IN THE DISTRICT COURT WITHIN AND FOR

THE COUNTY OF PITKIN AND STATE OF COLORADO

Criminal Action No. C-1616

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff, vs. THEODORE R. BUNDY, Defendant.	)	PEOPLE'S BRIEF REGARDING IDENTIFICATION ISSUE

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I. Identification of defendant by Carol DaRonch

The issues of compelled testimony and right to counsel at lineups and photo displays have been litigated before the U.S. supreme Court. In Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951(1967), the court said unequivocally that after the defendant is indicted, his right to counsel is triggered and any lineups conducted thereafter must be with notice to defense counsel. This same requirement is noted in U.S. v. Wade, 388 U.S. 218, 87 S.Ct. 1926(1967), decided the same day as Gilbert. Both cases hold that post indictment lineups are "critical" stages of a prosecution and, thus, the defendant must have counsel. If, in fact, a post indictment lineup is conducted without counsel, the identification must be suppressed unless the state can show, by clear and convincing evidence, an independent basis for identification, Wade, supra. The independent basis test is also applicable in cases where the pre-indictment lineup or photo display is "so impremissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification," Simmons v. U.S., 390 U.S., 88 S.Ct. 967(1967). Independent basis factors to consider are:

(1) prior opportunity for victim to observe defendant;
(2) discrepency between defendant's actual description and the description given police at the time of the crime;
(3) misidentification of another as perpetrator of the crime;
(4) prior identification through photo lineup;
(5) failure to identify defendant on prior occasion;
(6) lapse of time between crime and lineup or photo display; and
(7) method used at lineup;

In the Bundy case, all identifications were made before an indictment or information was filed. The case had not reached a critical stage of prosecution requiring counsel. Futhermore, defendant was given counsel at the physical lineup of October 2, 1975. The lineup was

conducted pursuant to a court order and under the appropriate procedures required by Utah statute. See attached exhibits "A"(Statute), "B"(sworn testimony) and "C"(Order of Court). This lineup occurred before any indictment or information was filed against Mr. Bundy. The procedure used conformed to criteria set forth in the Gilbert, Wade and Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967(1967) decisions. Thus, there is no reason to suppress the lineup identification on Right to Counsel grounds.

There is no legitimate issue of Right to Counsel at the photo lineups. U.S. v. Ash, 413 U.S. 300, 93 S.Ct. 2568 (1968) specifically held (at p.2579) that ... "the Sixth Amendment does not grant the right to counsel at photographic displays conducted by the Government for the purpose of allowing a witness to attempt an identification of the offender". This is true whether the photo display is shown pre-or-post indictment. People v. Pew, 543 P.2d 86(1975).

No grounds exist to suppress the lineups on the basis of self incrimination. This theory was presented and rejected in the Wade case, supra.

The remaining grounds for suppression rely on the Due Process Clause of the 5th Amendment. That issue has been presented in Utah and a portion of the prosecution's brief is presented to the court as Exhibit "D". The brief contains analysis of the U.S. Supreme Court decisions and the controlling Utah case law.

In addition to the cases contained in Exhibit "D", the recent U.S. Supreme Court case of Manson v. Braithwaite, ____U.S.____, 97 S.Ct. 2243 (June 16, 1977), is significant. There the court reiterated the standards for photo identification contained in Simmons v. U.S., 390 U.S. 377, 88 S.Ct. 967(1968) wherein the court said:

> "Despite the hazards of initial identification by photograph, this procedure has been used widely and effectively in criminal law enforcement, from the standpoint both of apprehending offenders and of sparing innocent suspects the ignominy of arrest by allowing eyewitnesses to exonerate them through scrutiny of photographs. The danger that use of the technique may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error. We are unwilling to prohibit its employment, either in the exercise of our supervisory power or, still less, as a matter of constitutional requirement. Instead, we hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pre-trial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."

Turning then to the appropriate test for determining identification reliability, the Manson court adopted the "totality of the circumstances" test set forth in Stovall, supra. The court also adopted the criteria of "circumstances" set forth in Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375 (1972). The exact language Manson contains is:

> "We therefore conclude that reliability is the linchpin in determining the admissibility of identification testimony for both pre- and post-Stovall confrontations. The factors to be considered are set out in Biggers, 409 U.S., at 199-200, 93 S.Ct., at 382. These include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself".

Manson actually was a one photograph pre-trial identification. The case resolved a conflict which had evolved from the "per se" exclusion rule (an outgrowth of the Gilbert and Wade decisions) and the "totality" test set forth in Stovall. The second circuit had adopted the "per se" rule and excluded the one photo,

pre-trial identification as impermissibly suggestive. The Supreme Court reversed and held that the identification was admissible under the "totality of circumstances" test even if one photograph is suggestive. The constitutional test is "totality of circumstances." Both Utah and Colorado follow the principles espoused in the Manson decision.

People v. Keelin, Colo. App., 565 P.2d 957,(1977), cites Simmons as controlling law on photo displays and states at p.959, "It was not essential that Mrs. Wilder's identification be totally free from doubt as a prerequisite to admissibility."

People v. Jones, 553 P.2d 770(1976), held that even though the defendant was the only one in the lineup with a scar, the identification was not impermissibly suggestive. The court stated that claims of impermissibly suggestive pre-trial identification procedures must be evaluated in light of the totality of circumstances. In this case the defendant's picture didn't stand out from the other photos used. See also People v. Sanchez, 520 P.2d 751(1974), where a photo lineup was held to be impermissibly suggestive but nevertheless allowed an in court identification on the independant basis theory.

People v. Williams, 516 P.2d 114, rejected the "per se" suggestiveness rule in favor of the totality of circumstances-reliability rule in a one-on-one show-up case. Here the witness could not at first, identify the defendant at the one-on-one show-up. Before leaving the police station he did positively identify the defendant as the culprit.

People v. Knapp, 505 P.2d 7(1973), was a case where a three-man photo lineup was upheld, a 5th Amendment self-incrimination argument was rejected, a 6th Amendment Right to Counsel at photo display theory was rejected, and the court held that lineup cases should be decided on a case by case basis by the trial court.

Vigil v. People, 470 P.2d 837(1970), held that uncertainties and inconsistencies concerning identification

go to weight of evidence, not admissibility. The court said, "We have held on many occasions that it is not the duty of this court to superimpose its judgments or conclusions for those of a jury when determining the veracity of the identifying witnesses".

People v. Trujillo, Colo. App. No.76-542, decided November 3, 1977, held that a three photo lineup was admissible even though a show-up occurred shortly thereafter. Neither the photo lineup nor the one-on-one show-up were "per se" violations of due process. Both identifications were admissible under the totality of circumstances.

People v. Coston, Colo. App. No.76-921, decided November 10, 1977, addressed the issue of a "car lineup," in the following manner:

> "The defendant first contends that the trial court erred when it refused to suppress as evidence the identification of his car at the auto "lineup" as being similar to the car seen leaving the scene of the crime. We disagree with this contention.
> An item of real evidence is admissible if it is in some way connected with either the perpetrator of a crime, the victim, or the crime itself, People v. Penno, 188 Colo. 307, 534 P.2d 795(1975), and where, as here, a witness observes and subsequently describes an automobile for law enforcement officers, testimony as to the description and subsequent out-of-court identification may be introduced, See United States v. McKenzie, 414 F.2d 808 (3rd Cir. 1969), cert. denied sub nom., United States v. Anthony, 396 U.S. 1019, 90 S.Ct. 586, 24 L.ed.2d 510. Further, factors surrounding the identification, such as the suggestiveness of the "lineup", affect only the weight to be given to the evidence, not its admissibility. See McKenzie, supra. And, contrary to the defendant's contention, the presence of counsel is required only in certain instances of pre-trial confrontation of the accused with investigators or witnesses against him. See United States v. Ash, 413 U.S. 300, 93 S.Ct. 2568, 37 L.ed.2d 619 (1973); People v. Lowe, 184 Colo. 182, 519 P.2d 344 (1974). Thus, admission of the identification testimony was proper."

