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DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO 7325 S. Potomac St. Centennial, Colorado 80112	▲COURT USE ONLY▲
PEOPLE OF THE STATE OF COLORADO **v.** **JAMES EAGAN HOLMES,** **Defendant**	Case No. **12CR1522** Division: **201**

AMENDED ORDER REGARDING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE: SEARCHES OF 1690 N. PARIS ST., #10 (D-123-A)[1]

INTRODUCTION

The defendant is charged with shooting, and killing or injuring, numerous people inside auditoriums 8 and 9 of the Century 16 Theatres in Aurora, Colorado, during the early morning hours of July 20, 2012. In Motion D-123, he moves to suppress evidence of the searches of his residence, 1690 N. Paris St., Apartment #10, Aurora, Colorado. The defendant challenges the July 20, 2012 warrantless entry into his apartment, as well as the subsequent search of his apartment conducted pursuant to a search warrant. The prosecution opposes the motion, arguing that the initial entry was justified by the colorable claim of emergency

[1] This Order amends and supersedes Order D-123, issued November 15, 2013.

exception to the warrant requirement and that the second search was authorized by a valid warrant.

The Court held hearings on the parties' non-capital motions, including Motion D-123, throughout the month of October, 2013. As relevant here, the following witnesses testified on October 15 and October 23: Officer Jason Sweeney, Officer Jason Oviatt, Officer Aaron Blue, Officer Justin Grizzle, Sergeant Stephen Redfearn, Sergeant Michael Holm, Commander Roger Kelley, Detective Paul Capolungo, Detective Mark Yacano, and Detective Thomas Wilson.

For the reasons articulated in this Order, the Court concludes that Motion D-123 lacks merit. Accordingly, it is denied.

CREDIBILITY DETERMINATIONS

The Court observed each witness' manner, demeanor, and body language while on the stand, and considered each witness' means of knowledge, strength of memory, and opportunity for observation. With respect to each witness, the Court assessed the reasonableness or unreasonableness of the testimony, the consistency or lack of consistency of the testimony, and whether the testimony was contradicted or supported by other evidence. The Court examined whether the witnesses had a motive to lie, as well as whether bias, prejudice, or interest in the case affected their testimony. Finally, the Court took into account all other facts

and circumstances shown by the evidence which affected the credibility of any of the witnesses.

The Court finds the witnesses credible. Although the witnesses' recollection of events differs in some respects, the Court nevertheless concludes that their testimony is generally reliable.[2] Based on its credibility determinations, the Court makes findings of fact.[3] The Court's resolution of any conflicts in the testimony provided is reflected in its factual findings.

FINDINGS OF FACT

A. Events at The Century 16 Theatres

At approximately 12:30 a.m. on July 20, 2012, during the midnight premiere of "The Dark Knight Rises," officers from the Aurora Police Department received "a call for service" requesting them to respond to the Century 16 Theatres at 14300 East Alameda, in Aurora, Colorado. Dispatch informed officers that shots had been fired and that one person was down. An update indicated that there was an "active shooter" and that there were "multiple people down." Because of the theater's close proximity to an Aurora Police Department station, officers

[2] In Order D-125, the Court found Officer Grizzle's recollection of his interaction with the defendant insufficiently reliable. That part of Officer Grizzle's testimony is not relevant to this Order. The Court finds the rest of Officer Grizzle's testimony reliable.

[3] Although the Court relies primarily on the testimony presented on October 15 and 23, without objection from the parties, the Court considers all of the reliable evidence presented during the non-capital motions hearings.

responded within approximately a minute of the call, with their emergency lights and sirens activated.

At the hearing, the scene was described as "mass chaos." One officer likened the scene to "a war zone," describing it as "absolutely chaotic." There was "blood all over the place," including on the sidewalk immediately outside the theater. There were injured parties covered in blood who were running out of the theater screaming. Some of them had large wounds and appeared to be victims of a shooting. Individuals who appeared to have been shot were yelling, "help me, help me."

Officer Sweeney responded approximately a minute and a half after receiving the call for service. He drove to the back side of the theater and parked on the southeast corner of the complex. As he made his way to the northeast end of the complex, he met Officer Oviatt. Officer Oviatt had seen two people who were bleeding coming from the direction of a trail of fresh blood. The two officers followed that trail of blood south along the back side of the theater complex in an attempt to gain entry into the theater and to stop the shooting. They had their weapons drawn and were walking at a very fast pace.

Meanwhile, Officer Blue responded to the front of the theater complex. He entered the theater through one of the front exit doors and went to the lobby, where he saw dozens of people running out of the auditoriums. As he walked through the

lobby, a girl pointed toward the back of the theater complex and said: "It's back in there. It's coming from back in there." A radio report mentioned that the incident was occurring in auditorium 9. Officer Blue walked past auditorium 9 and smelled what appeared to be tear gas coming from inside. Someone other than Officer Blue radioed that there appeared to be gas inside auditorium 9.

As Officers Sweeney and Oviatt continued moving south along the back side of the theater complex, they observed someone they believed was a fellow officer standing next to the open driver's side door of a small, two-door, white car that was parked on the back side of the theater, near an auditorium's rear emergency exit. There were no other cars parked in the immediate vicinity, and the individual was wearing all dark clothing, as well as a Kevlar, ballistic-type helmet, and a gas mask. Although the individual was facing the theater, when Officers Sweeney and Oviatt were approximately twenty feet away, he turned and looked at Officer Sweeney. Officer Sweeney immediately noticed that the gas mask the individual was wearing was not consistent with department-issued gas masks. Additionally, both officers observed that, unlike all of the officers at the theater—who were active, moving around, and "trying to find a way into the building or trying to deal with people who had been injured"—this individual was "just standing there," taking off his gloves. Since gas had been deployed inside auditorium 9 and this individual who was wearing a gas mask did not appear to be an officer, Officers

Oviatt and Sweeney concluded, independently but almost simultaneously, that he was a suspect.

One of the officers aired over the radio that there was a possible suspect in the back of the theater and assistance was needed with containment. Officer Blue immediately exited through one of the lobby's side doors and headed toward the back of the theater complex. Officer Grizzle, who was still in his vehicle when he received this radio transmission, drove to that location.

Officers Sweeney and Oviatt approached the suspect from the passenger's side of the white vehicle. Both officers pointed their guns at him and Officer Sweeney ordered him to put his hands up. The suspect, who was still wearing the gas mask and the helmet, complied. Since the tint on the white vehicle's windows was very dark, the officers could not see if there were other occupants in the car. Officer Oviatt moved around the front of the car and held the suspect at gunpoint. Officer Sweeney, who still had his gun drawn, moved around the back of the vehicle to attempt to see if anyone else was inside and to fend off any other threat. Through the open driver's side door, he observed a large, plastic-like rifle case in the back seat. He immediately called out to Officer Oviatt that there was a rifle case in the car. At that point, Officers Sweeney and Oviatt ordered the suspect face down on the ground. The suspect appeared to understand the commands and complied with them.

