

District Court, Weld County, Colorado Court address: 901 9 th Avenue, Greeley, CO 80631	DATE FILED: September 17, 2018 4:16 PM
PEOPLE OF THE STATE OF COLORADO, Plaintiff v. CHRISTOPHER WATTS, Defendant	▲ COURT USE ONLY ▲
John Walsh, Atty. Reg. No. 42616 Kathryn Herold, Atty. Reg. No. 40075 Deputy State Public Defenders 822 7th Street, Ste. 300 Greeley, CO 80631 Phone Number: (970) 353-8224 FAX Number: (970) 352-8293 E-mail address: john.walsh@coloradodefenders.us	Case Number: 18CR2003 Division: 5
(D-036) MR. WATTS' OBJECTION TO GOVERNMENT MOTION [K]	

CHRISTOPHER WATTS, through his attorneys, hereby objects to the government's Motion [K]. As grounds for this motion, Mr. Watts states:

1. The government requests evidence from Mr. Watts' person to use as evidence in its prosecution against him. Mr. Watts objects to the request on several grounds.
2. First, the government's pleading generically recites that "numerous items of evidence have been collected and are in the process of being sent to the Colorado Bureau of Investigation for testing." Motion [K] at ¶ 2. That generic assertion is not further explained.
3. Mr. Watts reminds this Honorable Court that government requests for the accused to provide evidence are "subject to constitutional limitations." *See* COLO. R. CRIM. P. 16(a)(1).
4. In fact, "the trial court, in ruling on the prosecution's Crim.P. 16 motions which are in issue, must first determine whether discovery which has been objected to will constitute a violation of the defendants' constitutional rights." *People By & Through VanMeveren v. Dist. Court In & For Larimer Cty.*, 531 P.2d 626, 632 (1975)(internal citation omitted).
5. Based on the general nature of the pleading, Mr. Watts cannot make out the government's need for buccal swabs, finger and palm prints, nor digital photographs. Because of that, Mr. Watts must conclude that the required seizure of Mr. Watts and the subsequent search of his person are unconstitutional for the reasons set forth below.

**THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES
CONSTITUTION AND ARTICLE II, § 7 PROHIBIT UNREASONABLE SEARCHES
AND SEIZURE UNSUPPORTED BY PROBABLE CAUSE**

6. Mr. Watts objects to the government’s request because it visits both an unreasonable search and seizure upon him without the establishment of probable cause. U.S. CONST. amends. IV, XIV; COLO. CONST. art. II, §§ 7, 25.
7. The Fourth Amendment to the United States Constitution and Article II, Section 7 of the Colorado Constitution both prohibit searches and seizures unsupported by probable cause taken under oath. U.S. CONST. amends. IV, XIV; COLO. CONST. art. II, §§ 7, 25. Indeed, “[w]arrantless searches and seizures are presumptively invalid under the fourth amendment to the United States Constitution and article II, section 7 of the Colorado Constitution” *Hoffman v. People*, 780 P.2d 471, 474 (Colo. 1989).
8. It is clear that searches and seizures pursuant to state statute “must comport with the Fourth Amendment” and its Colorado equivalent. *See e.g., People v. Hyde*, 393 P.3d 962, 966 (Colo. 2017). For that reason, if the court finds the statute does not require a showing of probable cause (or other constitutional suspicion) before the search and seizure, Mr. Watts argues that the statute is unconstitutional. U.S. CONST. amends. IV, XIV; COLO. CONST. art. II, §§ 7, 25. Mr. Watts requests the court make such a finding.
9. That said, in establishing probable cause to support a search or seizure, the government must show a connection between the crime suspected and thing or area to be searched or seized. *See e.g., People v. Eirish*, 165 P.3d 848, 852 (Colo. App. 2007). The government has not done so.
10. The government may claim that Rule 16 merely allows for a *de minimis* search and seizure of Mr. Watts, and therefore survives constitutional scrutiny.
11. With respect to the question of an unreasonable seizure, the United States Supreme Court has acknowledged that even “the seizure of a person necessary to bring him into contact with government agents” is a cognizable seizure. *U.S. v. Dionisio*, 410 U.S. 1, 8 (1973)(*citing Schmerber v. California*, 384 U.S. 757 (1966)). This argument does not appear to be foreclosed by *Early v. People*, 496 P.2d 1021, 1024 (Colo. 1972)(appearing to find reasonable suspicion for the detective palm printing the accused). Counsel presumes that Mr. Watts would be subject to some additional seizure necessary to bring him into contact with government agents to perform the search.
12. In 2015, the United States Supreme Court considered a similar *de minimis* argument with respect to whether the accused was unreasonably searched. In *Rodriguez v. U.S.*, the High Court found that even *de minimis* intrusions into privacy which prolong a search are unlawful under the United States Constitution. *See Rodriguez v. U.S.*, 135 S.Ct. 1609, 1614-17 (2015)(rejecting the Eight Circuit’s ruling that a *de minimis* intrusion could be justified by “the Government’s strong interest in interdicting the flow of illegal drugs”)

13. And so, Mr. Watts objects to the government's Motion [K] because it requests to both seize and then search Mr. Watts without any showing of constitutional suspicion. The government fails to explain its need for any of the requested information, and such failure bolsters Mr. Watts' argument that the requested relief would result in an unreasonable search and seizure. Mr. Watts respectfully requests the court deny the government's motion.