Armed with the facts presented to this court on the Carol DaRonch kidnapping case, it becomes apparent that she viewed hundreds of photos and only Mr. Bundy's was selected. The photographs used were not suggestive, there was an adequate number on each occasion; and there was no evidence

of police pressure exerted on Miss DaRonch to select Mr. Bundy's photo. Thus, there is nothing "impermissibly suggestive" about the photo displays under the U.S. Supreme Court, Utah or Colorado law. Even if the court should find some suggestiveness it definitely was not of a degree to "give rise to a very substantial likelihood of irreparable misidentification".

Furthermore, the subsequent physical lineup was fair, conducted pursuant to statute, with counsel, and for a legitimate purpose.

The grounds for the lineup were approved by the Utah trial court and would determine if Miss DaRonch could positively identify her attacker. Also, there was a substantial chance Mr. Bundy would be exonerated as not being the assailant.

Casting all that aside, if the court should find that the lineup and photo displays were impermissibly suggestive, it must view the identification under the totality of circumstances. The court has heard the circumstances and there is no real doubt that Miss DaRonch had an "independent basis" for making her identification.

II. Identification of defendant by Mrs. Harter

The Harter identification of Mr. Bundy being at the Wildwood Inn on January 12, 1975, is subject to the very same tests enunciated previously in the DaRonch part of this brief. The court has heard testimony that Mr. Bundy was picked out of a seven man photo lineup and again out of a single photo which contained eight men.

At the preliminary hearing, Mrs. Harter never actually pointed to Mr. Bundy and said "that's him." Because of this, the state must present law which allows her prior identification to be admitted as substantive evidence.

Starting with People v. Spinuzzi, 369 P.2d 427 (1962), the court held that "uncertainty of identification goes to its weight rather than its admissibility". See also Duran v. People, 427 P.2d 318. In this case, the witness was asked if he could identify the person holding the gun. The witness responded "Well, I am not sure, but I think I recognize him." At that point defense counsel objected, the court sustained the objection and the Supreme Court said keeping the identification out was error.

Three years later in Gallegos v. People 403 P.2d 864(1965), a very important case was decided by the Supreme Court of Colorado. Therein, the court said at p.868: "There is a growing body of law which recognizes the worthiness of an extrajudicial identification, and holds testimony thereof admissible." See also Dawkins v. Chavez, 285 P.2d 821. "As an exception to the hearsay rule, its application has been extended to the admission of the testimony of a third person who heard or observed the extrajudicial identification under consideration." See also DiCarlo v. U.S, 2nd Cir.,6F.2d 364, and Trujillo v. People, 146 P.2d 896. "And admissibility is particularly sanctioned in cases where the identifier testifies at trial." The next two paragraphs of the opinion encompass the reason for the rule: "That identification is

circumstantial and does not have the conclusiveness resulting from recognition of the persons charged; does not militate against the use of the rule... Uncertainty of identification under circumstances here present involves the weight to be given such testimony rather than its admissibility ... Whatever discrepencies or differences were shown to exist between testimony and extrajudicial identification could possibly cast doubt on the verity of one or the other, a matter conceivably advantageous to the two Gallegos." See also Cokley v. People, 449 P.2d 824, (1969), where at p. 827 the court states "error is also assigned to certin testimony of a police officer relating to the extrajudicial identification of the defendant at a so-called police lineup. It is claimed that the testimony of the police officer was hearsay. Suffice it to say that we perceive no prejudicial in this regard." (cites Gallegos v. People, supra as authority).

Then in Kurtz v. People, 494 P.2d 97(1972), the court held: "This jurisdiction permits extrajudicial identifications of a defendant as substantive evidence and as an exception to the hearsay rule. Further, we note that this exception has been extended to extrajudicial identifications heard or observed by a third person." The court cites Cokley and Gallegos, supra as authority.

One of the best Colorado cases dealing with failure to identify at a subsequent confrontation is People v. Trujillo, 539 P.2d 1234,(1975). There a witness named Dunhill was stabbed. The next day he was shown seven photos and he identified both of his assailants as being in the photo display. At a hearing, Dunhill was unable to positively identify the defendant. Because of Dunhill's inability to identify the defendant at the hearing, the earlier photographic identification was introduced into evidence. The defense protested and the court said, "Evidence of an extra-judicial identification is admissible, not only to corraborate an identification made at the trial...

but as independent evidence of identity...Evidence of an extra-judicial identification is admitted regardless of whether the testimonial identification is impeached, because the earlier identification has greater probative value then an identification made in the courtroom after the suggestions of others and the circumstances of the trial may have intervened to create a fancied recognition in the witness' mind."

Another case in point is People v. Pew, 543 P.2d 86 (1975). The pertinent part of the case is set out in its entirety.

> "Pew next contends that the trial court erred in refusing to strike Nichol's testimony because she did not make a courtroom identification of him and because the procedures employed in conducting the earlier photographic identification were unreasonably suggestive. He further complains that he was denied fundamental fairness since his lawyer was not present during the photographic identification proceedings.
>
> Nichol's testimony concerned only an earlier identification procedure in which she identified a photograph of the defendant as the man who had attempted to cash the forged payroll check. She testified that a detective, Iantorno, came to the store eleven days after the event, and showed her six photographs in succession, and that she immediately identified a photograph of the defendant as depicting the perpetrator of the offense. At no time, however, did the prosecutor ask Nichols to attempt a courtroom identification.
>
> We reject the claim that Nichol's testimony should have been stricken. If the witness is available for cross-examination at trial, the testimony as to a prior identification is admissible as independent evidence of identity, and not only to corraborate a courtroom identification. This is true even where there is no in-court identification by such witness. See People v. Gould, 54 Cal.2d 621, 7Cal.Rpts. 273, 354 P.2d 865.
>
> A further factor here is that at an in camera hearing prior to trial, testimony was presented that substantiated the trustworthiness of the earlier identification by Nichols and fully supported the trial court's conclusion that the photographic identification was free from impermissible suggestion. See Simmons v. United States, 390 U.S.377, 88 S.Ct.967, 19L.ed.2d 1247.
>
> There is no merit in the claim that counsel needed to be present during the identification proceedings. In Colorado, no right to counsel at photographic identification proceedings attaches during the investigatory stage of a criminal case." Brown v. People, 177 Colo. 397, 494 P.2d 587; People v. Renfro, 181 Colo. 159, 508 P.2d 396.

From the cases heretofore presented, it becomes evident that Mrs. Harter's pre-trial identification of Mr. Bundy is admissible as a matter of law. Even though admissible, her identification may be attacked by cross-examination at trial time and her answers will affect her credibility, thus affecting the strength of the identification.

Respectfully submitted,

FRANK G.E. TUCKER
District Attorney

By George Vahsholtz
George Vahsholtz, #7179
Deputy District Attorney
Fourth Judicial District

Milton K. Blakey, 2691
Deputy District Attorney
Ninth Judicial District

IN THE SUPREME COURT

STATE OF COLORADO

CASE NO. 27963

THE PEOPLE OF THE STATE OF COLORADO BY AND THROUGH THEIR DULY APPOINTED REPRESENTATIVES, FRANK G.E. TUCKER, DISTRICT ATTORNEY,

Petitioners.

vs.

THE DISTRICT COURT OF THE STATE OF COLORADO, GEORGE E. LOHR, AS ONE OF THE DISTRICT COURT JUDGES OF THE DISTRICT COURT,

Respondents.

MOTION FOR EXTENSION OF TIME

COMES NOW, the Petitioner, in the above captioned cause by and through Milton K. Blakey, Deputy District Attorney, and respectfully moves this Court to grant an extension of time for a period of sixty (60) days to July 17, 1978, within which to file a reply to Respondent's Answer, received on April 27, 1978.