Officer Sweeney was holding the suspect at gunpoint when Officer Grizzle arrived. Officer Oviatt holstered his weapon, checked the small of the suspect's back for weapons, and, with Officer Grizzle's assistance, put handcuffs on him and placed him under arrest.[4] The individual arrested was later identified as James Eagan Holmes, the defendant in this case. The defendant does not dispute that this was a lawful arrest.

Officer Oviatt was concerned that there were additional suspects. Officer Sweeney was equally concerned about the potential for multiple shooters. In the wake of recent mass shootings around the country—including the one at Columbine High School, which involved two perpetrators—and based on their training and experience, these officers were keenly aware that mass shootings often involve multiple assailants.[5] Further, they lacked "clear information" at that point "about the number of suspects" and they knew there were multiple people who had been shot.[6]

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[4] Officer Oviatt explained that he checked the small of the suspect's back for weapons because that would be the location where the individual's hands would be placed incidental to handcuffing.

[5] Officers are taught from day one at the academy that "if you have one shooter, there [are] possibly two," and officers should "look for two."

[6] Later on, Officer Oviatt received "radio traffic" about a potential second suspect. Officer Grizzle also recalled that at some point he received conflicting reports regarding the number of shooters.

To obtain "some cover and some concealment from any other suspects that were still inside the theater," Officers Sweeney and Oviatt grabbed the defendant by his armpits and elbows and dragged him approximately eight to ten feet from the side of the white vehicle to an area next to a dumpster.[7] Officer Oviatt removed the defendant's helmet and gas mask, and Officer Sweeney asked the defendant "if there was anybody else with him." Without delay or hesitation, and without any indication that he did not understand the question, the defendant provided a clear response: "no, it's just me."

Officer Sweeney believed that he used a conversational tone of voice with the defendant, although he admitted that everyone was very excited. As Officer Sweeney questioned the defendant, neither his firearm nor that of any other officer standing nearby was drawn.

Officers conducted a pat-down search for weapons "and for anything that would make [the defendant] still a threat." Officer Blue arrived at that time and provided assistance with the pat-down search of the defendant. During the search, officers recovered "a couple of pocket knives and a magazine for a handgun." They also retrieved a brown wallet from the defendant's pocket. Because of the

[7] The location where the defendant was handcuffed was between the white vehicle and a brick or concrete dumpster enclosure, which was approximately ten yards from the rear emergency exit to auditorium 9. Officer Sweeney referred to the area as a "fatal funnel" because the officers were limited in their movement, there was no cover, and they were vulnerable to being ambushed by another suspect. Officer Oviatt expressed a similar concern; he realized while handcuffing the defendant that he had his back to the theater, the theater was dark, and that another suspect could come out of the theater and shoot at them.

armor the defendant was wearing, however, they were not able to conduct a sufficiently thorough search to be certain that he was not armed.

Pursuant to Officer Sweeney's request, Sergeant Redfearn drove his marked police car to the location where the defendant was being detained. Officers Oviatt and Blue then placed the defendant in the back seat of the patrol car and stayed with him while other officers attempted to evacuate victims from the theater. Officer Oviatt observed that there was a lot of blood and that injured people continued leaving the theater with the assistance of officers. Likewise, Officer Blue noticed that the scene continued to be chaotic and that there were a number of gunshot victims outside the theater.

Because Officer Blue wanted to learn the defendant's identity, he opened the defendant's wallet and took out a driver's license.[8] The photograph on the license matched the defendant's physical appearance.

While the defendant was in the back seat of the patrol car, Officers Oviatt and Blue monitored him by leaning into the car through the rear side doors. Sergeant Redfearn initially sat in the driver's seat of the patrol car. However, because officers started to become "inundated with victims," he ended up taking a supervisory role over the "triage" of the injured individuals being brought out through the rear emergency exit to auditorium 9.

[8] The Court is aware that Officer Oviatt testified that Officer Blue gave him the wallet, and that he opened it, and pulled out the defendant's driver's license.

Immediately after the pat-down search of the defendant, Officer Blue became concerned because the search had yielded no firearms. He believed it was important to find out where the weapons were. As he explained at the hearing: "I'm at a shooting call with people that have been shot, and there's no guns. I didn't see any guns." He elaborated during the following exchange on direct examination:

> PROSECUTOR: Now, you indicated that you felt that you were concerned because you hadn't located any guns and yet you had gunshot victims.
>
> OFFICER BLUE: Correct.
>
> PROSECUTOR: Can you be more specific about what your concerns were with regard to that?
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> OFFICER BLUE: I'm on a shooting. There's multiple victims outside . . . . and I don't have any weapons on the guy I'm dealing with right here.
>
> PROSECUTOR: Did you consider it to be a safety issue?
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> OFFICER BLUE: Yes.

Like Officers Sweeney, Oviatt, and Grizzle, Officer Blue was also worried that there were other suspects. This was another safety consideration for him, as he was aware that officers were searching for other suspects inside the theater.

Officer Blue's concerns were exacerbated less than a minute after the defendant was placed in the patrol car, as both he and Sergeant Redfearn observed the defendant "fidgeting around," possibly trying to "get to something." Since no firearms had been found and there were multiple gunshot victims, Officer Blue was worried that the defendant had a weapon on him.

In light of the circumstances confronting him, Officer Blue asked the defendant if he had any weapons on him. The defendant replied that he had "four guns." He added that "he didn't have any bombs [at the theater], but [that] he had improvised explosive devices at his house" that would not "go off unless [police officers] set them off." Officer Blue inquired whether the defendant's address was the address on the driver's license recovered, 1690 Paris Street, Apartment #10 (hereinafter "apartment 10," "the defendant's apartment," or "the apartment"). The defendant answered "yes." Officer Blue then asked the defendant whether anybody else was with him. The defendant stated, "no." Officer Blue did not know that a few minutes earlier Officer Sweeney had asked the defendant whether anyone else was with him, and that the defendant had responded: "no, it's just me."

Officer Oviatt overheard part of Officer Blue's conversation with the defendant. He understood the defendant's comments to mean that he had "booby-trapped" apartment 10.

Two to five minutes after the defendant was placed in the back seat of the patrol car, Officers Oviatt and Blue removed him from the car in order to conduct a more thorough search of his person. The officers did so for different safety reasons. Officer Blue remained concerned that there were multiple gunshot victims and officers had not yet located any guns. He was also mindful that he had observed the defendant fidgeting around just moments earlier. Officer Oviatt, on the other hand, had planned on conducting a more thorough search all along because the armor the defendant was wearing prevented a full search, which made the officer question whether the defendant "was actually disarmed." Although Officer Oviatt had intended to wait until the scene was under control, two factors convinced him to do otherwise: (1) the defendant's comment to Officer Blue that there were bombs in apartment 10 led the officer to suspect that the defendant might have explosives on his person; and (2) the chaotic atmosphere that persisted led him to conclude that the scene was not likely to be under control any time soon.