**THE FIFTH AND FOURTEENTH AMENDMENTS AND ARTICLE II, §§ 18 AND 25
PREVENT COMPELLED SELF-INCRIMINATION AND THE GIVING OF
EVIDENCE THAT VIOLATES DUE PROCESS, AND, BASED ON THE
INFORMATION PROVIDED, A DETERMINATION ON THE
CONSTITUTIONALITY OF THE GOVERNMENT'S REQUEST CANNOT BE MADE**

14. Because of the significant damage already done to Mr. Watts' rights to a fair trial and a fair and impartial jury, this Honorable Court should afford Mr. Watts the full protection of and requisite fundamental fairness accompanying his rights to due process under the Colorado and Federal constitutions. U.S. CONST. amends. V, XIV; COLO. CONST. art. II, §§ 16, 23, and 25.
15. It is true that the Supreme Court has held that the privilege against self-incrimination "is a bar against compelling communications or testimony, but that compulsion which makes a suspect or accused the source of real or physical evidence does not violate it." *Pennsylvania v. Muniz*, 496 U.S. 582, 591-92 (1990)(internal punctuation omitted). Mr. Watts first requests a good-faith modification, extension, or reversal of that precedent. After all, "our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors..." *Miranda v. Arizona*, 384 U.S. 436, 460 (1966).
16. Even so, it is also clear that not all acts merely make the accused "a source of real or physical evidence . . ." *Id.* To the contrary, some acts may constitute a communicative statement – and, *ipso facto*, a testimonial statement – "if the conduct is intended to be communicative." *People v. Lujan*, 2018 COA 95, ¶ 25.
17. Of course, any claim of a violation of the Fifth Amendment necessarily relies on the context of the evidence given, and the purpose for which the evidence will be used.
18. For instance, the introduction of "basic identifying information" generally does not violate the Fifth Amendment and Article II, Section 18's prohibition against compelled self-incrimination. *See e.g., People v. Allen*, 199 P.3d 33, 35 (Colo. App. 2007)(recognizing what the court calls the "booking question exception.")
19. However, the responses to booking-type questions are also not automatically admissible. *See Id.* For instance, in *Pennsylvania v. Muniz*, the High Court found the accused's response to a question about the date of his sixth birthday to be inadmissible, even when asked in context with other booking questions. *Muniz*, 496 U.S. at 592-602. The Colorado Court of Appeals similarly held inadmissible answers to booking-type questions about weapons and contraband. *Allen*, 199 P.3d at 35-37.

20. As the Colorado Supreme Court has stated, this court must determine if “the request for disclosure [is] overbroad and, therefore invalid” *VanMeveren*, 531 P.2d at 632. Such a request would be invalid if the request sought “information which might serve as an unconstitutional link in a chain of evidence tending to establish the accused’s guilt of a criminal offense.” *Id.* (citation omitted).
21. Based on the government’s Motion [K] there is no way to make that vital first inquiry here. The government’s motion, as it stands, makes a generic note that “numerous items of evidence have been collected and are in the process of being sent to the Colorado Bureau of Investigation for testing.” Motion [K] ¶ 2.
22. In order for this court to conduct a meaningful analysis here, the court must order the government to both establish probable cause and make a specific offer of proof with respect to its request. Then, if Mr. Watts has additional objections, he will bring them at that time.

TO THE EXTENT THE COURT FINDS ANY OF THE RELIEF REQUESTED IN THIS MOTION UNAVAILABLE, MR. WATTS REQUESTS A GOOD FAITH EXTENSION, MODIFICATION, OR REVERSAL OF EXISTING LAW, AND REQUESTS THAT THE COURT CONSIDER ALL CLAIMS UNDER THE MORE PROTECTIVE COLORADO CONSTITUTION

23. Counsel realizes this Honorable Court may find his requests for relief foreclosed, at least in part, by the authorities of *Davis. Mississippi*, 394 U.S. 721 (1969), *U.S. v. Dionisio*, 41 U.S. 1 (1973), *U.S. v. Mara*, 410 U.S. 19 (1973), and others. To the extent the court finds Mr. Watts’ requests for relief are foreclosed by those and similar authorities, Mr. Watts moves the court for a good faith modification, extension, or reversal of established law.
24. In addition, counsel reminds the court that all requests in this motion are made under both the United States *and* Colorado constitutions. The Colorado Supreme Court has consistently recognized that the Colorado Constitution provides greater protections for the citizens of Colorado than that of its Federal counterpart. *See e.g., People v. Oates*, 698 P.2d 811, 818 (Colo.1985); *People v. Corr*, 682 P.2d 20, 27 (Colo.1984); *People v. Sporleder*, 666 P.2d 135, 139-40 (Colo.1983); *Charnes v. DiGiacomo*, 612 P.2d 1117, 1119–21 (Colo. 1980).
25. And so, Mr. Watts requests that if the court finds the relief requested herein unavailable under the Federal constitution that it order the relief under the more protective Colorado constitution.
26. Because this motion includes a claim that a state statute is unconstitutional, counsel has served the attorney general, via U.S. Mail, a copy of the motion.

WHEREFORE, Mr. Watts moves the court to deny the government’s Motion [K]. The court further must deny the government’s request for evidence compelled from Mr. Watts’ person as such evidence violates his rights to be free from unreasonable searches and seizures, his right against self-incrimination, and his rights to a fundamentally fair proceeding comporting with due process of law. U.S. CONST. amends. IV, V and XIV; COLO. CONST. art. II, §§ 7, 16, and 25.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on
9/17/18, I served the foregoing
document by e-service through ICCES to all
opposing counsel. TC
