

DISTRICT COURT, BOULDER COUNTY, COLORADO 1777 Sixth Street Boulder, CO 80302	DATE FILED: May 24, 2024 4:39 PM
PEOPLE OF THE STATE OF COLORADO v. AHMAD AL ALIWI ALISSA Defendant	▲ COURT USE ONLY ▲
Michael T. Dougherty, District Attorney Adam Kendall, Chief Trial Deputy District Attorney 1777 Sixth Street Boulder, CO 80302 Phone Number: (303)441-3700 FAX Number: (303)441-4703 E-mail: akendall@bouldercounty.org Atty. Reg. #38905	Case No. 21CR497 Div.: 13
Response to [Defendant's] Motion to Suppress Illegally Seized Evidence from the Unconstitutional Search of [Defendant's] Apple iCloud Account (D-032)	

Ahmad Al Aliwi Alissa (the “Defendant”) requests that the Court suppress all evidence related to Defendant’s Apple iCloud account.¹ As law enforcement recovered evidence from Defendant’s Apple iCloud account pursuant to a lawful search warrant, Defendant’s request is without merit. This Court should deny his Motion.

I. BACKGROUND

On March 22, 2021, Defendant drove his Mercedes to the Table Mesa King Soopers store

¹ Defendant generally mentions evidence from the search, “as well as any additional evidence, statements, or other incriminating evidence obtained as a “result” thereof.” Defendant’s lack of specificity is defective, and the People are not required to address his claim with regard to supposed “additional evidence” at issue. *See People v. Dailey*, 639 P.2d 1068, 1075 (Colo. 1982) (“[F]airness to the prosecution requires that the motion to suppress specify [the evidence] challenged, so that the prosecution can prepare for the suppression hearing.”); *see also People v. Cunningham*, 2013 CO 71, ¶ 12 (“[T]he defendant, as the moving party, bears the burden of going forward to show a violation of his or her Fourth Amendment rights. If the defendant satisfies this burden, it is then upon the prosecution to show that defendant's Fourth Amendment rights were not violated. [T]he prosecution does not have an initial burden of going forward at a suppression hearing.”).

in Boulder armed with a semi-automatic Ruger AR-556 pistol (often referred to and described as an assault rifle), other guns, large capacity magazines, and a large amount of ammunition. Soon after he arrived at the store, he began shooting victims in the parking lot before continuing into the store and shooting other victims. Ultimately, he murdered 10 people, and shot in the direction of many others. Immediately after the shooting, law enforcement began an extensive investigation into Defendant and his behavior and actions in the months before March 22, 2021. A Jury Trial is currently scheduled to begin on September 3, 2024. A Motions Hearing is scheduled for June 4, 2024.

Defendant filed his Motion to Suppress Illegally Seized Evidence from the Unconstitutional Search of Apple iCloud Account (D-32) on April 26, 2024. Defendant alleges that all evidence seized from Apple should be suppressed because the warrant lacked particularity.

However, the warrant obtained by law enforcement, and signed by Judge Thomas Mulvahill, passes Constitutional muster and is legally sufficient.

A. The facts alleged within the affidavit.

Because a court's review of a challenged warrant is a four corners review, the People incorporate the warrant at issue, signed by Judge Thomas Mulvahill on March 24, 2021, as part of this response. *People v. Gutierrez*, 222 P.3d 925, 937(Colo. 2009); *see* Exhibit B ("Ex. B") attached to the Motion.

B. The items to be produced, as articulated in the affidavit, and other relevant information.

On March 24, 2021, Investigator Kristin Weisbach applied for and obtained a warrant for records believed to be held by Apple related to Defendant's iCloud account (the "Warrant"). *See* Ex. B. The Warrant authorized that the following records be produced from Apple for Defendant's account:

- a. All records or other information regarding the identification of the account, to include full name, physical address, telephone numbers, email addresses (including primary, alternate, rescue, and notification email addresses, and verification information for each email address), the date on which the account was created, the length of service, the IP address used to register the account, account status, methods of connecting, and means and source of payment (including any credit or bank account numbers);
- b. All records or other information regarding the devices associated with, or used in connection with, the account (including all current and past trusted or authorized iOS devices and computers, and any devices used to access Apple services), including serial numbers, Unique Device Identifiers ("UDID"), Advertising Identifiers ("IDFA"), Global Unique Identifiers ("GUID"), Media Access Control ("MAC") addresses, Integrated Circuit Card ID numbers ("ICCID"), Electronic Serial Numbers ("ESN"), Mobile Electronic Identity Numbers ("MEIN"), Mobile Equipment Identifiers ("MEID"), Mobile Identification Numbers ("MIN"), Subscriber Identity Modules ("SIM"), Mobile Subscriber Integrated Services Digital Network Numbers ("MSISDN"), International Mobile Subscriber Identities ("IMSI"), and International Mobile Station Equipment Identities ("IMEI");
- c. The contents of all emails associated with the account, including stored or preserved copies of emails sent to and from the account (including all draft emails and deleted emails), the source and destination addresses associated with each email, the date and time at which each email was sent, the size and length of each email, and the true and accurate header information including the actual IP addresses of the sender and the recipient of the emails, and all attachments;
- d. The contents of all instant messages associated with the account, including stored or preserved copies of instant messages (including iMessages, SMS messages, and MMS messages) sent to and from the account (including all draft and deleted messages), the source and destination account or phone number associated with each instant message, the date and time at which each instant message was sent, the size and length of each instant message, the actual IP addresses of the sender and the recipient of each instant message, and the media, if any, attached to each instant message;
- e. The contents of all files and other records stored on iCloud, including all iOS device backups, all Apple and third-party app data, all files and other records related to iCloud Mail, iCloud Photo Sharing, My Photo Stream, iCloud Photo Library, iCloud Drive, iWorks (including Pages, Numbers, and Keynote), iCloud Tabs, and iCloud Keychain, and all address books, contact and buddy lists, notes, reminders, calendar entries, images, videos, voicemails, device settings, and bookmarks;
- f. All activity, connection, and transactional logs for the account (with associated

IP addresses including source port numbers), including FaceTime call invitation logs, mail logs, iCloud logs, iTunes Store and App Store logs (including purchases, downloads, and updates of Apple and third-party apps), messaging logs (including iMessage, SMS, and MMS messages), My Apple ID and iForgot logs, sign-on logs for all Apple services, Game Center logs, Find my iPhone logs, logs associated with iOS device activation and upgrades, and logs associated with web-based access of Apple services (including all associated identifiers);

- g. All records and information regarding locations where the account was accessed, including all data stored in connection with Location Services;
- h. All records pertaining to the types of service used; and
- i. All records pertaining to communications between Apple and any person regarding the account, including contacts with support services and records of actions taken.

The Warrant specifically sought records from January 15, 2021 to March 22, 2021 at 1528 hours.

The investigation into the mass murder at King Soopers began on March 22, 2021. While executing a search of Defendant's Mercedes pursuant to a lawful warrant, law enforcement found a cell phone belonging to Defendant (an Apple iPhone), large amounts of ammunition, and other evidence that he planned this attack. Notably, Defendant is not challenging the search of his Mercedes used in the commission of this crime.

Pursuant to the Warrant, law enforcement recovered records from Apple related to Defendant's Apple iCloud account.

II. APPLICABLE LAW AND ARGUMENT

A. The Warrant is Supported by Probable Cause.

The Fourth Amendment and Colorado Constitution require a search warrant to be supported by probable cause, and this probable cause must exist within the four corners of the affidavit. *People v. Gall*, 30 P.3d 145, 158 (Colo. 2001); *People v. Randolph*, 4 P.3d 477, 481 (Colo.2000). "Under the Colorado Constitution, the facts supporting probable cause must be reduced to writing, and so probable cause must be established within the four corners of the warrant

or its supporting affidavit.” *People v. Scott*, 227 P.3d 894, 897 (Colo.2010).

Probable cause to search exists when an affidavit for a search warrant alleges sufficient facts to warrant a person of reasonable caution to believe that contraband or evidence of criminal activity is located at the place to be searched. *People v. Hebert*, 46 P.3d at 482 (internal quotation marks omitted); *People v. Pate*, 878 P.2d at 689 (Colo.1994). An affidavit for a search warrant must supply a sufficient nexus between criminal activity, the things to be seized, and the place to be searched. *Hebert*, 46 P.3d at 482. Circumstantial evidence and inferences can supply the necessary link between suspected criminal activity and a specific location to be searched. *Id.*

The facts alleged in the affidavit, together with reasonable inferences drawn from those facts, may be enough to establish the requisite link between suspected criminal activity and a specific location to be searched. *People v. Green*, 70 P.3d 1213, 1215 (Colo.2003). Probable cause “depends upon probabilities, not certainties, and upon knowledge grounded in the practical considerations of everyday life on which reasonable and prudent persons act.” *People v. Unruh*, 713 P.2d 370, 381 (Colo.1986) (abrogated on other grounds by *People v. Esparza*, 272 P.3d 367) (internal citations omitted); *see also People v. Washington*, 865 P.2d 145, 147 (Colo.1994). Because probable cause does not amount to certainty, an affidavit need only establish a “fair probability” that officers will find evidence of a crime at the location to be searched. *Green*, 70 P.3d at 1214. Thus, a totality of the circumstances analysis is necessary to determine probable cause. *Illinois v. Gates*, 462 U.S. 213, 230-31 (1983); *People v. Pannebaker*, 714 P.2d 904, 907 (Colo. 1986).