During the second search of the defendant's person, the officers took off the "full body armor" ballistic gear he was wearing, including a bulky black jacket, a ballistic vest, a ballistic throat protector, ballistic leggings, and windbreaker pants.[9]

[9] An officer noted at the hearing that the defendant was wearing what "a SWAT officer might wear." A SWAT officer is a Special Weapons and Tactics officer.

After this search was completed, the defendant, who was then only wearing his underwear and t-shirt, was placed back in the patrol car.

Around the time when Officers Oviatt and Blue were conducting the second search of the defendant, Officers Sweeney and Grizzle saw what they believed to be a green laser beam coming from the greenbelt behind the theater. The officers realized that the greenbelt could have been a relay position for an additional shooter or a location where the defendant had stashed weapons or explosives. Because they feared that there was another suspect or that there were additional weapons or explosives, they decided to investigate the source of the green laser beam. They eventually discovered that it was coming from a handgun on top of the roof of the white vehicle.[10]

Sergeant Redfearn was made aware of this handgun. Because the injuries he was observing were not consistent with one handgun, he remained concerned that there were other suspects and more weapons. Officers subsequently recovered an assault-type rifle on the ground by the rear exit door to auditorium 9, as well as a shotgun inside auditorium 9. Sergeant Redfearn saw a fourth firearm in the passenger's side door pocket of the white vehicle.

[10] The Court realizes that Officer Oviatt testified on cross-examination that this weapon was visible to him as he went around the front of the white vehicle before the defendant was arrested.

After all the injured parties had been transported to local hospitals, Sergeant Redfearn went into the back hallway of auditorium 9 and was able to glance briefly into part of the auditorium. He observed "people down" and a lot of disarray, including "things discarded everywhere." There was also quite a bit of blood on the floor, and he could smell gas.

Sergeant Holm, the commander of the Aurora Police Department's SWAT team, responded to the theater at approximately 12:50 a.m. and made similar observations inside auditorium 9. More specifically, he saw a large number of what appeared to be .223-caliber casings, bullet magazines, a number of injured people being removed, and deceased bodies.

Because Sergeant Redfearn had been alerted about the defendant's statement regarding improvised explosive devices inside apartment 10, he looked through the defendant's wallet and pulled out the driver's license. After running the address on the license through a computer database, he discovered that there had been a loud music complaint at the defendant's apartment within the hour. This made him suspicious. At the hearing, when asked to elaborate, he explained that it was too much of a coincidence that there was a pending noise complaint related to the address of the person in custody for the theater shooting; something about that complaint being made shortly before the shooting "didn't seem right" to him.

Sergeant Redfearn contacted the sergeant in charge of vice and narcotics and told him that he believed undercover officers should be sent to the defendant's apartment to keep "a physical eye" on it. Sergeant Redfearn took this precautionary measure because officers did not yet know what they "were dealing with," as there was a lot of information they still did not have at that point in time. Indeed, officers did not know if there were other assailants, and they lacked specifics about the potential explosives at the defendant's apartment. The defendant's statement related to explosives also made Sergeant Redfearn concerned that "there could easily be something in [the defendant's] vehicle or other items that are designed to hurt first responders, which has historically been something that's gone on with other incidences of mass violence that [he was] aware of."

B. Searches of the Defendant's Apartment

While at the theater complex, Lieutenant Dailey and Sergeant Poppe spoke to Sergeant Holm. Lieutenant Dailey told Sergeant Holm that he believed there were explosive devices inside the defendant's apartment. Sergeant Poppe explained that the defendant had said that there were explosives at that location. A few minutes after 1:00 a.m., Lieutenant Dailey and Sergeant Poppe asked Sergeant Holm to respond to the defendant's apartment. Accordingly, Sergeant Holm coordinated a group of SWAT officers who were at the theater to respond to

apartment 10. Sergeant Holm instructed these officers to meet at the Aurora Police Department District 1 station to gather equipment. Once at the station, the sergeant gave the SWAT officers assignments so that they could "do an immediate deployment" when they arrived at the defendant's apartment.

Sergeant Holm drove an armored car with "a cadre of officers" to apartment 10. Upon arrival, he parked in front of the apartment building and took a command post inside the armored car. The apartment building was described at the hearing as a three-story, rectangular-shaped brick building, that "runs east and west" with a total of twelve to sixteen apartments.

Officers set up a perimeter around the building for containment purposes. An "arrest team" was assigned to go to the top of the stairwell to secure apartment 10, which was on the third floor. Based on his earlier observations at the theater, and his knowledge that a large number of people had been killed and an even larger number of people had been seriously injured, Sergeant Holm believed there were other suspects involved in the shooting. He was concerned about the realistic potential of another suspect inside the defendant's apartment, especially since officers "were not prepared immediately to confront [another] suspect." Pursuant to his instructions, the arrest team tied the apartment's door shut from the outside to prevent anyone from exiting the apartment. Additionally, officers placed a handheld camera in the stairwell so that they could watch the door to apartment 10.

The sergeant next directed his team to evacuate the building. The evacuation order was given because Sergeant Holm was concerned that there were explosives inside apartment 10. As he explained: "I was very concerned, due to the large number of casualties at Century 16, that if the scope of the explosive[s] was relative, that it would be very dangerous for anybody that would be in the vicinity." Given the number of people in the apartment building and the proximity of surrounding apartment buildings, he wanted the building evacuated quickly.

At Commander Kelley's suggestion, Sergeant Holm subsequently expanded the evacuation zone. Accordingly, officers evacuated the apartments that were immediately to the west and all of the buildings that were on the north side.

While in his command post, Sergeant Holm received information from Officer Brant Harrold that the resident who lived in the apartment directly below apartment 10 had reported hearing loud music coming from apartment 10 around midnight. The loud music prompted this individual to go up to apartment 10, where she saw the door to the apartment slightly ajar. Shortly thereafter, she called the police and complained about the loud music. According to this individual, the music "went off" at about 1:00 in the morning. In the sergeant's mind, this exacerbated the danger:

PROSECUTOR: Did the information about the loud music impact the way that you considered the dangerousness of the situation?

SERGEANT HOLM: It did because we were there after 1 o'clock and . . . she said that, in her opinion, nobody had left the apartment as far as she could tell. My concern was that either somebody was still inside that could detonate a device if it was inside and I was also concerned that if there was not somebody there to detonate the device, that perhaps the device could be on a timer because it appeared as though the music was possibly on a timer.

At the sergeant's request, officers gave announcements to whoever may have been in apartment 10 to come out. Because there was no response, Sergeant Holm called Lieutenant Dailey and informed him that he needed a bomb squad to respond as he intended to open the front door to the apartment so that officers could look inside. The sergeant had concluded that there were exigent circumstances present to look inside the apartment without a warrant.