IS GROUNDS THEREFORE, the Petitioner states as follows:

1. That the complexity of the issues relating to the constitutionality of the Death Penalty requires more extensive consideration and briefing than can be done in the usual time period.

2. That the case giving rise to this action, People vs. Theodore Robert Bundy, (Pitkin County Court Action No. C-1616), can not proceed to trial until the state of Florida honors the Colorado Governor's request and he has been returned to custody of the State of Colorado.

3. Neither party will suffer any prejudice by the granting of this extension, for no extensions have previously been requested by the Petitioner.

Respectfully submitted,

FRANK G.E. TUCKER
DISTRICT ATTORNEY

By _____ #2691
MILTON K. BLAKEY, Chief Deputy
District Attorney
For the Fourth Judicial District

Deputy District Attorney For
Ninth Judicial District

IN THE SUPREME COURT

STATE OF COLORADO

CASE NO. 27963

THE PEOPLE OF THE STATE OF COLORADO BY AND THROUGH THEIR DULY APPOINTED REPRESENTATIVES, FRANK G.E.TUCKER, DISTRICT ATTORNEY,

Petitioners.

vs.

THE DISTRICT COURT OF THE STATE OF COLORADO, GEORGE E. LOHR, AS ONE OF THE DISTRICT COURT JUDGES OF THE DISTRICT COURT,

Respondents.

CERTIFICATE OF MAILING FOR MOTION FOR EXTENSION OF TIME

CERTIFICATE OF MAILING

Clerk of the District Court
Pitkin County Courthouse
Aspen, CO 81611

Hon. George E. Lohr,
District Court Judge
Pitkin County Courthouse
Aspen, CO 81611

Mr. Kevin O'Reilly
Box 1635
Glenwood Springs, Co 81601

Mr. Ken Dresner
Jardon Building, Suite C
Gunnison, CO 81230

ClERK OF THE SUPREME COURT
State of Colorado Attn: Becky
Denver, Colorado

I hereby certify that I mailed a copy of the foregoing to opposing Counsel of Record this 16 day of May 19 78.

Diana L Hewat

IN THE DISTRICT COURT WITHIN AND FOR

THE COUNTY OF PITKIN AND STATE OF COLORADO

Criminal Action No. C-1616

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff, vs. THEODORE ROBERT BUNDY, Defendant.	MOTION FOR EXTENTION OF TIME

COMES NOW, the District Attorney, by and through Milton K. Blakey, Deputy District Attorney, and moves this Court for an extension of time to file briefs concerning identification issues and search and seizure issues and as cause therefore states that the Defendant was to have filed with the court his briefs on December 2, 1977, and the District Attorney to file theirs on December 9, 1977. The Defendant has not filed any briefs thusfar and it is not believed that they will be filed in time to give the District Attorney an opportunity to appropriately respond by December 9, 1977.

WHEREFORE, the District Attorney requests the Court to grant an extension of time to file briefs, granting the District Attorney leave to file his briefs five(5) days after filing by the Defendant.

Respectfully submitted,

FRANK G.E. TUCKER
District Attorney

By M K Blakey #2691
Milton K. Blakey
Deputy District Attorney

IN THE DISTRICT COURT WITHIN AND FOR

THE COUNTY OF PITKIN AND STATE OF COLORADO

Criminal Action No. C-1616

THE PEOPLE OF THE STATE OF COLORADO,	)	
Plaintiff,	)	
vs.	)	O R D E R
THEODORE ROBERT BUNDY,	)	
Defendant.	)	

The Court having reviewed the District Attorney's Motion for Extension of Time and it appearing a proper and warranted request,

IT IS THEREFORE ordered that the District Attorney file his briefs which were previously due on December 9, 1977, no later than 5 days after filing by the Defendant.

Done in chambers this _____ day of December, 1977.

BY THE COURT

_____
George E. Lohr
District Judge

IN THE DISTRICT COURT WITHIN AND FOR

THE COUNTY OF PITKIN AND STATE OF COLORADO

Criminal Action No. C-1616

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff, vs. THEODORE ROBERT BUNDY, Defendant.	MOTION FOR EXTENSION OF TIME TO FILE BRIEFS

COMES NOW, People through Milton K. Blakey, Deputy District Attorney, moves this honorable Court for an extension of time in which to file briefs and as cause therefore, states as follows:

1. As mentioned in the People's first Motion for Extention of Time to file briefs, no responsive brief to the Public Defender's brief, (in the case of the People vs. Mildermuth,) was located in either the Attorney General's Office or any of the District Attorney's Offices in the State of Colorado. Original research and preparation was, therefore, required by the District Attorney's Office. Deputy District Attorney Lance Sears and Chief Deputy District Attorney Milton K. Blakey, were assigned to prepare the brief. Chief Deputy District Attorney Milton K. Blakey has had previous commitments in the State of Maine for the past two weeks. Deputy District Attorney Lance Sears has been in trial on several matters and, therefore, the brief is not completed at this time.

2. The People have timely filed a memorandum brief in opposition to the Defendant's Motion for Bill of Particulars.

3. Counsel for the People believes that adequate presentation of this issue of the law requests such additional time and that such extention as requested here will not be prejudicial to the Defendant.

Wherefore, the People move this Court for an extension of time to file a brief in opposition to Defendant's Motion to Strike Death Penalty. It is requested that the time be extended for one week, from July 29, 1977 to August 5, 1977.

The People further move the Court to grant this Motion ex parte and to grant the Defendant such extensions as would be reasonably required by this delay.

Respectfully submitted,

FRANK G.E. TUCKER
District Attorney

By
Milton K. Blakey (2691)
Deputy District Attorney

IN THE DISTRICT COURT WITHIN AND FOR

THE COUNTY OF PITKIN AND STATE OF COLORADO

Criminal Action No. C-1616

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff vs. THEODORE ROBERT BUNDY, Defendant.	MEMORANDUM CONCERNING ADMISSIBILITY OF SIMILAR TRANSACTIONS (FACTUAL SUMMARY)

COMES NOW, the District Attorney, by and through Milton K. Blakey, Deputy District Attorney, and submits the following summary of facts to be considered along with the People's Memorandum of Law Concerning Admissibility of Similar Transactions previously filed.

I. TIME PERIOD

Evidence shows that Melissa Smith disappeared on October 18, 1974, and that her body was found in Summit Park on October 27, 1974.

Carol DaRonch was abducted on November 8, 1974, and escaped from her abductor.

Caryn Campbell disappeared on January 12, 1975, and her body was found on February 17, 1975.

The medical testimony establishes that Caryn Campbell's time of death was within a few hours of the time she was last seen on January 12, 1975. The medical testimony concerning the time of death of Melissa Smith is not so precise but is not inconsistent with death shortly after her disappearance on October 18, 1974.

II. VICTIMS APPEARANCE

The evidence shows that Caryn Campbell was twenty-three (23) years of age, 5'5" tall, 110 pounds, with long brown hair parted in the middle.

Melissa Smith was seventeen (17) years old, 5'3" tall, weighed approximately 100 pounds. She had long light-brown hair parted in the middle.

Carol DaRonch, on November 8, 1974, was eighteen (18) years old, approximately 5'7" tall, with long brown hair parted in the middle.

III. TIME, LOCATION AND NATURE OF DISAPPEARANCE

Caryn Campbell disappeared in the early evening hours of January 12, 1975 from the Wildwood Inn at Snowmass At Aspen. The Wildwood Inn is a resort hotel and was, on the weekend of Caryn Campbell's disappearance, nearly fully occupied and quite busy. The evidence indicates that she left the lobby to go to her room to pick up a magazine. The evidence indicates that she did not get there and there is no evidence to indicate that she was violently abducted between the lobby and her room.

