DISTRICT COURT, BOULDER COUNTY, COLORADO Court Address: 1777 SIXTH STREET P.O. BOX 4249, BOULDER, CO, 80306-4249	DATE FILED: May 28, 2024 10:36 AM
THE PEOPLE OF THE STATE OF COLORADO v. **Defendant(s)** AHMAD AL ALIWI ALISSA	⚠ **COURT USE ONLY** ⚠ Case Number: 2021CR497 Division: 13 Courtroom:

Order:MR. ALISSA'S MOTION TO SUPPRESS ILLEGALLY SEIZED EVIDENCE FROM THE UNCONSTITUTIONAL SEARCH OF MR. ALISSA'S FACEBOOK ACCOUNT (D-049)

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 Defendant's Facebook Account. 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 6th 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 55TH 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 ILLEGALLY SEIZED EVIDENCE FROM THE UNCONSTITUTIONAL SEARCH OF MR. ALISSA'S FACEBOOK ACCOUNT (D-049)

AHMAD ALISSA, by and through counsel, moves for this Court to suppress all evidence obtained by the police from the defective search warrant for his Facebook account, 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:

FACTS[1]

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.

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

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.
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. Mr. Alissa was shot in the leg and then surrendered to police. Law enforcement placed Mr. Alissa under arrest and transported him to the hospital.

6. On March 23, 2024 law enforcement applied for a received a search warrant for Mr. Alissa's residence in Arvada. In addition to searching that residence law enforcement spoke to a number of Mr. Alissa's family members. Mr. Alissa's family members were in shock and disbelief with what Mr. Alissa did that day. They would describe Mr. Alissa as someone who was quiet, non-violent. Someone who irrationally believed he was being followed by the FBI and would talk to himself in a way that was like he was talking to someone who wasn't there.

7. In addition to learning more about Mr. Alissa and his mental illness, law enforcement also learned that his phone number was 720-999-4482 and it was associated with a T-Mobile account. Law enforcement confirmed that Mr. Alissa's phone was an Apple iPhone 7 that is metallic and gray in color.

8. On March 23, 2021 Investigator Weisbach submitted a search warrant for Mr. Alissa's iPhone. That warrant was signed by Honorable Judge Mulvahill that same day. *See Exhibit A.*

9. On March 24, 2021 law enforcement used a forensic tool to obtain an image of Mr. Alissa's phone. During this imaging, law enforcement learned that Mr. Alissa's phone was associated with a Facebook account.

10. On March 25, 2021 Investigator Weisbach submitted a search warrant request for Facebook. *See Exhibit B.* She requested all records and other information related to this account. She only put some limitations as to the dates for some information, however it still covered over a two month period.

11. Honorable Judge Mulvahill signed the warrant that same day. *See id.*

LAW AND ARGUMENT

12. 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).

13. 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 IV.

14. "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.*

15. "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).

16. 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.

17. Mr. Alissa does not allege that the publically accessible information available on his Facebook page is constitutionally protected. However, as to the private information that 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.* Mr. Alissa does have a legitimate expectation of privacy, for example, in the contents of password protected Facebook messages. See *United States v. Meregildo*, 883 F. Supp. 2d 523, 525 (S.D.N.Y. 2012) (Facebook "postings using more secure privacy settings reflect the user's intent to preserve information as private and may be constitutionally protected.")

18. 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. The government could not have accessed this information by logging onto Facebook and searching for Ms. Schreiner's Facebook page. 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.

19. "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).

20. 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,* 525 U.S. 83 (1998); *Rakas v. Illinois*, 439 U.S. 128(1978).
21. 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).

22. Facebook offers users various types of services. Some of those services allow for public viewing of pictures, video, or data, but other services included on Facebook allow a user to deem various pieces of information private and viewable only to the user. The private messaging service on Facebook is almost identical to email services where courts have recognized a legitimate expectation of privacy. See *United States v. Warshak*, 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.").

23. One cannot distinguish a password-protected private Facebook message from other forms of private electronic correspondence. *R.S. ex. Rel. SS*, 894 F.Supp. 2d at 1142. Any governmental intrusion into the password protected details of password protected information is unreasonable without the showing of probable cause. *Id.*

24. 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.

25. 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.

26. 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."

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. The warrant lacked the particularity required by the Fourth Amendment of the United States Constitution and therefore any fruits of the search must be suppressed. In this case, the warrant describes a broad, generalized list of information to be searched for which could arguably include almost anything within the records. Here, the warrant was not specific enough to meet the particularity requirements of the U.S. and Colorado Constitutions or C.R.C.P. 41(d)(I)(1). The particularity requirements 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). Requesting all records and information surrounding a two month period of Mr. Alissa's iCloud records does not meet the particularity requirement of the Fourth Amendment.

WHEREFORE, Mr. Alissa requests this Court suppress all evidence obtained through the defective search warrant for his Facebook account. 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

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Supervising Deputy State Public Defender

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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.
_____KH_____

Dated: April 25, 2024