The Adams County Bomb Squad responded shortly thereafter. Commander Kelley, who had more than seven years of experience as a bomb technician, was among those who responded from that squad. He had initially received a call to respond to the theater because officers suspected that the defendant's car was

booby-trapped with explosive devices. But on his way to the theater, Deputy Kasey Overton advised him that he had been reassigned to the defendant's address. Commander Kelley arrived at the command post in the armored car at approximately 3:00 a.m.; he was promptly briefed by Sergeant Holm. Sergeant Holm informed him that he suspected that there were explosives inside apartment 10 and that he and his supervisors were in agreement that this was an exigent situation that required entry into the apartment as soon as possible "to ascertain what was in it."

After being briefed on the gravity of the situation, Commander Kelley concluded that there was "an extreme possibility of explosives in th[e] apartment." He also realized that, "[n]ot knowing [what was] in there and not assessing what was in there could cause harm to the general public and the first responders." The following exchange at the hearing highlights Commander Kelley's opinion that time was of the essence:

> PROSECUTOR: When you're dealing with potential explosives in a residential area, is there any importance to assessing what is there as quick as possible?
>
> COMMANDER KELLEY: Yes, there is.
>
> PROSECUTOR: Why is that?

COMMANDER KELLEY: Without knowing the quantity, the type, what it's made of, whether it involves any kind of disbursal device, which could run the gamut of the imagination, it's an unknown at the moment, and without knowing what we were up against, there's no way to gauge evacuation distances and exclusionary zones.

PROSECUTOR: Was there any way to gauge the danger faced by the personnel who were at the scene?

COMMANDER KELLEY: No.

PROSECUTOR: Was there any way to gauge the danger just to the public around there?

COMMANDER KELLEY: No.

At Commander Kelley's request, a bomb robot was brought to the apartment building. The bomb robot, which was equipped with four cameras, was operated remotely by Sergeant James Gerdeman from a control center in a bomb truck. Because the cameras on the robot were connected to the monitors in the bomb truck, officers were able to observe whatever was in the path of the cameras. When the robot arrived at the front door of the defendant's apartment, at approximately 4:00 a.m., the door to the apartment was closed. Sergeant

Gerdeman had the robot open the door with an "energetic tool." This allowed officers to view part of the family room of the apartment.

There was a "booby-trap-type device directly within the threshold of the front door," which appeared to be "just barely clear of the door swing." It was "a victim-activated device" with a "trip wire" anchored to something "up on the wall" and connected to an open thermos jug lying on top of a pile of shoes. The jug, which contained a clear plastic bottle with some type of liquid in it, was positioned so that the opening was over the top of a frying pan on the floor below it. If a person walked into the room, he would hit the wire, and pushing on the trip wire, in turn, would pull the jug over the frying pan. There was also some white powder on the floor in the threshold of the door. Further, scattered across the floor of the family room, "there were three clusters of what appeared to be explosive or incendiary devices," and in the middle of two of those clusters were "small black plastic boxes with flashing red LED lights" that seemed to be "remote firing devices" for the explosives.[11]

Although no fusing was visible, "just the fact that [there was] wiring coming out of a remote firing device could create its own fusing." Commander Kelley believed that "the fusing would be inside the incendiary or explosive devices."

[11] One cluster consisted of six eight-inch round black spheres, normally associated with a manufacturer of firework mortars. Another cluster was comprised of what appeared to be "only half of the [same type of] sphere[s] with the open side down." The third cluster was made up of "two-liter soda bottles that appeared to have some unknown liquid in them."

The small black boxes with the flashing LED lights on the floor appeared to have wires that "terminated to the clusters of devices that were grouped around them." But there were also a lot of wires that went into those devices, essentially double fusing the devices; the wires "left the family room . . . and ran around the corner and into the kitchen where [officers] had no visual observations." This troubled Commander Kelley because he had no idea what these wires were connected to or how a device in another room may have been set up to detonate. Based on his observations, Commander Kelley concluded that this "appeared to be a very serious . . . situation" involving explosive or incendiary devices. Detective Capolungo, a member of the Denver Police Department's bomb squad, described the situation as "highly dangerous." As he explained, if those "numerous, numerous explosive devices [and potentially] incendiary devices . . . would go off in that small of an area, it would have been devastating."

Officers were worried about explosive or incendiary devices in other areas of the apartment for two reasons: (1) since there were several such devices in the family room, officers had to assume there were more throughout the residence; and (2) the family room was booby-trapped and there were a lot of wires from the small black boxes with the flashing LED lights that ran around the corner and into the kitchen and other areas in the apartment officers could not see. Although the robot was at the threshold of the apartment, "there was no way of even clearing the

threshold" because there were "initiating devices scattered on the floor" and the numerous wires that were loosely laid out could become tangled in the robot's treads. Additionally, the booby trap at the front door prevented officers from moving the robot into the apartment. In fact, officers were worried that the robot's manipulator control arm was right up against the trip wire at the threshold of the door. Officers knew that if the robot tripped that wire or set off the booby trap, at a minimum, there would be an explosion or a fire. As a result, officers were afraid to even move the robot backwards. In any event, regardless of whether officers could have maneuvered the robot past the booby trap at the threshold of the apartment, they suspected that there were more booby traps and explosive devices throughout the apartment.

Given the concern about the robot's position in relation to the booby trap at the threshold of the apartment, Deputy Overton donned a bomb suit and responded to the front door of the defendant's apartment to do "reconnaissance." Without entering the apartment, Deputy Overton ascertained that the robot was far enough away from the trip wire that it could be moved backwards and its arm could be moved a short distance. From outside the apartment, Deputy Overton detected a strong odor of gasoline emanating from inside the apartment. This magnified the officers' safety concerns, as they were aware of "the possible ignition of those gasoline fumes in [the] apartment."

Yet another concern was the prospect that there may have been victims or suspects in other rooms in the apartment. Since officers "had no way to even look into those other rooms," they could not determine whether there were people inside the apartment. Under the circumstances, officers concluded it was important to undertake efforts to attempt to see inside other rooms in the apartment.

At about 6:00 a.m., officers used a pole cam—a small video camera mounted on the end of a rigid pole with a movable neck—so that they could attempt to look into the apartment through the third-floor windows "to do a reconnaissance" for any suspects, victims, and other explosive and booby-trap devices. The pole cam was not effective because all the blinds in the apartment were pulled down. Moreover, the lights in the apartment were turned off and the pole cam did not provide an adequate image to allow officers to see what was inside the apartment.

Officers next used a lift truck from the Aurora Fire Department so that they could physically get up to the windows of the apartment instead of trying to peer into them remotely with a video camera. Detective Capolungo went up on the fire truck's ladder and broke out a total of four windows and removed any blinds that may have covered the windows. By doing so, Detective Capolungo was able to see inside the kitchen, two bedrooms, and a bathroom. There was an additional reason for breaking out the kitchen window: at the fire department chief's request,

officers wanted to reduce the gasoline vapor level in the apartment. Fans were also placed outside the apartment "to put some pressurized air up on the third floor to hopefully evacuate some of the fumes."