Melissa Smith was last seen around 10:00 to 10:30 P.M. on October 18, 1974 in J.B.'s Restaurant at the corner of State Street and 6100 South, across from the Fashion Place Mall, Murray, Utah. The evidence regarding her disappearance shows no indication that she was violently abducted from J.B.'s or any other place along her route from J.B.'s to her home.

On November 8, 1974, Carol DaRonch was lured from the Fashion Place Mall in Murray, Utah, to a vehicle parked on 6100 South approximately a half block from J.B.'s Restaurant. Having been lured into that vehicle and driven from the mall area she was then physically abducted, once she was removed from the area where an abduction would surely have been observed by members of the public. Had Carol DaRonch not escaped from her abductor,

the manner of her disappearance from the Fashion Place Mall would have been as mysterious as that of Caryn Campbell from the Wildwood and Melissa Smith from J.B.'s.

IV. BODY LOCATION

The evidence shows that the body of Caryn Campbell was found on February 17, 1975, off the Owl Creek Road just over the Sinclair Divide. The scene indicates that the body was dumped there in the snow and brush in this rather remote area.

The body of Melissa Smith was found on October 27, 1974, in the tall oak brush east of Summit Park, subdivision in Summit County approximately 22.7 miles from J.B.'s Restaurant in Murray, Utah. This is also a rather remote and untraveled location.

V. BODY DESCRIPTION

At the time that the body of Caryn Campbell was found, the body was entirely nude except for the gold earrings which she had been wearing at the time of her disappearance. There was absolutely no other clothing or jewelry on the body.

When Melissa Smith was found, her body was entirely nude except for her necklace and a ligature around her neck.

VI. INJURIES

Extensive testimony of the pathologists, Dr. Clark and Dr. Moore, indicates significant areas of similarity of injuries to the bodies of Caryn Campbell and Melissa Smith. Both bodies exhibit contused lacerations of the scalp. Additionally, beneath those contused lacerations are skull fractures in virtually the identical location on both bodies. Both bodies also exhibit numerous bloodless abrasions which the doctors find significantly similar.

The doctors further find on each body, lacerations in the area of the left ear. In both instances, they find the nature

and the location of these lacerations strikingly similar.

The doctors further find from their examination of both bodies that there is no evidence of defensive marks. Particularly upon the hands or arms of the victims.

VII. WEAPON USED AND MANNER OF KILLING

The doctors have examined the People's Exhibit "Q" in evidence before the Court and find that weapon to be consistent with all of the injuries on the body of both victims. Most significantly, that weapon is consistent with the size, nature and severity of the head wounds causing contused lacerations and underlying skull fracture. Both doctors likewise find the crowbar consistent with the injuries to the left ear and the lacerations in the vicinity of the left ear of each victim.

VIII. CONNECTION TO THE DEFENDANT

The evidence linking the Defendant to the abduction and murder of Caryn Campbell is that the vehicle previously owned by Mr. Bundy and seized by authorities in October of 1975, contained two hairs which have been identified by Robert Neill of the Federal Bureau of Investigation, as being microscopically like the head hairs of Caryn Campbell. One of these hairs was found in the interior of the vehicle previously owned by Mr. Bundy and the other was found in the trunk of that vehicle. Although Mr. Bundy denied to Officer Thomason that he had ever been in Colorado, a pamphlet taken in a search of his residence on August 21, 1975, has the Wildwood Inn marked in that publication.
Further, the records of purchases by Chevron credit card belonging to the defendant, establish that he signed two gasoline charge tickets in Glennwood Springs, Colorado, dated January 12, 1975.

Further evidence of connection is established by the testimony of the pathologist concerning the consistency of People's Exhibit "Q" with the injuries to Caryn Campbell,

that exhibit having been seized from the Defendant's car in his presence in August, 1975.

The Defendant is tied to the Melissa Smith case by pubic hair found in the vehicle previously owned by the defendant and seized in October of 1975, which has found to be microscopically like that of Melissa Smith. This connection is further corroborated by the consistency of People's Exhibit "Q" with the injuries to Melissa Smith and the connection of the defendant to Exhibit "Q."

The defendant's connection to the Carol DaRonch action is established by the microscopic comparison of a hair found in the Defendant's vehicle with the known hair sample of Carol DaRonch and by her direct eye witness testimony identifying the defendant as her abductor of November 8, 1974.

VI. CONCLUSION

People submit that the similarities established by the facts recited above with the reasonable inferences that may be drawn therefrom, clearly show a common scheme, design and plan for abduction and murder and establish a modus operendi sufficently distinctive as to be the trade mark of one individual, and thereby relevant to establish the identity of the perpetrator.

The People therefore, submit that the transactions involving the abduction of Carol DaRonch, on November 8, 1974, and the disappearance and murder of Melissa Smith, on October 18, 1974, are admissible under the law previously outlined to establish the identity and the modus operendi of the killer of Caryn Campbell.

Respectfully submitted,

FRANK G.E. TUCKER
District Attorney

By M E Blakey #2691
Milton K. Blakey
Deputy District Attorney

IN THE DISTRICT COURT

IN AND FOR THE COUNTY OF EL PASO

STATE OF COLORADO

Criminal Action No. C-1616

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff, vs. THEODORE ROBERT BUNDY, Defendant.	MEMORANDUM OPINION AND ORDER

On May 16, 1977, defendant filed a Motion To Suppress Evidence. On June 7, 1977, a supplement to motion to suppress was filed, designating the specific items sought to be suppressed. A hearing was held on that motion and others beginning November 14, 1977. Defendant represented himself and was assisted by advisory counsel Kevin O'Reilly, Esq. and Kenneth Dresner, Esq. The People were represented by District Attorney Robert Russel, Esq. and Deputy District Attorney Milton Blakey, Esq., both of the Fourth Judicial District, each of whom had been appointed as a Deputy District Attorney in the Ninth Judicial District for the purpose of this case.

Defendant seeks to suppress items seized from his Volkswagen automobile on August 16, 1975, items seized from his apartment on August 21, 1975 and items seized from a Volkswagen pursuant to search warrant issued on October 3, 1975, as well as credit card slips dated January 12, 1975 and January 13, 1975. In each case, it is contended by the defendant that the search violated his constitutional right to be free from unreasonable searches and seizures.

The Court has considered the evidence and the argument of counsel*, and, on the basis thereof, makes the following findings for the purpose of ruling on this motion only and issues the following order.

*All parties have argued Colorado and federal law; there is no indication in the record that Utah standards are more restrictive in any respect.

Search of Volkswagen on August 16, 1975: Facts:

About 2:30 a.m. on August 16, 1975, Utah State Highway Patrol officer Robert Hayward was about to go off duty. As was his custom, he spent the last few minutes of his duty period parked in front of his home in a suburban Granger, Utah area alert to observe any unusual activity. Granger is three to four miles southwest of Salt Lake City. Hayward was in uniform in an unmarked car. The lights of his car were out. He observed four cars in the block, which was rather unusual at that late hour. One was a Volkswagen bug, light tan or gray in color. He did not recognize it although he recognized the other three as being neighborhood cars. About 10 minutes later, Salt Lake County law officers called for some assistance relating to an incident a few blocks away. On the way to that scene, Hayward observed the same Volkswagen parked on a nearby street with its lights out. Hayward threw his own lights on high beam and the Volkswagen took off with its lights out at what appeared to Hayward to be the fastest speed it could muster. He pursued. The Volkswagen went through at least two stop signs with Hayward in pursuit. When he was close enough, he flooded the Volkswagen with a spotlight. Eventually, the Volkswagen pulled over at a gas station and stopped. Defendant Bundy got out of the Volkswagen and Officer Hayward got out of his car and asked Bundy for his driver's license and car registration. Bundy was wearing dark clothing. Hayward asked Bundy what he was doing in the area. Bundy indicated he was lost, and that he had been to a drive-in movie three miles west. Hayward asked what was showing. Bundy said "The Towering Inferno". Hayward asked another patrolman to check the movie. Hayward had radioed for assistance during the course of the chase and two other patrol cars appeared. Hayward noted by using his flashlight that the right front seat was not in place but was lying in the back seat. He also noted in back of the driver's seat was a small pinch bar. He asked Bundy if he could look in, or look through, his car. Bundy said go ahead. Upon