In looking at the totality of the circumstances, a court must make a “practical, commonsense decision whether a fair probability exists that a search of a particular place will reveal contraband or evidence of a crime.” *People v. Pacheco*, 175 P.3d 91 (Colo.2006).

The reviewing court does “not engage in de novo review but rather examines whether the

magistrate had a substantial basis for concluding that probable cause existed.” *People v. Krueger*, 296 P.3d 294, 304 (Colo. App. 2012) (internal quotation marks omitted). The question is not whether the reviewing trial court would have issued the search warrant, but whether the affidavit provides a “substantial basis” for the issuing judge to conclude that there was sufficient probable cause for a valid search warrant. *People v. Hebert*, 46 P.3d 473, 481 (Colo.2002).

Great deference is given to the initial probable cause determination. *People v. Eirish*, 165 P.3d 848, 853 (Colo.App.2007); *Pate*, 878 P.2d at 690; *Gall*, 30 P.3d at 150. This deference was articulated by the Supreme Court in *United States v. Leon*: “[r]easonable minds frequently may differ on the question whether a particular affidavit establishes probable cause, and we have thus concluded that the preference for warrants is most appropriately effectuated by according ‘great deference’ to a magistrate's determination.” *United States v. Leon*, 468 U.S. 897, 914 (1984) (internal citations omitted). Further, any doubts must be resolved in favor of the initial determination of probable cause “because such deference supports the preference for police to seek a judicial determination of probable cause, rather than resorting to warrantless searches in the hope of relying on consent or another exception to the warrant requirement that might develop at the time of the search.” *Hebert*, 46 P.3d at 481.

Here, the facts alleged in Investigator Weisbach’s affidavit establish probable cause to allow the production of the Apple iCloud records. The totality of the circumstances established by these facts, among others, provided substantial basis for Judge Mulvahill to conclude that probable cause for a search existed. Using a practical and commonsense evaluation of the facts in the affidavit a reasonable person would conclude that a search of the Apple iCloud records could contain evidence of a crime.

The affidavit contains a number of facts and events that together link the Apple iCloud records with the crime at hand. Receipts for ammunition and gun purchases were discovered in

Defendant's car. Defendant brought his mobile phone (an Apple iPhone) and a large amount of ammunition and weapons to the King Soopers. Defendant bringing his cell phone to the King Soopers in his Mercedes, along with a large amount of ammunition and weapons, and Investigator Weisbach's knowledge that mass murderers often use their mobile phones, and the cloud based systems utilized by their mobile phones, to research, plan, and complete their crimes creates a direct nexus between the phone data sought and Defendant's activities in either planning or committing the murders. Defendant argues that there is little nexus between the using of Defendant's phone and the crimes at King Soopers as they relate to the phone. However, the data sought goes toward the toward the identification of the phone as belonging to Defendant and the ability of investigators to establish Defendant's location before, during, and after the murder. Additionally, the Warrant seeks any materials that relate to the planning and commission of the murder without time constraints as phones can be manipulated, and data on the device may not contain time stamps, or time stamps may have been removed or altered by either the user of the device or the device's internal functioning. As a result, appropriate subject matter constraints were placed within the Warrant. Given the above facts, there is a sufficient nexus to support inclusion of all of the data sought by the Warrant.

In sum, the affidavit alleged sufficient facts to warrant a person of reasonable caution to believe that evidence of criminal activity could be associated with the Apple iCloud records. Since circumstantial evidence and inferences may supply the necessary link between the crime alleged and the evidence seized, the facts alleged within this affidavit, together with reasonable inferences drawn from them, are more than sufficient to establish the nexus here between the Apple iCloud records and the crime. *Id.*; see also *Green*, 70 P.3d at 1215; *Randolph*, 4 P.3d 477, 482 (Colo. 2000) (*citing Gates*, 462 U.S. at 241-42).