While officers were at the defendant's apartment, Detective Yacano prepared an affidavit in support of a warrant and a warrant to search the defendant's apartment. *See* P-PT-47. He took both documents to Chief Judge Sylvester. *Id.* The affidavit was "SUBSCRIBED AND SWORN to" by the detective before Judge Sylvester. *Id.* After being sworn in by Judge Sylvester, Detective Yacano signed the affidavit. Chief Judge Sylvester reviewed the affidavit, signed it, and signed the warrant at 9:15 a.m. *Id.*[12]

The search warrant stated that the affidavit in support of the warrant, which was in compliance with the Colorado Rules of Criminal Procedure, sought authorization to search for and seize certain specified property believed to be situated at apartment 10, based upon one or more of the following grounds: that the property "ha[d] been used as a means of committing a criminal offense;" that the property was possessed illegally; or that the property "would be material evidence in a subsequent criminal prosecution." *Id.* The warrant further indicated that the author of the supporting affidavit was Detective Yacano and that Judge Sylvester

[12] Detective Yacano's affidavit and Judge Sylvester's warrant were introduced into evidence stapled together. *See* P-PT-47.

was "satisfied that grounds for the application" for the warrant existed, or that there was "probable cause to believe that they exist[ed]." *Id.*

Detective Yacano's four-page, single-spaced affidavit discussed in detail the shooting at the theater, including the defendant's representation "that there were bombs inside his apartment and they would go off if the wires were tripped." *Id.* Further, relying in part on observations made through the robot and by Detective Capolungo, it noted the presence of "trip wires . . . propane tanks, bottles filled with an unknown liquid and bottles filled with ammunition . . . located throughout the apartment." *Id.*

The warrant authorized officers to search the apartment for the following property:

> Any item that in the manner it is used or intended to be used, and is capable of producing death or serious bodily injury to include, but not limited to, guns, bullets, shells, shell casings, bullet magazines, tear gas canisters, tactical and ballistic body armor, any type of military equipment to include gas masks, protective eyewear, bodily fluids to include, but not limited to blood, bloody items, suspected blood, any object containing blood or suspected blood, any projectile or item which is capable of being fired out of a weapon, any knives, photos and video tape of the business, measurements, any trace evidence, microscopic evidence or evidence patterns, any items to include, cellular telephones, any documentation and literature indicating any ill will towards any of the victims, any receipts and documentation for the purchase and use of firearms and ammunition, any receipts indicating the purchase of chemicals and explosives, any documentation indicating the use of chemical and explosive devices. Electronic data processing and storage devices, computers, and computer systems, including central processing units; internal and peripheral storage devices, such as fixed disks, external hard disks,

> floppy disk drives, and diskettes, tape drives and tapes, optical storage devices or other memory storage devices; peripheral input/output devices, such as keyboards, printers, video display monitors, optical readers, and related communication devices, such as modems; together with system documentation, operating logs, and documentation, software and instruction manuals, proof of ownership or control of 1690 North Paris Street #10, Aurora, Adams County, Colorado and any other evidence that may be material to this investigation or is illegal to possess.

Id. Detective Yacano gave copies of the affidavit and warrant to Detective Alton Reed.

On July 21, Detective Wilson of the Aurora Police Department and others executed the search warrant at the defendant's apartment. Prior to officers searching the apartment, however, other personnel, including the fire department and federal agencies, took actions to render the apartment safe. During that process, multiple items were removed, including: containers with liquids in them, devices with potential explosives, spheres, jars with ammunition in them, fusing systems, wires, and the items that were at the doorway. While the warrant was executed, Detective Wilson had a copy of the warrant and Detective Yacano's affidavit.[13]

[13] Throughout the non-capital motions hearings, counsel and the witnesses frequently referred to a warrant and its accompanying affidavit as simply "the warrant." The Court infers from the testimony provided by Detectives Yacano and Wilson, P-PT-47, and the rest of the record that when the defendant's apartment was searched pursuant to the warrant issued by Judge Sylvester, Detective Wilson had both the search warrant and Detective Yacano's affidavit in support of the warrant.

ANALYSIS

I. Warrantless Search of the Defendant's Apartment

The defendant argues that the warrantless search of his apartment was illegal. The Court disagrees.

A. Protection Against Unreasonable Searches and Seizures

"Both the Fourth Amendment to the United States Constitution and Article II, Section 7 of the Colorado Constitution prohibit 'unreasonable searches and seizures.'" *People v. Brunsting*, 307 P.3d 1073, 1078 (Colo. 2013).[14] "The 'touchstone of the Fourth Amendment is reasonableness.'" *People v. Mendoza-Balderama*, 981 P.2d 150, 152 (Colo. 1999) (quoting *Ohio v. Robinette*, 519 U.S. 33, 39, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996)). Consequently, in reviewing police conduct in the course of a challenged search, the trial court "must determine whether the police acted in a manner that was 'unreasonable.'" *Id.* The trial court's "fact specific reasonableness inquiry," *Robinette*, 519 U.S. at 39, 117 S.Ct. 417, is "of paramount importance" in assessing whether the challenged government action "violates this fundamental constitutional guarantee," *Mendoza-Balderama*, 981 P.2d at 152.

[14] For purposes of Motion D-123, there is no contention that the Colorado Constitution offers broader protection against unreasonable searches and seizures than the Fourth Amendment. Therefore, the Court's analysis of the lawfulness of the police officers' warrantless search focuses on the Fourth Amendment and relevant case law.

Searches conducted without a warrant are presumed to be unreasonable under the Fourth Amendment, "subject only to a few specifically established and well-delineated exceptions." *People v. Marshall*, 289 P.3d 27, 29 (Colo. 2012) (quoting *Arizona v. Gant*, 556 U.S. 332, 338, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009)) (other citations omitted). The prosecution has the burden of overcoming this presumption by establishing that the warrantless search was "justified under one of the narrowly defined exceptions to the warrant requirement." *People v. Fuerst*, 302 P.3d 253, 256 (Colo. 2013) (quotation omitted).

Additionally, "the facts and circumstances available to police at the time of the warrantless search are subject to the same probable cause inquiry as would have occurred had the officers applied for a search warrant." *Brunsting*, 307 P.3d at 1079. Hence, a warrantless search is lawful if it is "supported by both probable cause and an exception to the warrant requirement." *Id.*

B. Probable Cause

The Court examines first whether officers had probable cause to search the defendant's apartment. To establish that a search was supported by probable cause, "officers must demonstrate reasonable grounds to believe that contraband or evidence of criminal activity was located in the area to be searched." *Id.*

Here, it is undisputed that officers lawfully arrested the defendant in connection with the shooting of numerous individuals inside auditorium 9.

Officers observed evidence of a large-scale, bloody mass shooting that appeared to have been extensively planned. There were twelve people deceased, and even more people severely injured, and both the deceased parties and the survivors had gunshot wounds. Officers seized four firearms, numerous shell casings and bullet magazines, and ballistic gear. The large number of weapons, ammunition, and ballistic gear recovered suggested that the perpetrator had spent some time preparing to carry out the shooting.

