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District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	JUN - 8 2012 7:57 AM σ COURT USE ONLY σ
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff v. JAMES HOLMES, Defendant	Case No. 12CR1522 Division 26
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	
MOTION TO SUPPRESS AND/OR EXCLUDE MR. HOLMES' JULY 20, 2012, ALLEGED RESPONSE TO QUESTIONING BY OFFICER JUSTIN GRIZZLE [D-125]	

CERTIFICATE OF CONFERRAL

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

Pursuant to the Fifth and Fourteenth Amendments of the United States Constitution, article II, sections 18 and 25 of the Colorado Constitution, and Colorado Rules of Evidence 401-403 and 702, Mr. Holmes, through counsel, moves to suppress all testimony about any response he allegedly made to questions posed to him by Officer Justin Grizzle on July 20, 2012. See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966), *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); *People v. Quintana*, 665 P.2d 605, 611 (Colo. 1983). 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.

3. At some point after that, again without administering any warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), Officer Justin Grizzle claims that he again asked Mr. Holmes if there was anyone else who was helping him. Grizzle alleges that Mr. Holmes smiled in response. At the preliminary hearing, Officer Grizzle described this alleged “smile” as a “smirk.”

4. Any testimony about Mr. Holmes’ alleged response to Grizzle’s question must be excluded and suppressed on several grounds.

5. First, the admission of Mr. Holmes’ alleged response to Officer Grizzle’s question would violate the Colorado Rules of Evidence, because its meaning, or lack thereof, is ambiguous at best. Assuming this exchange between Officer Grizzle and Mr. Holmes occurred, whether Mr. Holmes’ alleged facial expression was communicative (and if so, what he meant to communicate by it), or was simply an exercise of his right to remain silent is entirely unclear. It is therefore irrelevant to any material issue at trial and is inadmissible pursuant to CRE 401-403.

6. The Colorado Supreme Court has excluded post-arrest silence on these grounds several times, acknowledging that “[a]n arrestee is under no obligation to speak to the police, and his failure to speak to an arresting officer may stem from a number of sources.” *People v. Quintana*, 665 P.2d 605, 611 (Colo. 1983). Accordingly, because there are “many possible explanations for [a] defendant’s post-arrest silence . . . evidence of [a defendant’s] failure to make a statement to arresting officers [is] so ambiguous and lacking in probative value as to be inadmissible as substantive evidence.” *Id.* at 610. *See also People v. Welsh* (“*Welsh IP*”), 80 P.3d 296 (Colo. 2003) (defendant’s pre-arrest silence inadmissible as substantive evidence of both sanity and guilt because it had “virtually no probative value”); *People v. Mares*, 705 P.2d 1013, 1017 (Colo. App. 1985) (“any reference to defendant’s refusal to make a written statement before arrest should not be allowed; defendant’s ‘silence’ in such circumstances is irrelevant.”); *People v. Wanke*, 726 N.E.2d 142, 145 (Ill. App. 2 Dist., 2000) (“[W]e fail to see the probative value of [defendant’s post-arrest, pre-*Miranda* silence]. Even though defendant might suffer from a psychiatric disorder that would render him legally insane, insanity is not the equivalent of stupidity.” (internal quotation marks and citations omitted)).

7. Moreover, Officer Grizzle’s testimony characterizing Mr. Holmes’ alleged response to his question as a “smirk” was improper speculation and inadmissible opinion testimony, as well as being unfairly prejudicial, in violation of the Rules of Evidence. *See e.g.* CRE 401-403; 702.

8. In addition to being irrelevant, evidence of Mr. Holmes’ alleged response should be excluded under CRE 403 because it would be more prejudicial than probative to a jury. This evidence clearly presents a danger that the jury will view evidence that was nothing more than Mr. Holmes’ exercise of a constitutional right as substantive evidence of his guilt or sanity. *See*

Welch II, 80 P.3d at 307-08 (danger of “unfair prejudice and the likelihood of misleading the jury far outweighed any possible probative value that testimony regarding the defendant’s silence might have had [A] jury easily could be misled by evidence regarding the defendant’s uncommunicativeness.”); *U.S. v. Hale*, 422 U.S. 171, 180 (1975) (“Not only is evidence of silence at the time of arrest generally not very probative of a defendant’s credibility, but it also has a significant potential for prejudice. The danger is that the jury is likely to assign much more weight to the defendant’s previous silence than is warranted As we have stated before: ‘When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out.’” (quoting *Shepard v. United States*, 290 U.S. 96, 104 (1933))).

9. Second, to the extent the prosecution alleges that this purported response was communicative, it was obtained in violation of Mr. Holmes’ rights under the Fifth Amendment and article II, section 18 of the Colorado Constitution because it was obtained without administering Mr. Holmes his *Miranda* warnings and in the absence of a valid *Miranda* waiver.

10. A suspect is entitled to be advised of his *Miranda* rights any time he is subjected to “custodial interrogation” or its functional equivalent by a law enforcement official. See *Miranda*, 384 U.S. at 444-45; *People v. Dracon*, 884 P.2d 712, 716-17 (Colo. 1994).