B. The Warrant is Sufficiently Particularized.

A court must determine whether the affidavit meets the particularity requirement of the Fourth Amendment, in which it must “particularly” describe the place to be searched or the things to be seized in order to prevent a “general” search. *People v. Staton*, 924 P.2d 127, 131 (Colo. 1996). *See also Marron v. U.S.*, 275 U.S. 192, 196 (1927) (stating the purpose of the particularity requirement is twofold: to prevent the seizure of one thing under a warrant describing another thing, and to prevent leaving discretion at the hands of the executing officer).

“The particularity requirement . . . ensures that a search is confined in scope to particularly described evidence relating to a specific crime for which there is demonstrated probable cause. The test applied to the description of items to be seized is a practical one. A description is sufficiently particular when it enables the searcher to reasonably ascertain and identify the things authorized to be seized.” *U.S. v. Leary*, 846 F.2d 592, 600 (10th Cir. 1988). A warrant that describes the items to be seized in broad or generic terms is valid as long as the description is as specific as the circumstances and the nature of the activity under investigation permit. *U.S. v. Riccardi*, 405 F.3d. 852, 862 (10th Cir. 2005), citing to *Leary*, 846 F.2d at 600. Courts are discouraged from taking a “hyper-technical approach” when reviewing warrants due to the Fourth Amendment’s strong preference for searches conducted pursuant to warrant. *Gates*, 462 U.S. at 236; *see also Hill*, 690 P.2d at 859.

Moreover, “all records” warrants, while broad in scope, “do not automatically fail the particularity requirement because ‘the quantity of items listed in a search warrant or the quantity of items seized during the execution of a warrant does not necessarily have any bearing on the validity of the search itself.’” *People v. Roccaforte*, 919 P.2d 799, 803 (Colo. 1996) (quoting *People v. Tucci*, 179 Colo. 373, 375, 500 P.2d 815, 816 (1972)). As such, finding that a warrant is essentially an “all records” warrant is not dispositive of whether it is sufficiently particularized.

Id. So long as a warrant and its supporting affidavit constitute one, complete document, “the particularity of an affidavit can cure an overbroad warrant.” *Roccaforte*, 919 P.2d at 804, citing *United States v. Leary*, 846 F.2d at 603-04.

An affidavit must demonstrate a connection between the crime suspected and the area to be searched. This requirement is met where the affidavit establishes a fair probability that officers executing the warrant will find contraband or evidence at the location to be searched. *People v. Kazmierski*, 25 P.3d 1207 (Colo.2001).

The sufficiency of the Warrant in terms of a sufficient nexus should be analyzed in terms of “time, crime, objects, and place.” *Id.* at 1211. The affidavit must have more than vague allegations that the Defendant engaged in illegal activity; the affidavit must provide a nexus between the alleged criminal activity and place to be searched. *Randolph*, 4 P.3d at 482. This nexus can be established by circumstantial evidence and proper inferences drawn therefrom. *People v. Hakel*, 870 P.2d 1224, 1229 (Colo.1994). The facts alleged in the affidavit, together with reasonable inferences drawn from those facts, may be enough to establish the requisite link between suspected criminal activity and a specific location to be searched. *People v. Green*, 70 P.3d 1213, 1215 (Colo.2003).

Here, Investigator Weisbach ensured particularity by simply seeking records that existed from the time period associated with cash withdrawals and gun receipts in Defendant’s car (starting January 15, 2021) through the date of the crime. As detailed above, there is a direct nexus between the records sought and Defendant’s activities in the time frame immediately before and including the murders. Records of billing, activation, and device information go toward the identification of the phone as belonging to Defendant.

C. Alternatively, if the Court determines that portions of the Warrant are defective, blanket suppression is not the appropriate remedy.

“Blanket suppression is an extraordinary remedy that should be used only when the violations of search warrant requirements are so extreme that the search is essentially transformed into an impermissible general search.” *Eirish*, 165 P.3d at 856 (internal citations omitted). If this Court determines that particular requests within the Warrant are overbroad, the logical remedy here is exclusive suppression of items that lack a nexus with the criminal activity involved, but not a blanket suppression. See *U.S. v. Foster*, 100 F.3d 846, 852 (10th Cir. 1996) (“The extreme remedy of blanket suppression should only be imposed in the most “extraordinary” of cases...it is for that reason that the dearth of appellate cases authorizing blanket suppression is neither surprising nor revealing”).

III. CONCLUSION

WHEREFORE, the People hereby request that this Court DENY Defendant’s Motion.

Respectfully submitted,

MICHAEL T. DOUGHERTY
DISTRICT ATTORNEY

By:
s/Adam Kendall
Adam D. Kendall
May 24, 2024

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing served via the Colorado e-filing system/hand-delivered on May 24, 2024, and addressed as follows:

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