Immediately before his arrest, the defendant had been spotted outside the open driver's side door of his car, which was parked outside the rear emergency exit to auditorium 9. There was a firearm with a green laser light on the roof of the defendant's car, and officers saw a rifle case in the back seat of the car and another firearm in the side pocket of the passenger's side door of the car. The defendant was wearing a gas mask and officers had been notified that a chemical agent had been deployed inside auditorium 9 during the shooting. The defendant was also wearing full body armor ballistic gear, including a Kevlar-type ballistic helmet. Shortly after his arrest, the defendant reported that there were no other suspects, admitted he had four guns at the theater, and added that his apartment was booby-trapped with improvised explosive devices that would go if police officers triggered them.

Officers also knew: that the resident of the apartment directly below the defendant's apartment had called in a noise complaint around midnight because there was loud music coming from the defendant's apartment; that she had seen the door to the defendant's apartment ajar; and that the music had stopped at approximately 1:00 a.m., even though she had not seen anyone leave the apartment. This information indicated to officers that there was someone in the apartment who could detonate an explosive device or that the music had been set on a timer and an explosive device could likewise be set on a timer.

Under all of these circumstances, officers had reasonable grounds to believe that multiple crimes had been committed, that the defendant had committed those crimes, and that evidence of criminal activity was located inside the defendant's apartment. Accordingly, the Court concludes that officers had probable cause to search the defendant's apartment for evidence of the crimes related to the shooting and possession of explosive devices.

C. Exception to the Warrant Requirement

Having found that officers had probable cause to search the defendant's apartment, the Court next considers whether an exception to the warrant requirement applies. The Court concludes that the prosecution established at the hearing that the colorable claim of emergency exception applies.

The colorable claim of emergency exception is a variant of the exigent circumstances exception. *Id.* at 1080. It "requires a showing of an immediate crisis inside the home and the probability that police assistance will be helpful in alleviating that crisis." *Id.* (quotation omitted). The typical case involves officers responding to an ongoing emergency inside someone's residence. *People v. Aarness*, 150 P.3d 1271, 1278 (Colo. 2006) (citing *People v. Kluhsman*, 980 P.2d 529, 532-34 (Colo. 1999), where the defendant, who was covered in blood, reported to police that he had been chased all night and that he had killed a couple of his pursuers). To determine whether the emergency exception applies, the court:

> [M]ust examine the totality of circumstances, including the delay likely to be occasioned by obtaining a warrant, the character of the investigation, and the potential risk posed to other persons from any unnecessary delay, and must evaluate those circumstances as they would have appeared to a prudent and trained police officer at the time of the challenged entry.

People v. Winpigler, 8 P.3d 439, 446 (Colo. 1999) (citation omitted); *see also People v. Higbee*, 802 P.2d 1085, 1090 (Colo. 1990) (same) (citation omitted).

The Colorado Supreme Court has "endorsed a broad set of factors to determine whether a risk to officer safety creates exigent circumstances." *Brunsting*, 307 P.3d at 1080. In *Brunsting*, the Court categorized these factors as follows:

> Some of these factors assess whether the fear of danger is objectively reasonable. *See Aarness*, 150 P.3d at 1279 (employing such factors as "whether the suspect is believed to be armed"; "whether a grave offense is involved"; and "whether there is strong reason to believe the suspect is in the premises"); *Winpigler*, 8 P.3d at 446 (endorsing factor of "the risk posed to other persons from unnecessary delay"). Others address the reasonableness of the police response to the perceived risk. *Aarness*, 150 P.3d at 1279 ("whether the entry is made at night" and "whether the entry is made peaceably"); *Winpigler*, 8 P.3d at 446 ("the character of the investigation"). These factors are not exhaustive. Therefore, while courts faced with questions of exigent circumstances may use these factors to the extent they are helpful, the fundamental measure of the existence of exigent circumstances is an assessment of reasonableness based on the totality of the circumstances.

Id.

The reasonableness analysis used by the Colorado Supreme Court and the United States Supreme Court "is embodied by the approach taken by the Tenth Circuit Court of Appeals to exigencies created by a risk to personal safety." *Id.* In *Brunsting*, the Court adopted the Tenth Circuit's two-pronged test and held that "officer safety concerns fall within the exigent circumstances exception when (1) the officers have an objectively reasonable basis to believe there is an immediate need to protect the lives or safety of themselves or others, and (2) the manner and scope of the search is reasonable." *Id.* at 1081. The Court reasoned that "[t]his test appropriately emphasizes the fundamental totality-of-the-circumstances reasonableness inquiry and clarifies that the scope of the colorable

claim of emergency exception includes situations that federal courts have long considered within the scope of the exigent circumstances exception." *Id.*

The Court finds that the prosecution established both parts of the test approved in *Brunsting*. Therefore, the warrantless search of the defendant's apartment was justified under the colorable claim of emergency exception.

First, police officers had an objectively reasonable basis to believe that there was an immediate need to protect the lives or safety of themselves or others from explosives. "Exigent circumstances are frequently found when dangerous explosives are involved." *United States v. Lindsey*, 877 F.2d 777, 781 (9th Cir. 1989); *see also United States v. Infante*, 701 F.3d 386, 393-94 (1st Cir. 2012) ("a number of our circuits have held that the presence of potentially explosive chemicals can justify warrantless entry into a home").

At the time of the warrantless search of the defendant's apartment, officers had responded to an unprecedentedly chaotic crime scene involving a large-scale shooting with numerous casualties. Additionally, officers knew that a chemical agent had been deployed during the shooting, that four firearms had been located at the scene, and that the defendant had been wearing a gas mask and ballistic gear when he was first contacted at his vehicle.

Significantly, officers were aware that the defendant had told Officer Blue that his apartment was booby-trapped with improvised explosive devices. The

concern associated with this statement was magnified when officers learned: that the defendant's neighbor had heard loud music coming from the defendant's apartment around midnight; that when she went to the apartment, she noticed the door was ajar; and that she did not see anyone leave the apartment, but the music stopped at approximately 1:00 a.m. This information gave officers a reasonable basis to believe that there was someone inside the apartment who could detonate an explosive device or that the music was on a timer and there could likewise be an explosive device on a timer.

In light of the situation, there was no question that the officers' assistance would be helpful—if not required—to alleviate the crisis confronting them. Had officers not taken the immediate threat of explosive devices in the defendant's apartment seriously, they would have been derelict in their duty to protect the public and first responders.

The officers' actions corroborate that their fears were genuine, not a subterfuge to conduct an investigatory search. *See e.g.*, *Harman v. Pollock*, 586 F.3d 1254, 1265 (10th Cir. 2009) ("In evaluating exigency, we consider whether the circumstances are subject to police manipulation or abuse, or motivated by an intent to arrest and seize evidence") (internal quotation marks and citations omitted); *People v. Clements*, 661 P.2d 267, 271 n.1 ("This is not a case where the officers' actions to abate the emergency revealed a mere desire to search rather

than a desire to secure the public safety"). Specifically, the officers: monitored the door to the apartment using a video camera; tied the defendant's apartment door shut from the outside; evacuated the apartment building; evacuated nearby buildings; interviewed one of the defendant's neighbors; attempted to look into the apartment by using a pole cam; used a bomb robot equipped with cameras to enter the apartment; had a bomb technician who responded to the apartment don a bomb suit; used a fire truck ladder and broke out the kitchen window to reduce the gasoline vapor level in the apartment; used fans to evacuate some of the gasoline fumes; and broke out the windows and removed the blinds to see inside all the rooms in the apartment. These actions reflect that officers were truly convinced that there was an immediate need to protect the public, and first responders from the grave danger associated with explosives in the defendant's apartment.

