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District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	JUN 28 2012 4:03:58 PM σ COURT USE ONLY σ
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff  v.  <b>JAMES HOLMES,</b> 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: <a href="mailto:state.pubdef@coloradodefenders.us">state.pubdef@coloradodefenders.us</a>	Case No. <b>12CR1522</b>  Division 26
<b>MOTION TO SUPPRESS MR. HOLMES' JULY 20, 2012, STATEMENT TO DETECTIVES MEHL AND APPEL [D-126]</b>	

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**CERTIFICATE OF CONFERRAL**

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

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Mr. Holmes, through counsel, moves to suppress all statements he allegedly made to Detectives Chuck Mehl and Craig Appel on July 20, 2012, after he invoked his right to counsel, and any evidence and fruits obtained therefrom. In support of this motion, Mr. Holmes states the following:

1. In the immediate aftermath of the events of July 20, Officers Sweeney and Oviatt detained Mr. Holmes behind Theater 9 of the Century 16 Theaters in Aurora. After they arrested him, and without administering any warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), Officers Oviatt and Sweeney asked Mr. Holmes if there was anybody else involved, and Mr. Holmes responded that there was not. Mr. Holmes further stated that there were bombs inside his apartment and they would go off if the wires were tripped. After the officers removed Mr. Holmes' clothing, Officer Sweeney again asked Mr. Holmes whether anyone was with him, and he allegedly responded, "It is just me." Subsequently, they placed Mr. Holmes in an Aurora Police Department patrol vehicle.

2. While in the vehicle, and again without administering any *Miranda* warnings, Officer Blue asked Mr. Holmes if anyone else was with him, and whether he had any weapons.

Mr. Holmes responded that he was alone and that he had four guns as well as some explosive devices back at his apartment.<sup>1</sup>

3. Mr. Holmes was then transported to the Aurora City Detention Center, where Detectives Chuck Mehl and Craig Appel of the Aurora Police Department attempted to interrogate him.

4. As Mehl read Mr. Holmes his *Miranda* warnings, Mr. Holmes asked, “How do I get a lawyer?” Mehl responded, “Well, we’ll talk about that,” and continued to administer Mr. Holmes his *Miranda* warnings.

5. Immediately after Mehl was finished reading the warnings, Mr. Holmes then stated that he wanted to “invoke the Sixth Amendment.” Mehl stated, “So, you’re invoking your right to legal counsel?” to which Mr. Holmes responded, “Yeah.” Despite this response, the detectives did not cease all interrogation, instead asking, “Is there anyone else we need to be concerned about at the theaters?” After a brief exchange, Mr. Holmes again stated, “I want a court-appointed attorney.”

6. Thereafter, Mehl remarked that Mr. Holmes had “invoked his legal right to counsel” and stopped questioning him at 2:51 a.m. on July 20, 2012.

7. Detectives Mehl and Appel violated Mr. Holmes’ right to counsel and right to be free from self-incrimination as protected by the Fifth, Sixth and Fourteenth Amendments and article II, sections 16, 18 and 25 of the Colorado Constitution by failing to scrupulously honor Mr. Holmes’ invocation of his right to counsel and right to remain silent. *See Miranda v. Arizona*, 384 U.S. 436, 470 (1966) (Fifth Amendment privilege against self-incrimination includes the right of a suspect to consult with counsel before questioning and to have counsel present during any questioning if the suspect so desires); *Edwards v. Arizona*, 451 U.S. 477 (1981); *People v. Skufca*, 176 P.3d 83, 85 (Colo. 2008) (both State and federal constitutions afford a criminal defendant the right against incriminating him or herself at trial).

8. Mr. Holmes unambiguously asserted his right to counsel and right against self-incrimination the moment he asked, “How do I get a lawyer?” Once a defendant who is in custody invokes his right to counsel, all police-initiated interrogation must cease until the defendant has consulted an attorney. *Miranda v. Arizona*, 384 U.S. 436 (1966). In *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981), the United States Supreme Court held: “[A]n accused, ... having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police.”

9. “The prosecution must prove by clear and convincing evidence that the defendant both understood and agreed to waive his right to counsel . . . . Any ambiguity in determining whether a defendant has waived his rights must be resolved against the prosecution.” *People v. Martinez*, 789 P.2d 420, 422 (Colo. 1990) (citing *People v. Pierson*, 670 P.2d 770, 775 (Colo. 1983)).

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<sup>1</sup> Mr. Holmes is moving separately to suppress these statements. *See* D-124.

10. “It is long settled that if a defendant makes an unambiguous and unequivocal request for counsel, the request must be scrupulously honored and no further questioning can occur until either a lawyer is provided for the accused or the accused voluntarily reinitiates the questioning.” *People v. Redgebol*, 184 P.3d 86, 99-100 (Colo. 2008) (citing *Edwards*, 451 U.S. at 484-85). To determine if a request for counsel was made, the trial court must consider whether the accused’s statement “can reasonably be construed to be an expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police.” *McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991).

