

DISTRICT COURT, BOULDER COUNTY, COLORADO Court Address: 1777 SIXTH STREET P.O. BOX 4249, BOULDER, CO, 80306-4249	DATE FILED: May 28, 2024 10:55 AM
THE PEOPLE OF THE STATE OF COLORADO v. Defendant(s) AHMAD AL ALIWI ALISSA	<p style="text-align: center;">△ COURT USE ONLY △</p> Case Number: 2021CR497 Division: 13 Courtroom:
<p style="text-align: center;">Order:MR. ALISSA'S MOTION TO SUPPRESS EVIDENCE OBTAINED FROM A DEFECTIVE SEARCH WARRANT OF GOOGLE ACCOUNTS ASSOCIATED WITH HIS PHONE NUMBER (D-044)</p>	

The motion/proposed order attached hereto: MOOT.

Pursuant to the People's Response, they do not intend to attempt to admit any evidence from the search of the Google Accounts associated with the Defendant's phone number. Based upon this representation, any attempt to do so during the course of the trial shall be denied.

Issue Date: 5/28/2024



INGRID SEFTAR BAKKE
 District Court Judge

District Court, Boulder County, Colorado Court Address: 1776 6 th Avenue Boulder, CO 80306	
THE PEOPLE OF THE STATE OF COLORADO v. AHMAD AL ALIWI ALISSA Defendant.	σ COURT USE ONLY σ
Megan Ring, Colorado State Public Defender Kathryn Herold #40075 Supervising Deputy State Public Defender Samuel Dunn #46901 Deputy State Public Defender Boulder Regional Public Defenders 2555 55 TH Street D-200, Boulder, CO 80301 Phone: (303) 444-2322 Fax: (303) 449-6432 E-mail: boulder.defenders@state.co.us	Case No. 21CR497 Division 13
MR. ALISSA'S MOTION TO SUPPRESS EVIDENCE OBTAINED FROM A DEFECTIVE SEARCH WARRANT OF GOOGLE ACCOUNTS ASSOCIATED WITH HIS PHONE NUMBER (D-044)	

AHMAD ALISSA, by and through counsel, moves for this Court to suppress all evidence obtained by the police from the defective search warrant for Google accounts associated with his phone number, as well as any additional evidence, statements or other incriminating evidence obtained as a “result” thereof. In support of this motion, Mr. Alissa states the following:

FACTS¹

1. On the afternoon of March 22, 2021 Mr. Alissa left his home in Arvada, Colorado and drove to Boulder, Colorado. Boulder is a place that Mr. Alissa has no direct ties to nor is it believed he had ever visited prior to March 22, 2021.
2. Mr. Alissa’s family home in Arvada is less than one mile from a King Soopers store. Instead of going to the King Soopers in Arvada, Mr. Alissa drove approximately fifteen miles and went to the King Soopers in Boulder. Mr. Alissa has no known ties to that King Soopers in Boulder.
3. Mr. Alissa was driving a Mercedes Benz C Sedan (license plate number BJR-Y99) registered in his brother’s name. Law enforcement discovered through their investigation that Mr. Alissa and his brother regularly shared use of that sedan.

¹ The facts referenced in this motion are drawn solely from discovery. They do not constitute any admission on the part of Mr. Alissa.

4. After arriving at the King Soopers, Mr. Alissa shot and killed ten people, including a Boulder police officer. Witnesses heard very few statements from Mr. Alissa. Statements believed to be made by Mr. Alissa were described as “gibberish.”
5. Law enforcement would shoot Mr. Alissa in the leg. Shortly thereafter he surrendered. Law enforcement placed Mr. Alissa under arrest and transported him to the hospital.
6. While investigating the scene law enforcement discovered the sedan Mr. Alissa drove to the King Soopers. They applied for and received a warrant to search the sedan.² During the search of the sedan they found a number of items that were directly linked to Mr. Alissa. These items included his wallet, with identification, and a white iPhone 7 (IMEI 355311088471778).
7. Law enforcement requested a search warrant for the iPhone 7. During the search of Mr. Alissa’s phone law enforcement identified three Gmail accounts associated with Mr. Alissa’s phone. A warrant was issued to Google for the three Gmail accounts. Upon the return, eleven other accounts were associated with Mr. Alissa’s cell phone number. A new warrant was issued for the additional Gmail accounts associated with Mr. Alissa’s phone number. *See exhibit B*. In the warrant there was no specification tying the additional email accounts actually to Mr. Alissa just to the phone number associated with him.
8. In that warrant: Detective Flynn requested:
 - a. Any location data...
 - b. Account information
 - c. Application History
 - d. Any email content...
 - e. Google drive
 - f. Google voice
 - g. Google hangouts
 - h. Deleted data
9. The above information was requested from January 15, 2021 – March 22, 2021.
10. Without considering the lack of particularity of the requested search warrant, the Honorable Judge Butler signed that warrant on April 28, 2021 giving law enforcement “virtually unfettered access” to Mr. Alissa’s Gmail accounts. *See id. See also, People v. Coke*, 461 P.3d 508, 516 (Colo. 2020).