Obtaining a search warrant in the middle of the night would have been foolhardy because it would have resulted in an unreasonable delay and would have created an unnecessary risk that potential explosive devices might have detonated, thereby causing catastrophic harm and damage. *See Clements*, 661 P.2d at 271; *Kluhsman*, 980 P.2d at 536. Because officers reasonably believed that the defendant's apartment was booby-trapped with explosive devices, time was of the essence. The urgency was amplified by the fact that officers did not know whether there were victims in the apartment. In order to protect the public and first

responders from an immediate and grave danger, it was incumbent upon officers to act quickly to render the defendant's apartment safe.

Under all the circumstances present, the Court concludes that officers were understandably concerned that there were explosives in the defendant's apartment and properly determined that there was an immediate need to take action in order to protect the public and first responders. Considering the officers' training and experience, their knowledge of the grave crimes under investigation, and the magnitude of the risk to the public and first responders, their fear of the immediate danger associated with explosives was objectively reasonable and justified the warrantless search of the apartment.

Second, the manner and scope of the search was reasonable. The search was limited in manner and scope to its purpose: to clear the defendant's apartment of any explosive devices in an attempt to neutralize the danger. Whether through the robot or the broken windows, the search was narrowly focused on discovering and eliminating the danger. Further, the record does not support the conclusion that "a safe, feasible, and less intrusive alternative [was] reasonably available to the officers." *Clements*, 661 P.2d at 271 n.1. In this regard, the Court considers that officers did not know whether there were other suspects and/or victims in the apartment.

In sum, the Court holds that the officers in this case acted reasonably and competently in dealing with an immediate crisis that posed a grave danger to the public and first responders. The severity of the situation confronting the officers demanded that they act quickly in rendering the defendant's apartment safe. Further, the warrantless search was limited in manner and scope to its purpose. Accordingly, the Court rules that the colorable claim of emergency exception applies to the warrantless search of the defendant's apartment.

II. Search Conducted Pursuant to a Warrant

A. Challenges Under the "Fruit of the Poisonous Tree" Doctrine

"The 'fruit of the poisonous tree' doctrine provides that evidence derived from or acquired by the police through unlawful means is inadmissible and must be suppressed." *People v. Williams*, 297 P.3d 1011, 1016 (Colo. App. 2012) (citation omitted). Thus, for example, "evidence obtained by the police through . . . an illegal entry" must be suppressed. *People v. Prescott*, 205 P.3d 416, 422 (Colo. App. 2008) (citation omitted).

The defendant avers that the search conducted pursuant to the warrant must be suppressed because it followed "an illegal warrantless search." Motion at p. 2. Inasmuch as the Court has concluded that the warrantless search was not illegal, this contention fails.

The defendant next maintains that the search authorized by the warrant must be suppressed because the affidavit in support of the warrant relied on statements obtained from him by Officers Sweeney, Oviatt, and Blue in violation of his constitutional rights. *Id.* at p. 3. Because the Court has found that those statements were not obtained unconstitutionally, *see* Order D-124, this assertion fails.

B. Particularity Challenge

The defendant challenges the validity of the search warrant, arguing that it lacked particularity because it authorized officers "to search for and seize 'any other evidence that may be material to this investigation.'" *Id.* at p. 3 (quoting P-PT-47). The defendant concedes that the "search warrant specified certain items to be identified for search and seizure purposes." *Id.* However, according to the defendant, the catch-all phrase at the end of the long list of specific items to be seized—"any other evidence that may be material to this investigation"—rendered the warrant invalid on its face. *Id.*[15] The Court disagrees.

1. Legal Standard

In addition to the reasonableness requirement, searches and seizures are limited by the constitutional principle that "a warrant may not be issued unless

[15] The defendant alleges that the warrant was "unconstitutionally overbroad, and/or the warrant was illegally executed." Motion at p. 3. Because the defendant did not develop this passing reference to the execution of the warrant, either in the briefs submitted or at the hearing, the Court declines to address it. *See People v. Bondurant*, 296 P.3d 200, 206 n.2 (Colo. App. 2012) (refusing to address arguments raised in a cursory fashion before the trial court and the court of appeals), *cert. denied*, No. 12SC482, 2013 WL 120466 (Colo. Jan. 7, 2013).

probable cause is properly established and the scope of the authorized search is set out with particularity." *Brunsting*, 307 P.3d at 1078 (quotation omitted). "The Warrants Clause of the Fourth Amendment states that a warrant must 'particularly describ[e] . . . the person or things to be seized." *People v. Roccaforte*, 919 P.2d 799, 802 (Colo. 1996) (quoting U.S. Const. amend. IV); *see also* Colo. Const. art. II, sec. 7 ("no warrant to search any place or seize . . . things shall issue without describing the place to be searched, . . . or thing to be seized, as near as may be"). Similarly, under section 16-3-303(1)(b), a search warrant must "[i]dentify or describe, as nearly as may be, the property to be searched for, seized, or inspected."[16]

"A search warrant must describe the property to be searched with sufficient particularity so that the officer executing the warrant can identify the place intended with reasonable effort." *People v. Schrader*, 898 P.2d 33, 36 (Colo. 1995) (citation omitted); *see also People v. Ragulsky*, 518 P.2d at 286, 288 (Colo. 1974) ("the description is adequate if the officer executing the warrant can with reasonable effort ascertain and identify the place intended to be searched"). However, "[t]he description of the property to be searched . . . does not need to meet the technical requirements sought by conveyancers, and an erroneous

[16] For purposes of Motion D-123, there is no contention that the Colorado Constitution offers broader protection against the issuance of search warrants than the Fourth Amendment. Therefore, the Court's analysis of the lawfulness of the police officers' second search focuses on the Fourth Amendment and relevant case law.

description does not necessarily render a warrant invalid." *Schrader*, 898 P.2d at 36 (quotation marks and citations omitted). Courts "have been reluctant to suppress evidence based on highly technical attacks on warrants because a negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting." *Id.* (quotation marks and citation omitted).

The primary function of the particularity requirement "is to ensure that government searches are confined in scope to particularly described evidence relating to a specific crime for which there is demonstrated probable cause." *Roccaforte*, 919 P.2d at 802 (quotation marks and citation omitted). The policy served by the particularity requirement "is to prevent officers from conducting a general, exploratory rummaging in a person's belongings." *Id.* (quotation marks and citation omitted). Requiring that warrants particularly describe the items to be seized "makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another." *Id.* (quoting *Marron v. United States*, 275 U.S. 192, 196, 48 S.Ct. 74, 72 L.Ed. 231 (1927)). However, the fact that warrants may not be "exemplars of draftsmanship" does not necessarily mean that they are unconstitutionally broad. *Id.* at 805.

