within the 10 listed items,

Including any and all Information relating to any written documents, diaries, memoirs, journals, notes, letters, memorandums, address/phone number listings, training records, certificates, photographs, videos, audio recordings, sent and received e-mails, chat line logs and communications, Internet web sites visited, Internet history, financial transactions detail, online purchases, user/owner identifications, computer registration information, and passwords whether or not these any of these items have been encrypted, password protected, previously deleted, or privatized to deny access in any other manner by any prior operator of the computer.

Any and all computer programs or software used in the operation of the computer system, used to transmit or receive information, used to display or print graphics or other types of files, and all other computer programs and software associated with the computer system to include all programs stored on the computer or other storage media.

Any and all correspondence, electronic mail (e-mail), letters, notes, memorandum, or other communications in written or oral form, stored on the listed items.

Any and all documents which serve the purpose of explaining the way in which the computer hardware, programs and data are used, including manuals for computer equipment or software, printouts of computer programs, data files or other information which has been or continues to be stored electronically or magnetically in the computer system.

Any and all computer programs or software used in the operation of the computer system, used to transmit or receive information, used to display or print graphics or other types of files, and all other computer programs and software associated with the computer system to include all programs stored on the computer or other storage media.

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 search for ten (10) separate computer-related items, including four computers and three USB thumb drives, as well as a modem and two network adapters.

13. The warrant authorized a general search of “Any and all information and data stored within the ten listed items.” Such a blanket search authorization is unconstitutionally overbroad, and is 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).

15. The Tenth Circuit specifically addressed a search warrant employing essentially identical 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 Mr. Holmes but includes language referring to "any prior operator of the computer." Thus, this warrant is arguably even broader than the one denounced in *Otero, supra*.

17. The warrant for these ten (10) items 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 parameters 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 failed to establish an adequate nexus to believe that evidence related to crimes would be found in these items. 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 items seized here were instrumentalities 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 these items were in Mr. Holmes’ apartment and Mr. Holmes was connected to 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. To the extent the affiant seems to claim that there may be relevant evidence if Mr. Holmes' iPhone was backed up to one of these drives, then any warrant should have been limited in nature to a search for such backup files; however, no such limitation is contained in the warrant or affidavit. The warrant and affidavit seeks "all information" on the devices, 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 these items 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 these items 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.

Reliance on Illegally Obtained Information

25. Further, the probable cause affidavit and resulting warrant relied upon information obtained from the entry into Mr. Holmes' apartment, the search of Mr. Holmes' car, and the search of Mr. Holmes' iPhone. *See* Motion to Suppress Evidence: iPhone [D-119]; Motion to Suppress Evidence: Wallet [D-114]; Motion to Suppress Evidence: Searches of 1690 N. Paris Street #10 [D-123]; Motion to Suppress Evidence: Searches of White Hyundai [D-115]. It is likewise Mr. Holmes' position that this warrant and probable cause affidavit impermissibly relied upon unconstitutionally obtained evidence and is therefore the fruit of the poisonous tree of one or more of those unconstitutional searches, 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 these ten (10) items at any of the proceedings in this action.

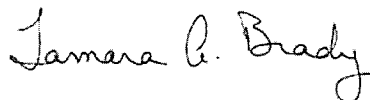
Request for a Hearing

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)
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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
<p align="center">ORDER RE: MOTION TO SUPPRESS EVIDENCE: SEARCH AND SEIZURE OF COMPUTERS AND COMPUTER-RELATED HARDWARE AND DRIVES [D-116]</p>	

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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Jacob Edson
Rich Orman
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AKC