opening the door, Hayward saw a small satchel next to the driver's seat on the right hand side. He looked in the satchel and saw a ski mask, a silk stocking and other items. Hayward went to his patrol car and radioed for the county sheriff, as a result of which two uniformed deputies arrived. Hayward informed them of what he had observed and said that Bundy had given the go ahead to look in the car. One or more deputies went through the car including the unlocked trunk and removed some items, including handcuffs found in a brown paper bag in the trunk. After the search of Bundy's car had begun, Hayward learned that "Towering Inferno" was not playing at the drive-in which Bundy said he had attended. Hayward turned his attention to Bundy, advised him of his rights and placed him under arrest for attempting to evade an officer. No Miranda advisement was given. Throughout this entire procedure, Bundy was congenial, cooperative and offered absolutely no objections. He did not obect or attempt in any way to interfere with the search of his vehicle or the removal of items therefrom. The search and seizure took place where he could observe the officer's activities. He did not appear to the officers to be under the influence of alcohol or drugs.

Bundy acknowledged that the items taken were his and said they were junk accumulated through the years. Deputy Ondrak told Bundy he was going to take the items and give them to the County Attorney and try to get a complaint for possession of burglary tools. Bundy said, "Fine."

Although Bundy was not formally placed under arrest until after the search was well in progress, Hayward testified that Bundy was never free to go from the moment that the Volkswagen was stopped.

Search of Apartment on August 21, 1975: Facts:

On August 21, 1975, Theodore Bundy was arrested and charged with possession of burglary tools resulting from the events surrounding the stop of his Volkswagen vehicle on August

16, 1975. He was placed in the Salt Lake County Jail where he was contacted at about 3:00 p.m. by Deputy Sheriff Ben Forbes of Salt Lake County. Bundy was taken to a small room which contained a table and two chairs. Forbes indicated that he was interested in talking with him because his car matched the description of a car involved in the abduction of a young girl from the Fashion Place Mall. Bundy said he wanted to cooperate to clear up the misunderstanding. Forbes advised him of his Miranda rights, reading from a card which he carries for that purpose. After Bundy had been fully advised of those rights, he stated he wanted to talk about the matter. He understood the rights of which he was advised and at the time was not under the influence of alcohol or drugs. Forbes and Bundy discussed the items which had been found in his car and Bundy gave an explanation for each. Bundy never indicated a desire for services of an attorney and never asked Forbes to stop the questioning. He was cooperative throughout and exhibited no animosity. Forbes made no promises to him and made no threats to him. At the conclusion of the interview of approximately 45 minutes, Forbes asked Bundy for consent to search his apartment. He had a consent form with him which he read to Bundy. The form reads in pertinent part:

> "I, Theodore, R. Bundy, having been informed of my constitutional right not to have a search made of the premises, hereinafter mentioned without a search warrant and of my right to refuse to consent to such a search, hereby authorize Ben Forbes and Jerry Thompson, Deputy Sheriffs, Salt Lake County Sheriff's Department, to conduct a complete search of my premises/vehicles located at 565 - 1st Ave. #2. These deputies are authorized by me to take from my premises/vehicles any letters, papers, materials or other property which they may desire.
>
> This written permission is being given by me to the above named Deputy Sheriff(s) voluntarily and without threats or promises of any kind."

Bundy agreed to consent to the search if he could be present. Forbes agreed to that. The form was given to Bundy and he filled in his name and signed it.

Although the sheriffs' interest in Bundy extended to cases other than the Carol DaRonch case, no mention of that was

made to Bundy.

Later in the day, Bundy was taken by Sheriff's Officer Warner to Bundy's apartment at 565 1st Ave. Accompanying them in a different car were sheriff's officers Jerry Thompson and Bernardo. Bundy let the officers in with his key. He never indicated to any of them at any time that he wished to revoke his consent but on the contrary was very cooperative in permitting them to conduct their search. They searched the apartment and removed several items therefrom. Among the items removed were certain credit card charge slips which led the officers to two credit card slips which are subjects of the motion to suppress. It has been stipulated that these slips came into the possession of the law enforcement officers as a fruit of the search of the apartment. Bundy expressed no unwillingness to the removal of the items from his apartment. Throughout the search he was pleasant, talkative, calm and agreeable. He did not appear to the officers to be under the influence of alcohol or drugs.

The officers were looking for anything in any way related to violent crimes in which women were the victims. Bundy was never advised that their interest extended outside the Carol DaRonch case. Bundy was in custody during the entire search and was not specifically advised of a right to revoke his consent to the search. The entire search required 90 minutes or less.

Shortly after the search of Bundy's apartment, the charge of possession of burglary tools was dropped without the necessity of Bundy's appearance.

Seizure of Volkswagen in October, 1975: Facts:

On September 17, 1975, Theodore Bundy sold to Bryan Severson the 1968 Volkswagen which Bundy then owned. Title was transferred to Severson and he retained exclusive possession of the vehicle until it was seized by law officers. Bundy had no access to the vehicle after the sale.

On October 1, 1975, Deputy Jerry Thompson of the Salt

Lake County Sheriff's Department executed an affidavit for search warrant before a judge of the city court of Salt Lake in the State of Utah. He stated that he had reason to believe that in the Volkswagen in question there existed "one small black revolver, one brown leather ladies purse with zipper top, shoulder strap fastened by two gold rings and the stitching on each side unsewn, one earring, white in color round shaped with gold clip, one gold ladies wallet containing papers and identification of Carol DaRonch." Exhibit D (11-14-77). The affidavit refers to the attempted abduction of Carol DaRonch on November 8, 1974, her description of the Volkswagen used in her abduction, that "recently the aforedescribed victim, Carol DaRonch, picked out the photograph of an individual known as Theodore Bundy from a group of photographs as the individual she felt had committed the aforedescribed offenses. Also, she has identified the 1968 Volkswagen beetle described above as being the vehicle used in the attempted abduction by personally examining same while parked on a public street in Salt Lake City, Utah." Exhibit D (11-14-77). The affidavit states that the items in question were left inside the vehicle during the abduction attempt and that the vehicle is registered to Theodore Bundy. On the basis of that affidavit, a warrant was issued authorizing the seizure of the vehicle and the search thereof to find the above listed items. The warrant was signed by the judge of the city court of Salt Lake on October 1, 1975.

On or about October 3, 1975, the warrant was presented to Severson by the police and the Volkswagen was seized. Subsequent thereto, the Volkswagen has been searched on more than one occasion and hair samples and other items have been taken therefrom.

Search of Volkswagen on August 16, 1975: Conclusions:

The People rely upon defendant's consent to establish that the search of defendant's Volkswagen on August 16, 1975, did not violate defendant's constitutional protections against unreason-

able searches and seizures.

The People did not have a warrant to search the vehicle. Accordingly, they have the burden of showing that the search satisfied constitutional standards. People v. Hancock, 186 Colo. 30, 525 P.2d 435 (1974). A search conducted without a warrant but with the voluntary consent of the person whose place was searched is reasonable and does not violate state or federal constitutional standards. Capps v. People, 162 Colo. 323, 426 P.2d 189 (1967); Phillips v. People, 170 Colo. 520, 462 P.2d 594 (1969).

The test for whether a consent to search is sufficient to negate a claim that the search is unreasonable in a constitutional sense is whether the consent was voluntary; whether a consent was voluntary must be determined from the totality of the circumstances surrounding the consent. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041 (1973); Capps v. People, supra.