11. Mr. Holmes unambiguously asserted his right to counsel by asking “How do I get a lawyer?” Indeed, the Colorado Supreme Court found a nearly identical statement to be an unambiguous request for counsel in *People v. Lynn*, 278 P.3d 365, 367 (Colo. 2012). In that case, the defendant asked, “When can I talk to a lawyer?” The Court concluded that the totality of the circumstances, including the fact that the defendant made the request while the *Miranda* advisement was being given, while the defendant was already in custody, and after he was aware that charges were pending, rendered the request unambiguous.

12. In reaching this conclusion, the Court rejected the prosecution’s contention that the police were justified in following up with the defendant, making clear that “[t]he question of whether an accused invoked the right to counsel is an objective inquiry” and therefore the officer’s state of mind had no bearing on the inquiry of whether the request was unambiguous. *Id.* at 369. Moreover, the Court emphasized, “[O]ur own case law do[es] not allow the interrogator to pursue any sort of inquiry, no matter how limited, to clarify an accused’s statement regarding counsel unless the statement is ambiguous. Where, as here, the request is unambiguous, no such follow-up is permissible.” *Id.* Here, it is clear that the question was unambiguous because rather than asking a follow-up question, Mehl instead told Mr. Holmes, “We’ll talk about that.”

13. Moreover, even if the question “How do I get a lawyer?” can be somehow construed as ambiguous, Mr. Holmes’ further statement that he wanted to “invoke the Sixth Amendment” was certainly unambiguous, as even Detective Mehl recognized. Mehl stated, “So, you’re invoking your right to legal counsel?” to which Mr. Holmes responded, “Yeah.”

14. Because Mehl blatantly acknowledged that Mr. Holmes was invoking the right to counsel, it is beyond question that the interrogation should have ceased at that point. *People v. Fish*, 660 P.2d 505, 509 (Colo.1983) (a statement sufficiently reflects a desire for counsel when it “put[s] the officers on notice that the defendant intend[s] to exercise his right to counsel and his right against self-incrimination.”). Instead, Mehl asked whether there was “anybody else” they needed to be concerned about at the theater and continued to engage with Mr. Holmes. All statements made by Mr. Holmes after this point must be suppressed.<sup>2</sup>

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<sup>2</sup> Counsel is moving separately to suppress statements made by Mr. Holmes to Special Agent Gumbinner and Detective Appel later that day. *See* D-127.

15. Finally, any statements Mr. Holmes made to Mehl and Appel after he invoked his right to counsel must be suppressed because they were involuntary. In order to be admissible at trial, a statement must be “the product of an essentially free and unconstrained choice by its maker.” *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961) (plurality opinion). The Fifth Amendment, as applied to the states through the Due Process Clause of the Fourteenth Amendment, as well as Article II, section 18 of the Colorado Constitution, “prevents admission of involuntary statements into evidence, regardless of the defendant’s custodial situation, and whether or not the defendant made an inculpatory statement.” *People v. Medina*, 25 P.3d 1216, 1221 (Colo. 2001).

16. The totality of the circumstances reveals that Mr. Holmes’ statements were involuntary. *Medina*, 25 P.3d at 1222. Not only was Mr. Holmes in custody, but Detective Appel continued to question him immediately after he asserted his right to counsel. This fact could only have indicated to him that he had no choice but to continue talking. Finally, Mr. Holmes’ interview took place after he had been held in custody for several hours and had presumably been awake for much of the night. Moreover, officers observing Mr. Holmes indicated that he appeared “out of it and disoriented” during the period following his arrest. *Medina*, 25 P.3d at 1222 (defendant’s mental and physical condition, as well as length, location, and physical conditions of interrogation are relevant to issue of voluntariness); *Raffaelli*, 647 P.2d at 235 (mental condition of the defendant is relevant to the voluntariness of his statements).

17. These factors all weigh in favor of a finding that his statement was involuntary and was obtained in violation of his Fifth Amendment rights.

18. Mr. Holmes’ July 20, 2012, statement to Detectives Mehl and Appel was obtained involuntarily and in violation of an unambiguous and unequivocal invocation of his rights to counsel and to be free from self-incrimination as protected by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article II, sections 16, 18 and 25 of the Colorado Constitution, and must be suppressed. Finally, any fruits of Mr. Holmes’ statement must also be suppressed. See *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).

### **Request for a Hearing**

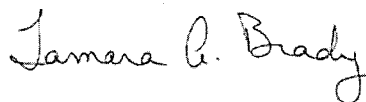
19. Mr. Holmes requests an evidentiary hearing on this motion.

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.




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Daniel King (No. 26129)  
Chief Trial Deputy State Public Defender



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Tamara A. Brady (No. 20728)  
Chief Trial Deputy State Public Defender



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

Dated: June 3, 2013



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  
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AKTD