LAW AND ARGUMENT

11. The Fourth Amendment of the United States Constitution and Art II, Sec. 7, of the Colorado Constitution “provides protections against unreasonable searches and seizures.” *People v. Williams*, 192 Colo. 249, 253 (Colo. 1976).
12. The United States Constitution states in pertinent part, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause...” U.S. Const. Amend

² See Exhibit A.

IV.

13. “The Fourth Amendment protects people, not places.” *Katz v. United States*, 389 U.S. 347, 351 (1967). Information that a person “seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.” *Id.*
14. “As in the case of the Fourth Amendment to the United States Constitution...the purpose of the Colorado constitutional provision is to protect a person's legitimate expectation of privacy from unreasonable governmental intrusions.” *People v. Sporleder*, 666 P.2d 135, 139-40 (Colo. 1983); *Charnes v. DiGiacomo*, 612 P.2d 1117 (1980); *People v. Bement*, 567 P.2d 382 (1977); *People v. Counterman*, 556 P.2d 481 (Colo. 1973).
15. The determination of the legitimacy of a defendant’s expectation of privacy turns on the question of whether a person expected that their property would be free from governmental intrusion, and if so, whether that expectation is one that society is prepared to recognize as reasonable” *Sporleder*, 666 P.2d at 140.
16. Mr. Alissa’s Google accounts are constitutionally protected material. This information is password protected and not accessible by the public, the Fourth Amendment protects all individuals from intrusions upon their private electronic conversations. *See Katz, supra.*
17. The type of electronic content that is only accessible after entering a password and only viewable to the person with knowledge of that password is obviously private. It is difficult to imagine how anyone who protects any information with a password would not reasonably expect that such information is free from intrusion, governmental or otherwise.
18. “Any governmental action intruding upon an activity or area in which one holds such an expectation of privacy is a “search” that calls into play the protections of the Colorado Constitution.” *People v. Oates*, 698 P.2d 811 (Colo. 1988).
19. “Courts have long recognized that a person's reasonable expectation of privacy “turns in large part” on their “ability to exclude others from the place searched.” *R.S. ex rel. S.S. v. Minnewaska Area School Dist. No. 2149*, 894 F.Supp. 2d 1128 (D.Minn. 2012) (*citing Minnesota v. Carter*, 119 S.Ct. 469 (1998)); *Rakas v. Illinois*, 99 S.Ct. 421 (1978).
20. For example, “Letters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy; warrantless searches of such effects are presumptively unreasonable.” *RS ex rel. SS*, 894 F.Supp 2d at 1142 (*citing United States v. Jacobsen*, 104 S.Ct. 1652 (1984)); *see also People v. Williams*, 557 P.2d 399 (Colo. 1976) (holding that diaries are part of the papers and effects protected by the warrant requirement.); *People v. Gutierrez*, 222 P.3d 925, 932–33 (Colo. 2009) (holding that a taxpayer did not lose his expectation of privacy in his tax returns because he disclosed them to a third-party tax preparer); *People v. Corr*, 682 P.2d 20 (Colo. 1984) (finding reasonable expectation of privacy in telephone toll records, despite that information necessarily being available to service provider); *People v. Sporleder*, 666 P.2d 135 (Colo. 1983) (same for out-going calls monitored by pen-registers); *Charnes v. DiGiacomo*, 612 P.2d 1117 (Colo. 1980) (finding reasonable expectation of privacy in bank transactions, despite their necessary disclosure to, and recording by, bank personnel).
21. An individual does have a legitimate expectation of privacy in email services. *See United States v.*

Warsbak, 631 F.3d 266, 285-86 (6th Cir. 2010) (noting that “given the fundamental similarities between email and traditional forms of communication, it would defy common sense to afford emails lesser Fourth Amendment protection”.); *Klayman v. Obama*, et al., 957 F.Supp.2d 1 (D.D.C. Dec. 16, 2013) (holding that to the extent that a federal statute (the Stored Communications Act) which authorized seizure of emails from an internet service provider without a warrant, such a seizure even pursuant to a statute was unconstitutional and violated petitioners’ 4th Amendment rights); *United States v. Zavala*, 541 F.3d 562, 577 (5th Cir.2008) (concluding that defendant had a reasonable expectation of privacy with respect to “private information, including emails” stored on his cellular phone); *Forrester*, 512 F.3d at 511 (“The privacy interests in these two forms of communication [email and traditional mail] are identical.”); *Crispin v. Christian Audigier, Inc.*, 717 F.Supp.2d 965, 991 (C.D.Cal.2010) (noting that private Facebook messages are similar to email and “inherently private” because Facebook messages “are not readily accessible to the general public.”).