The overriding inquiry is whether the consent was intelligently and freely given. People v. Hancock, supra. The burden of proof in that determination "rests firmly on the People". People v. Hancock, supra, at page 33. It has been stated that the burden is "by clear and convincing evidence". People v. Trujillo, Colo.Ct.of App. No. 76-542, decided November 3, 1977.

The most recent Colorado Supreme Court case on the subject is People v. Hayhurst, No. 27748, Colo. S.Ct. 11-21-77, in which a voluntary consent was found to search a van suspected to have been used by a juvenile in the severe beating of another juvenile. Police officers went to the suspect's house at 5:30 a.m. the morning following the incident and advised the juvenile and his father of their Miranda rights and asked if they could look in the van. No advisement was given that the father and son had a right to refuse to consent to the search. No search warrant was obtained. The father stated he wished to do everything he could to find out what happened and directed his son to open the van door. The trial court found the consent to be voluntary but held that advisement of

right to refuse to consent was a condition to admissibility of the evidence. The Supreme Court held that:

> "While proof that an express advisement was given in a particular case certainly would lighten that burden, and such a warning - if given - would be a persuasive factor to be considered in determining voluntariness, other evidence is often quite adequate to prove that a consent was voluntary, knowing, and intelligent."

In Hayhurst the Court found it noteworthy that there was no evidence the officers claimed any right to search the vehicle, exhibited any signs of force or attempted to deceive the Hayhursts. The Court held that "Given these facts, we conclude that the Hayhursts' consent was voluntary, and no additional advisement was necessary."

It is concluded that lack of a Miranda advisement to a suspect in custody before requesting a consent to search is simply one aspect of the totality of circumstances to be considered in determining whether the consent was given voluntarily.

In the present case, defendant, although not formally arrested, was not free to leave the scene. He adopted a fully cooperative approach in responding to the officer's inquiries. The officer claimed no right to search the vehicle. He did not expressly or impliedly threaten the use of force. He did not attempt to deceive the defendant. Defendant was present throughout the search. He was fully able to determine whether at some point the nature of the search became more extensive than he intended to authorize. He expressed no objection or reluctance to allow the search. If, as defendant contends, the request to search and his response left the authorized scope of search ambiguous, he could have objected when the officer exceeded the scope of authorization. He did not do so. He did not object to the seizure of any items from his car. The nature of the items in their totality could reasonably have been considered by the police as burglary tools or other implements of crime which were appropriate for seizure upon discovery by a constitutionally valid search. Defendant was a law student at the University of Utah. He was not under the

influence of alcohol or drugs. The evidence is clear and convincing that, considering the totality of the circumstances, the search was conducted pursuant to defendant's consent, which was voluntarily, freely and intelligently given. The evidence is clear and convincing that defendant's decision to adopt a cooperative stance and to permit the search was his own considered decision, voluntarily, freely and intelligently made. For other expressions of the Colorado Supreme Court with respect to consent searches see People v. Wieckert, 554 P.2d 688 (1976); People v. Reges, 174 Colo. 377, 483 P.2d 1342 (1971); and People v. Sanchez, 184 Colo. 25, 518 P.2d 818 (1974).

Search of Apartment on August 21, 1975: Conclusions:

The People rely on defendant's consent to establish that the search of his apartment on August 21, 1975, did not violate defendant's constitutional protection against unreasonable searches and seizures.

The People did not have a warrant to search the apartment. The law cited above with respect to the August 16, 1975 search of the Volkswagen is applicable to the search of defendant's apartment as well.

Defendant was in custody, incarcerated and charged with possession of burglary tools when he was asked to consent to the search of his apartment. He was advised at the time that he was a suspect in the Carol DaRonch incident. After being advised of his Miranda rights, defendant freely discussed with Deputy Sheriff Forbes the items which had been found in his vehicle and defendant gave an explanation for each. Bundy was fully cooperative during the interview. After Forbes requested consent to search, he read Bundy a consent form which specifically advised him that he had a constitutional right not to have the search made. Bundy signed the written consent containing such language. Forbes claimed no right to search the apartment. He did not expressly or impliedly threaten use of force. He did not attempt to deceive the defendant. Bundy accompanied the officers on the search. He was fully coopera-

tive throughout and made no objection to removal of items from his apartment. Defendant was a law student at the University of Utah. He was not under the influence of alcohol or drugs. The evidence is clear and convincing that, considering the totality of the circumstances, the search and seizure were conducted pursuant to defendant's consent, which was voluntarily, freely and intelligently given.

Seizure of Volkswagen in October, 1975: Conclusions:

It is undisputed that defendant had no property or possessory interest in the Volkswagen, and no right of access to the vehicle, after it was sold to Brian Severson on September 17, 1975. Defendant was not present when the vehicle was seized. Defendant had no reasonable expectation of privacy with respect to that vehicle after its sale.

Defendant has no standing to object to seizure of the Volkswagen. See Kurtz v. People, 177 Colo. 306, 494 P.2d 97 (1972); People v. Trusty, 516 P.2d 423 (S.Ct. Colo. 1973); People v. Pearson, 546 P.2d 1259 (S.Ct. Colo. 1976). Accordingly,

IT IS ORDERED THAT defendant's motion to suppress evidence filed May 16, 1977, is denied in all its aspects.

Done this 9 day of January, 1978, nunc pro tunc December 23, 1977.

BY THE COURT:

George E. Lohr
District Judge

IN THE DISTRICT COURT WITHIN AND FOR

THE COUNTY OF PITKIN AND STATE OF COLORADO

Criminal Action No. C-1616

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff, vs. THEODORE R. BUNDY, Defendant,	MEMORANDUM OF LAW CONCERNING ADMISSIBILITY OF SIMILAR TRANSACTIONS

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SIMILAR TRANSACTIONS

I.

The admissibility of similar offenses as proof of a defendant's conduct or state of mind on a particular occasion is a matter of law to be decided by the trial judge. Admissibility is essentially discretionary, so long as certain considerations are balanced and certain procedures followed, McCormick on Evidence, Sec. 186-191, p.442-459, Stull v. People, 140 Colo. 278, 344 P2d 1361.

The test of admissibility is basically the same in all jurisdictions. The similar offense must be substantially relevant for a particular purpose or a part of the Res Gestae of the crime charged. The judge balances relevance and probity against prejudice, confusion, delay and waste of time. In addition, the judge must consider the availability of other means of proof on that particular element of the offense, McCormick on Evidence 2d ed.,Sec. 190, p. 452, Advisory Committee's Note on Rule 404 of the Federal Rules of Evidence, Colorado Lawyer Vol. 5, No. 12, p.1810 (wherein Colorado Bar Association Evidence Code Review Committee indicates Colorado law and federal law on relevancy "are essentially the same.")

The House Committee on the Judiciary had this to say about introducing other offenses to establish motive, intent, preparation, design, modus operandi, knowledge, intent, identity or lack of mistake or accident;

> "This rule provides that evidence of other crimes, wrongs, or acts is not admissible to prove character but may be admissible for other specified purposes such as proof of motive.
>
> Although your committee sees no necessity in amending the rule itself, it anticipates that the use of the discretionary word "may" with respect to the admissibility of evidence of crimes, wrongs, or acts is not indended to confer any arbitrary discretion on the trial

> judge. Rather, it is anticipated that with respect to permissible uses for such evidence, the trial judge may exclude it only on the basis of those considerations set forth in Rule 403, i.e. prejudice, confusion or waste of time."

Before the court can allow a similar transaction into evidence, relevance and probity must be shown. That relevance and probity must go to motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi or absence of mistake or accidents unless the crime charged was part of the Res Gestae of the criminal episode, Warford v. People, 43 Colo. 107, 96 Pac.556, Stull v. People, 140 Colo. 278,344 P.2d 1361, Henson v. People, 442 P.2d 406, People v. Lobato, 530 P.2d 493, People v. Henderson, 559 P.2d 1108, Rule 404, Federal Rules of Evidence.