11. An objective standard applies to the issue of custody—that is, whether a reasonable person in the suspect’s position would have considered himself deprived of his freedom of action in a significant way. See, e.g., *People v. Hamilton*, 831 P.2d 1326, 1330 (Colo. 1992).

12. Mr. Holmes was clearly in custody at the time Officer Grizzle asked him these questions. He had been detained by Officer Oviatt, handcuffed, searched, and placed in a patrol vehicle. See, e.g., *People v. Pascual*, 111 P.3d 471, 480 (Colo. 2005) (explaining that, in determining “custody for *Miranda* purposes, this court has considered significant evidence that the officers drew their guns, used handcuffs, or otherwise demonstrated the kind of force typically associated with an arrest” (internal quotation marks omitted)); *People v. Mangum*, 48 P.3d 568, 571-72 (Colo. 2002) (defendant was in custody for *Miranda* purposes after he was chased by law enforcement officers by foot and was subdued and handcuffed).

13. Moreover, Officer Grizzle was clearly “interrogating” Mr. Holmes by asking if there was anyone else helping him. From Mr. Holmes’ perspective, these questions were clearly likely to elicit incriminating information. See, e.g., *People v. Trujillo*, 784 P.2d 788, 790-91 (Colo. 1990) (“The term ‘interrogation’ under *Miranda* refers not only to express questioning by a police officer, but also to any words or actions on the part of the officer that the officer ‘should know are reasonably likely to elicit an incriminating response from the suspect.’” (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980))).

14. Third, to the extent this purported response is construed as “silence,” it must likewise be suppressed. Introducing evidence of post-arrest, pre-*Miranda* silence against Mr. Holmes for any reason would impermissibly penalize him for exercising his Fifth Amendment rights. See, e.g., *People v. Welsh* (“*Welsh I*”), 58 P.3d 1065, 1071 (Colo. App. 2002) (use of defendant’s pre-arrest silence as substantive evidence of sanity violates Fifth Amendment) *People v. Reynolds*, 194 Colo. 543 (1978) (any comment at trial on the “postarrest silence” of a

defendant “may well violate a defendant’s due process rights”); *People v. Campbell*, 531 P.2d 381, 383 (Colo. 1975) (“We have repeatedly held that the defendant has a right to remain silent after arrest. Later, at trial, the prosecution may not allude to this silence as indicating a consciousness of guilt. That would impermissibly penalize the defendant for exercising his Fifth Amendment privilege against self-incrimination.”); *U.S. v. Hernandez*, 948 F.2d 316, 322-25 (7th Cir. 1991) (post-arrest silence, like pre-arrest silence, cannot be introduced as substantive evidence of guilt); *U.S. v. Whitehead*, 200 F.3d 634 (9th Cir. 2000) (finding post-arrest, pre-*Miranda* silence inadmissible under Fifth Amendment); *U.S. v. Moore*, 104 F.3d 377, 386 (D.C. Cir. 1997) (same); *State v. VanWinkle*, 273 P.3d 1148 (Ariz. 2012) (relying on Fifth Amendment to find postarrest, pre-*Miranda* silence as substantive evidence was inadmissible); *State v. Ellington*, 253 P.3d 727 (Idaho 2011); *Wanke*, 726 N.E.2d at 145 (State’s use of defendant’s post-arrest, pre-*Miranda* silence as evidence of sanity violated Fifth Amendment; “[t]he State cannot use defendant’s silence as knowledge of his guilt. By doing so, the State improperly uses defendant’s exercise of a fundamental constitutional right as a proxy for sanity.”); *Morris v. State*, 913 P.2d 1264 (Nev. 1996) (substantive use of post-arrest, pre-*Miranda* silence prohibited).

15. Fourth, to the extent it is construed as communicative, any response by Mr. Holmes to Officer Grizzle must be suppressed because it was involuntary. 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). *See also Culombe v. Connecticut*, 367 U.S. 568, 602 (1961) (plurality opinion) (in order to be admissible at trial, a statement must be “the product of an essentially free and unconstrained choice by its maker.”).

16. The totality of the circumstances reveals that Mr. Holmes’ response to Officer Grizzle was involuntary. *Medina*, 25 P.3d at 1222. Mr. Holmes was in custody at the time he made the statement and had been handcuffed and dragged by officers into the police car. Moreover, police did not *Mirandize* him, which likely led him to believe that he had no choice but to answer the questions posed to him. Finally, 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. 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).

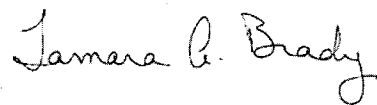
Request for a Hearing

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

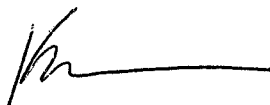
Mr. Holmes files this motion, and makes all other motions and objections in this case, whether or not specifically noted at the time of making the motion or objection, on the following grounds and authorities: the Due Process Clause, the Right to a Fair Trial by an Impartial Jury, the Rights to Counsel, 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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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	
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ORDER RE: MOTION TO SUPPRESS AND/OR EXCLUDE MR. HOLMES' JULY 20, 2012, ALLEGED RESPONSE TO QUESTIONING BY OFFICER JUSTIN GRIZZLE [D-125]	

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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AKP