In *Roccaforte*, the Court recognized that the "laudatory goal" of the particularity requirement "has proven somewhat impractical," explaining that "at

some point during any search the executing officer must exercise his or her judgment in applying the language of the warrant to the premises to be searched." *Id.* at 803 (citation omitted). Therefore, "courts have turned to a more practical standard: whether the description in a warrant is sufficiently particular that it enables the executing officer to reasonably ascertain and identify the things authorized to be seized." *Id.* (citations omitted).

"[A]n affidavit can be used to satisfy the Fourth Amendment's particularity requirement if (1) a deficient warrant incorporates a curative affidavit by reference, (2) both documents are presented to the issuing magistrate or judge, and (3) the curative affidavit accompanies the warrant during the execution of the search warrant." *People v. Staton*, 924 P.2d 127, 132 (Colo. 1996). In *Staton*, the Court held that "the warrant's [particularity] defects were cured by the supporting affidavit which was incorporated by reference into the warrant." *Id.* at 128.

2. Application

The defendant's particularity challenge is premised on the catch-all phrase in the warrant's description of the property to be seized: "any other evidence that may be material to this investigation." The Court concludes that this language did not render the warrant impermissibly general.

Any deficiency in particularity injected by the catch-all phrase was cured by Detective Yacano's supporting affidavit, which was incorporated by reference into

the warrant. On the first page, the warrant stated that Detective Yacano had filed an affidavit in support of the warrant, that the affidavit was in compliance with the Colorado Rules of Criminal Procedure, and that the affiant sought the Court's authorization to search for certain specified property believed to be situated in apartment 10. *See* P-PT-47. On the second page, the warrant indicated that the affidavit's author was Detective Yacano and that Judge Sylvester was satisfied that grounds for the application of the warrant existed or that there was probable cause to believe that they existed. *Id.* In addition to signing the warrant, Judge Sylvester also signed Detective Yacano's affidavit. *Id.*

The other two requirements in *Staton* were also met. 924 P.2d at 132. The warrant and the affidavit were both presented to Judge Sylvester, and the affidavit accompanied the warrant as the warrant was executed.

Because the affidavit was incorporated into the warrant, was presented to Judge Sylvester when he signed the warrant, and accompanied the warrant when the warrant was executed, the affidavit may be used to satisfy the Fourth Amendment's particularity requirement. Under the circumstances present here, "[t]he authority of the warrant must be read within the context of the affidavit, wherein the scope [of the warrant] was defined . . . ." *Roccaforte*, 919 P.2d at 804.

The Court notes that the catch-all phrase did not stand alone in the warrant. Instead, it appeared at the end of a long list of specific items to be seized, which must be read in the context of Detective Yacano's affidavit.

In *United States v. Pindell*, 336 F.3d 1049, 1053 (D.C. Cir. 2003), the defendant asserted that the warrants issued violated the particularity requirement of the Fourth Amendment because of the catch-all phrase at the end of the warrant's list of items to be seized: "and any other evidence of a violation of Title 18 U.S.C. § 242."[17] The Court disagreed, reasoning:

> We have no doubt that had the warrants ***merely*** authorized the seizure of "evidence of a violation of Title 18 U.S.C. § 242, they would indeed have been impermissibly broad. But that phrase did not stand alone, and instead came in the same sentence as, and at the conclusion of, a quite specific list of items to be seized. That list constrained the interpretation of the last phrase, making it reasonably clear that the warrants did not authorize the seizure of evidence of just any violation of § 242, but rather of evidence relating to such a violation in connection with [the victim].

Id. (emphasis in original). Although the United States Supreme Court has not addressed the issue directly, in *Andresen v. Maryland*, 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976), it reached a similar conclusion. The warrant in that case authorized the search of a list of specifically described documents related to a fraudulent real estate scheme. *Id.* at 480 n.10, 96 S.Ct. 2737. At the end of the list,

[17] The relevant sentence in the warrants in *Pindell* read as follows: "a green card and driver's license [in] the name of [the identified victim], cash money in the amount of approximately $500, a white gold chain, a dark blue police uniform, and any other evidence of a violation of Title 18 U.S.C. § 242." 336 F.3d at 1053 (emphasis omitted).

the warrant contained the following catch-all phrase: "together with other fruits, instrumentalities and evidence of crime at this (time) unknown." *Id.* The Court concluded that the reference to an unknown crime did not transform the warrant into a general warrant lacking particularity because the catch-all phrase was "not a separate sentence." *Id.* at 480-82, 96 S.Ct. 2737. Inasmuch as the catch-all phrase had to be read in the context of the preceding items, it clearly referred to other evidence of the particular scheme in question. *Id.*

Here, when read in the context of Detective Yacano's detailed affidavit, it becomes readily apparent that the catch-all phrase in the warrant did not authorize the search of any evidence that may be material to an unidentified investigation.[18] A common sense reading of the warrant and the affidavit together clearly shows that the phrase referred to any evidence, other than the evidence listed earlier in the paragraph, which may be material in "this investigation," namely, the specific investigation of the July 20, 2012 Century 16 Theatres shooting and the explosive devices in the defendant's apartment. *See* P-PT-47. Detective Yacano's thorough affidavit left no doubt about the specific investigation to which the warrant referred.

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[18] Notably, the defendant does not take issue with the preceding list of specific items in the paragraph, presumably because he recognizes that it must be read in the context of Detective Yacano's affidavit. Indeed, if the list is not read in that context, it suffered from the same alleged defect as the catch-all phrase. Just as Detective Yacano's affidavit prevented the list from violating the Fourth Amendment's particularity requirement, it cured any specificity defect the catch-all phrase may have introduced.

Nor was it improper or unreasonable for Detective Yacano to seek "any other evidence that may be material" to the investigation. While Detective Yacano included a long list of specific items to be seized, he could not have anticipated every piece of material evidence that might be found in the defendant's apartment. "[A]t some point during any search the executing officer must exercise his or her judgment in applying the language of the warrant to the premises to be searched." *Roccaforte*, 919 P.2d at 803. By limiting the catch-all phrase to any evidence that may be material to the investigation into the shooting and the explosive devices, the warrant avoided running afoul of the Fourth Amendment's particularity requirement.

The Court concludes that the warrant was sufficiently specific to satisfy the strictures of the Fourth Amendment's particularity clause. Therefore, the defendant's particularity challenge fails.

CONCLUSION

For all the foregoing reasons, the Court concludes that Motion D-123 lacks merit. Accordingly, it is denied.

Dated this 18th day of November of 2013.

BY THE COURT:

Carlos A. Samour, Jr.
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2013, a true and correct copy of the **Amended order regarding defendant's motion to suppress evidence: searches of 1690 N. Paris St., #10 (D-123-A)** was served upon the following parties of record:

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