The burden of proof on the state to introduce a similar transaction is "sufficient to connect" the defendant to the offered offense, People v. Hosier, 525 P.2d 1161. McCormick indicates the evidence must be "substantial," McCormick on Evidence, 2d ed. Sec. 190, p. 452.

Relevancy must be "substantially relevant" for some other purpose than to show a probability that he (defendant) committed the crime on trial because he is a man of criminal character. There are numerous other purposes for which evidence of other criminal acts may be offered, and when so offered, the rule of exclusion is simply inapplicable, McCormick on Evidence, 2d ed., Sec. 190, p.447-478. Some of these purposes that McCormick refers to are found at pages 448-451 of his text. The ten he enumerates are:

> (1) "To complete the story of the crime on trial by proving its immediate context of happenings near in time and place. This is often characterized as proving a part of the "same transaction" or the "res gestae."

(2) "To prove the existence of a larger plan, scheme, or conspiracy, of which the present crime on trial is a part.

(3) "To prove other like crimes by the accused so nearly identical in method as to earmark them as the handwork of the accused. Here much more is demanded than the mere repeated commission of crimes of the same class, such as repeated burglaries or theft. The device used must be so unusual and distinctive as to be like a signature."

(4) "To show a passion or propensity for illicit sexual relations with the particular person concerned in the crime on trial. Other like sexual crimes with other persons do not qualify for this purpose. It has been argued that certain unnatural sex crimes are in themselves so unusual and distinctive that previous such acts by the accused with anyone are strongly probative of like acts upon the occasion involved in the charge, but the danger of prejudice is likewise enhanced here, and most courts have in the past excluded such acts with other persons for this purpose. More recent cases show signs of lowering this particular barrier to admission.

(5) "To show, by similar acts or incidents, that the act on trial was not inadvertent, accidental, unintentional, or without guilty knowledge."

(6) "To establish motive. This in turn may serve as evidence of the identity of the doer of the crime on charge, or of deliberateness, malice, or a specific intent constituting an element of the crime."

(7) "To show, by immediate inference, malice, deliberation, ill will or the specific intent required for a particular crime."

(8) "To prove identity. This is accepted as one of the ultimate purposes for which evidence of other criminal conduct will be received. It is believed, however, that a need for proving identity is not ordinarily of itself a ticket of admission, but that the evidence will usually follow, as an intermediate channel, some one or more of the other theories here listed. Probably the second (larger plan), the third (distinctive device) and the sixth (motive) are most often resorted to for this purpose."

(9) "Evidence of criminal acts of accused, constituting admissions by conduct, intended to obstruct justice or avoid punishment for the present crime."

(10) "To impeach the accused when he takes the stand as a witness, by proof of his convictions of crime.

If the prosecution can show a genuine need for the evidence contained in the similar offense, that should influence the court toward admissibility, providing the state shows adequate relevancy, 70 Yale Law Journal 764 (1961). This idea of "need admissibility" is strengthened by the comments of the Advisory Committee's Notes on the Federal Rules of Evidence, Rule 403 (Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion or Waste of Time). There the committee states: "unfair prejudice within its (Rule 403) context means undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Rule 403, is not designed to exclude relevant evidence except when its probative value is substantially outweighed by the danger of unfair prejudice, confusion, delay or waste of time. Thus, if similar offenses are a primary source of evidence of a necessary element, Rule 403 indicates that evidence should be admitted.

A leading law review article, Slough and Knightly, Other Vices, Other Crimes, 41 Iowa L. Rev. 325 (1956), cited under Rule 404 by the Advisory Committee, defines the elusive terms of motive, intent, plan or design, Identity and Inseparable Crimes, as used in the Federal Rules of Evidence (which Colorado has been asked to adopt by the Colorado Bar Association). There the authors say:

> "Motive may be defined as an inducement or state of feeling that impels and tempts the mind to indulge in a criminal act," citing 1 Wigmore, Evidence, Sec. 117,118 (3d ed. 1940).

"Criminal Intent has been defined as that state of mind which negatives accident, inadvertance or casualty," citing 2 Wigmore, Evidence, Sec. 300,302,307,363 (3d ed. 1940). "Intent spells purpose to use a particular means to obtain a desired end, whereas motive supplies the reason that nudges the will and prods the mind to indulge the criminal." 41 Iowa L. Rev. 329-330.

To be a similar offense, according to the authors, "Evidence of another crime must cast some light upon defendant's intent."..."It must be shown that the prior acts are similar, at least sufficiently so to allow for some probative value;"

"Knowledge signifies awareness," 41 Iowa L. Rev. 329.

"Plan or Design refers to an antacedent mental condition which evidentially points to the doing of the act planned," citing 2 Wigmore, Evidence, Sec. 300,304 (3d ed. 1940).

"If the facts surrounding crime A are strikingly similar to the facts surrounding crime B, the inherent value of such evidence is to identify the accused by means of proving a distinctive plan of behavior or operation. A peculiar method of doing things may strongly evidence plan in certain instances, but many plans are woven on the basis of dissimilar events," 41 Iowa L. Rev. p.330.

"Identity - "The quality of sameness figures important when pondering the admission of other crimes to prove Identity. Here one seeks out common features in another crime to point up the liklihood that the accused was the perpetrator of the crime in question," citing - 2 Wigmore Evidence 306,410-413 (3d ed. 1940)

"Inseparable Crimes - linked in point of time and circumstances with crime charged that one cannot be fully shown without proving the other," 41 Iowa L. Rev. p.330.

TENTH CIRCUIT CASES

II

Recently, March 22, 1977, the tenth circuit decided the case of U.S. v. Nolan, 551 F.2d 266. That case involved a two year old drug conviction in a foreign jurisdiction (England) which the prosecution asked to introduce to show intent, design, continuing course of conduct, guilty knowledge, capacity, habit, plan, motive or identity. The court allowed the other transaction because it was similar in these regards: (1) narcotics-cocaine in prior transaction, marijuana in case at issue; (2) source same - New Delhi, India; (3) Same kind of container - base of wooden lamp.

In deciding the case, the court noted long standing principles and rules for admitting similar offenses.

> "We have repeatedly held that evidence of uncharged crimes, wrongs or alleged prejudicial acts may be received for purposes proving motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. United States v. Freeman, 514 F.2d 1184 (10th Cir. 1975): United States v. Parker, 469 F.2d 884 (10th Cir. 1972); United States v. Pickens, 465 F.2d 884 (10th Cir. 1972); United States v. Pauldino, 443 F.2d 1108 (10th Cir. 1971), cert. denied, 404 U.S. 882, 92 S.Ct. 212, 30 D.ed.2d 163 (1971) United States v. Eagleston, 417 F.2d 11 (10th Cir. 1969). The evidence in question in each of the above cited cases was not that of a criminal conviction, but it was that of criminal activity. It follows, then, that the evidence introduced under this exception need not be a constitutionally valid criminal conviction. Even if Nolan's British conviction should not meet our federal constitutional demands, it is still admissible under this exception. Furthermore, Fed. Rules of Evid. Rule 404(b), 28 U.S.C.A. supports this conclusion by reference to admission of evidence of "Other crimes, wrongs, or acts." That rule does not require proof of a conviction such as that required under Rule 609 of the Federal Rules of Evidence."

We need not decide if a British conviction is admissible to prove guilt or enhance punishment. That issue is not before us.
We hold that an alien conviction is admissible for the purpose of proving a common plan, motive opportunity, intent, knowledge, identity or absence of mistake if relevant and material to the charges and issues raised in the federal prosecution. The proof of Nolan's British conviction was used for these purposes in the instant case."

