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| District Court, Criminal Matters Adams County, State of Colorado **Court Address:**  1100 Judicial Center Drive DAT  Brighton, Colorado 80601 FILI CAS | E FILED: February 23, 2017 4:13 PM |
| NG ID: E1F3CE56D9F23 |
| E NUMBER: 2016CR2658 |
| THE PEOPLE OF THE STATE OF COLORADO, |  |
| Plaintiff |  |
| v. |  |
| JAMES WALKER, |  |
| Defendant | COURT USE ONLY  |
| **Attorney:**  Danielle McCarthy, #34573  **DANIELLE M. MCCARTHY, P.C.**  1175 Osage Street, Suite 200  Denver, CO 80204  Phone: (303) 350.1550  Fax: (303) 350.1555  E-m[ail: daniellemccarthy11@gmail.com](mailto:daniellemccarthy11@gmail.com) | Case Number: 16CR2658 Division: G  Courtroom: 406 |
| **MOTION TO SUPPRESS IDENTIFICATION** | |

Mr. James Walker, by and through undersigned counsel, moves to suppress the results of any out-of-court identification. Mr. Walker also moves this court to force the People to demonstrate that the People's identification witnesses have an independent basis for any identification. In support of this motion, Mr. Walker states as follows:

1. Mr. Walker was arrested and charged with multiple offenses including Kidnapping, Aggravated Robbery and Burglary.
2. Several alleged victims were presented with a photo lineup created by Commerce City Detective James Zamora. Detective Zamora also conducted the photo lineup procedure by returning to meet with the alleged victims at their residences.
3. Here, Detective Zamora thought of Mr. Walker after getting a general description of a tall black man, heavy set, talkative, mild-mannered from an alleged victim. Although other alleged victims concurred with the description of a tall black man, an age of “mid-30s” was provided by the primary alleged victim, John Wagner. Mr. Walker was sixty-six (66) years old on the date of offense.
4. Perhaps more important, the photograph used by Detective Zamora in the photo array line-ups that he personally put together for the alleged victims is obviously a photograph of Mr. Walker in his younger years. Discovery does not indicate

where the photograph or Mr. Walker was taken or when this photograph was actually taken.

1. It’s obvious that Mr. Walker was the primary suspect in Detective Zamora’s mind while the photo array was being assembled. Detective Zamora did not gather photographs for the array based on the alleged victims’ description of a tall black man, aged “mid-30s” as told to officers. Instead, Detective Zamora assembled the photo array based on his own preconceived biased notions.
2. In ***People v. Singley***, 2015 COA 78M, the Court of Appeals made clear that a photo array that does not include photographs that are similar to a witness’s initial description is impermissibly suggestive. “When an eyewitness describes a suspect one way, and the police present that eyewitness with a photographic lineup of suspects that do not match the description, a reasonable witness would likely decline to identify any suspect in the lineup. Where, as here, an eyewitness identifies a suspect who differs significantly from his or her initial description, a court may conclude that the photographic lineup swayed the eyewitness’s recollection of the assailant, and was therefore impermissibly suggestive.”
3. The Court in ***Bernal v. People***, 44 P.3d 184 (Colo. 2002) requires the picture of the accused in any photographic lineup match the initial description given by the witness before proceeding to a full two-part analysis. The first prong in ***Bernal*** is that the defendant has the burden of demonstrating the photo array was impermissibly suggestive. In order to make that determination, the photo array must be based off of the initial witness description and NOT the person that the police officer had in mind. The second prong states if the defense meets its burden in the first prong, the prosecution must show the identification was nevertheless reliable under the totality of circumstances.
4. Here, Detective Zamora included Mr. Walker in the photo array because the officer believed Mr. Walker could be a suspect although Mr. Walker was not in his mid-30s; instead he was mid-60s at the time of offense. Therefore, the first prong in ***Bernal*** is met simply by procedure in which the photo array was assembled by Detective Zamora.
5. Mr. Walker argues that this pretrial identification procedure by Detective Zamora was so unduly suggestive as to violate the defendant's right to due process of law, and this out-of-court identification should be suppressed. *See* ***Manson v. Brathwaite***, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). In ***People v. Smith***, 620 P.2d 232 (Colo. 1981), the Colorado Supreme Court set out the test for determining whether a prior identification is admissible at trial and for determining whether or not the prior identification taints the in-court identification.
6. This test includes the following factors: the substantial likelihood of irreparable misidentification based on the totality of the circumstances. The totality of the circumstances is measured by:
   1. the opportunity of the witness to view the criminal at the time of the crime;
   2. the witness' degree of attention;
   3. the accuracy of the witness' prior description of the criminal;
   4. the level of certainty demonstrated at the confrontation; and
   5. the time between the crime and the confrontation.
7. In addition, any in-court identification by these witnesses is now tainted by this prior identification. The People have the burden of showing that this witness can identify the accused based on an independent recollection obtained from viewing the suspect at the time of the crime. ***People v. Walker***, 666 P.2d 113 (Colo. 1983). In order to determine whether this witness has such an independent recollection, the Court should assure that no further suggestive identification procedures are used in this case. If the accused is seated next to defense counsel during any subsequent hearing, then any in-court identification is likely to be the product of the suggestive courtroom atmosphere.
8. Therefore, the defendant requests permission not to be present in the courtroom at the any future evidentiary hearing. The defendant also requests permission to use a non-suggestive seating arrangement in the courtroom at any hearing where the Court requires the defendant's presence. *See* ***Moore v. Illinois***, 434 U.S. 220, 54 L.Ed.2d 424, 98 S.Ct. 458 n.5 (1977); ***People v. Staten***, 746 P.2d 1362 (Colo. App. 1987).

Wherefore, the defendant requests this Court to enter an order suppressing the pre-trial identification evidence pursuant to the above statements of fact and law, as well as any argument and authority presented at the motions hearing and the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution; C.R.Crim.P 5; Chapter 16, Article 3, Colorado Revised Statutes of 1986, as amended; and Article II, Sections 7, 16, and 25 of the Colorado Constitution.

Respectfully Submitted, DANIELLE M. MCCARTHY, PC

*s/ Danielle M. McCarthy*

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| Danielle M. McCarthy, #34573 | **Certificate of Service**  I hereby certify that on 2/23/17 copies of the foregoing document were served on all opposing counsel of record via ICCES. By: DMM |