22. Generally, the Warrant Clause of the Fourth Amendment has three basic requirements that must be met in order for a warrant to issue: “[1] probable cause, [2] supported by Oath or affirmation, and [3] particularly describing the place to be searched, and the persons or things to be seized.” *Whitely v. Warden*, 401 U.S. 560, 564 (1971); U.S. Const. amend. IV.
23. The Colorado Constitution, state statutes, and rules governing the issuance of search warrants provide additional requirements for a search warrant. *See* Colo. Const. art. II §§ 7, 8; *see also* C.R.S. §§ 16-3-301 to 16-3-308; Crim. P. 41.
24. Section 16-3-303(1) provides in relevant part: “a search warrant shall issue only on affidavit sworn to or affirmed before the judge and relating facts sufficient to: . . . (c) establish the grounds for issuance of the warrant or probable cause to believe that such grounds exist; and (d) establish probable cause to believe that the property to be searched for, seized, or inspected is located at, in, or upon the premises, person, place, or thing to be searched.”
25. “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).
26. Probable cause is determined in light of the totality of the circumstances and exists when an affidavit alleges sufficient facts to warrant a person of reasonable caution to believe that evidence of criminal activity is located at the place to be searched.
27. The affidavit must therefore supply a sufficient nexus between criminal activity, the things to be seized, and the place to be searched. *People v. Kazmierski*, 25 P.3d 1207, 1211 (Colo. 2001); *People v. Randolph*, 4 P.3d 477 (Colo. 2000).
28. “Probable cause for a search implicitly requires both sufficient grounds to connect the sought after items to a crime and ground to believe those items will be located in the place to be searched at the time of the search.” *People v. Gall*, 30 P.3d 145, 150 (Colo. 2001); *see also United States v. Wald*, 216 F.3d 1222, 1226-28 (10th Cir. 2000).
29. An affidavit containing only vague allegations that the defendant engaged in illegal activity without establishing a nexus between the alleged criminal activity and the place to be searched cannot establish probable cause and constitutes a “bare bones” affidavit. *Randolph*,

4 P.3d at 482.

30. Probable cause must be established as to each person, premise, place, or thing to be searched. *See* Section 16-3-306. Where the affidavit describes a variety of locations without specifying the crime being perpetrated at each, the geographic scope of the affidavit comes under close scrutiny. *People v. Bachofer*, 85 P.3d 615, 617 (Colo. App. 2003).
31. A warrant is insufficient on its face if it fails to connect any of the following links in the chain of probable cause to search: 1) person to criminal activity; 2) person to the place to be searched; 3) place to the things to be seized; 4) things to be seized to criminal activity.
32. The lack of a sufficient nexus or probable cause to search these records is further demonstrated by the affiant's unconstitutionally overbroad request to search, as laid out in Exhibit A. Since the affiant had no information to establish a nexus between the email data and any offense, the affiant was unable to identify any evidence to be seized with particularity and, instead, intended to conduct a general exploratory search in the hopes of finding evidence.
33. Here, the warrants were not specific enough to meet the particularity requirements of the U.S. and Colorado Constitutions or Rule 41(d)(1). 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. *United States v. Leahy*, 47 F.3d 396, 398 (10th Cir. 1996); *Anderson v. Maryland*, 427 U.S. 463 (1976). The warrants do not establish a sufficient nexus between the items searched and the criminal activity. Allowing the search of all Google data requested does not meet the particularity requirements required by law.

WHEREFORE, Mr. Alissa requests this Court suppress all evidence obtained through the defective search warrant of Google accounts related to his phone number. Mr. Alissa makes these arguments and motions, and all motions and objections in this case, whether or not expressly stated at the time of the motion or objection, under the Due Process, Trial by Jury, Right to Counsel, Confrontation, Compulsory Process, Equal Protection Cruel and Unusual Punishment and Privilege Against Self Incrimination Clauses of the federal and Colorado Constitutions, and the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments of the U.S. Constitution, and Art. II, §§ 3,6,7,8,16,18,20,23 and 25 of Colorado's Constitution.

MEGAN A. RING
COLORADO STATE PUBLIC DEFENDER



Kathryn Herold #40075
Supervising Deputy State Public Defender

Certificate of Service

I hereby certify that on ___April
26_____, 2024, I served the foregoing
document through Colorado E filing to all
opposing counsel of record.



Samuel Dunn #46901
Deputy State Public Defender

KH

Dated: April 24, 2024

Attachment to Order - 2021CR497

Attachment to Order - 2021CR497

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