"The general rule is that evidence of illegal activities other than those charged is ordinarily inadmissible. There are, however, several well-recognized exceptions to the rule, including receipt of such evidence in order to prove motive, opportunity, identity, absence of mistake or accident. United States v. Freeman supra; United States v. Burkhart 458 F.2d 201 (10th Cir. 1972); United States v. Pauldino, supra."

"We note that Rule 404(b) is not exclusionary in the sense of the above rule of our Court. Rather, it would allow the admission of uncharged illegal acts unless the only purpose for their admission is to prove the criminal disposition of the defendant. We hold that under either rule, however, the evidence of Nolan's prior conviction is admissible."

"The probative value of proof of the commission of the prior crime must outweigh the prejudice. Rule 403, supra. This determination is properly within the trial judge's discretion. United States v. Baca, 444 F.2d 1383 (10th Cir. 1976), U.S. Appeal Pending; United States v. Baca, 444 F.2d (10th Cir. 1971), cert. denied, 404 U.S. 979, 92 S.Ct. 347, 30 L.ed2d 294 (1971). A critical issue in the case at hand was Nolan's intent and knowledge. Proof of the British conviction was very relevant in the proof of those elements of the crime. In view of its obvious probative value, we hold that the trial court did not abuse its discretion in admitting this evidence."

"In United States v. Parker, supra, we announced some guidelines to test whether evidence of uncharged illegal acts should be admitted: (1) the evidence must tend to establish intent, knowledge, motive, identity, or absence of mistake or accident; (2) the evidence must be so related to the importation of contraband that it serves to establish intent, knowledge, motive, identity, or absence of mistake or accident; (3) the evidence must have real probative value, not just possible worth; and the uncharged illegal act must be close in time to the crime charged. See also: United States v. Burkhart, supra.

COLORADO CASES

III

The rules espoused in the preceding tenth circuit cases have long been the rules applicable in Colorado. In 1908, in the often cited case of Warford V. People, 43 Colo. 107, 96 Pac. 556, the Supreme Court stated the same rule and exceptions and held an assault, occurring three-quarters of an hour after the assault charged, involving the same parties, and a pistol wielded by the defendant, was admissible to show motive and intent. The court specifically said the similar transaction was not admitted as part of the Res Gestae but as a separate distinct transaction, similar enough to be admissible.

In numerous cases since then, the court would have allowed the other transaction, whether similar or dissimilar, on the theory that the separate crime was part of the Res Gestae, or so related and interwoven as to be inextricable from the crime at bar, Henson v. People, 442 p.2d 406, (checks), Segura v. People, 412 p.2d 227 (murder), Abshire v. People, 87 Colo. 507, 289 Pac. 1081 (murder), People v. Plotner, 534 P.2d 791 (2nd degree assault), Bell v. People, 406 P.2d 681 (murder), People v. Litsey, 555 P.2d 974 (kidnap-rapes).

Occasionally, the Colorado Supreme Court has justified admission of similar transactions on the Res Gestae - interwoven evidence rule and the other major rule of admissibility - similar or dissimilar crimes but remote in time. Probably the leading case in this area is William v. People, 158 p.2d 447 (1945). In that case a mother was charged with killing her infant. When the death was discovered, two other fetus' were found in the same trunk. Reference was made to the other two fetus'. The court said the reference was alright because both other deaths were similar offenses: (1) interwoven with the crime in issue and (2) "admissible otherwise in proof of deliberation in the crime charged, rather than the frantic hysteria of tragedy and inexperience, and also in proof of a preconceived plan of disposing of defendant's offspring...

Further, it strengthens the presumption and proof of life, and the possession of the three bodies strengthens the identification of defendant in whose possession they were found as the perpetrator of the crime." See also May v. People 29 Colo. 178, 240 p.697 (1925). The court indicated that a limiting instruction was needed when the similar offenses were admitted for specific purposes rather than as part of the Res Gestae. See also People v. Stull, 344 P.2d 555.

Perry v. People, 181 P.2d 439 (1947), decided the issue of whether subsequent crimes could be admitted as similar transactions when they "tend to prove plan, system, habit or scheme of related offenses, or a design to commit a series of of like crimes," p.441. The court held that "Similar offenses subsequent to the crime charged are admissible to show system, as well as prior crimes," p.441. The case involved a series of burglaries and thefts. Another interesting case, Ray v. People, 125 Colo. 381,243 P.2d 762 (1952), on embezzlement, admitted similar transactions before and after the offense charged (couple of months before and one month after). The court said, "It has repeatedly been held by our court that it is competent to show that a defendant on trial for a specific offense has participated in similar offenses, in order to establish either motive, intent, plan, design or scheme, and establish defendant's identification, and that such evidence is not inadmissible merely because it establishes that defendant is guilty of another offense."

The court has been especially liberal allowing similar offenses to prove identity of the offender, People v. Ihme, 528 P.2d 380 (1974), as long as the People establish the necessary "logical connection between the two independent offenses" which was ruled necessary in Webb v. People, 97 Colo. 262, 49 P.2d 381.

In Ihme, the defendant was accused of selling illegal drugs and he claimed he was an innocent bystander. The prosecution was allowed to place in evidence, a previous transaction between police and the defendant. The court ruled:

"It has been stated that this exception applies when the evidence shows a larger continuing plan to engage in a certain criminal activity, and it especially applies in cases where motive, identity of the actor, and intent are in dispute," (citing McCormick on Evidence, Sec. 190 (2d ed. 1972). See also Williams v. People, (I.D. motive and design case) supra, People v. Dago, 497 P.2d 1261 (Colo. 1972), (Identity case), People v. Orr, 566 P.2d 1361 (Colo. 1977), Leyba v. People, 174 Colo. 1, 481 P.2d 417.

Another very important case in the area of similar transactions is Stull v. People, 344 P.2d 455 (1959). There, the court allowed several similar acts to be admitted in the state's case without giving a limiting instruction.

The Supreme Court found error, ruling that if remote similar transaction are to be presented: (1) the prosecutor must advise court of purpose of similar acts, (2) if court admits, it must instruct jury of limited purpose of the admitted evidence, (3) general charge to jury should again limit use of the evidence, and (4) the instructions should be couched in words such as "other transactions, other acts" or "other conduct."

To be admissible as a similar transaction, the state must comply with the "degree of similarity" and "time" rules of Clews v. People, 377 P.2d 125 (1962). The court emphasized in this burglary, conspiracy and bribery case, that "time and the character of such collateral acts are important in the determination of their admissibility. The evidence must show that they (similar offenses) occurred at or about the time of the act in question, and there must be a substantial degree of similarity

between them. (cites Kostal v. People, 144 Colo. 505, 357 P.2d 70.) In practice, the proximity in point of time and the degree of similarity is largely left to the discretion of the trial court," page 128. Later on that same page, the court notes that "admissibility of evidence to establish the exception may turn on the posture of the case." In the Clews case, another similar offense was admitted. The court found it to be a facsimile of the case being tried except for the victim, who was entirely different.

In the more recent cases, the Colorado Supreme Court has enlarged the number of exceptions to include modus operandi. People v. Martinez, 549 P.2d 758, a burglary case where another burglary was admitted as a similar transaction to show common scheme, plan or design, is illustrative. The court stated:

> It is the general rule, of course, that evidence of other criminal acts may not be admitted to show guilt. People v. Ihme, 187 Colo. 48, 528 P.2d 380 (1974); People v. Moen, 186 Colo. 196, 526 P.2d 654 (1974). There are exceptions, however, to the general rule. We have repeatedly held that evidence of similar criminal acts may be admitted to show a common scheme, plan, or design. People v. Simms, 185 Colo. 214, 523 P.2d 463 (1974); Howe V. People, 178 Colo. 248,496 P.2d 1040 (1972); Wilkinson v. People, 170 Colo. 336,460 P.2d 774 (1969). In People v. Moen, supra, evidence of one burglary was presented in a trial for another burglary. We held the evidence admissible since it "was of a transaction similar in nature and closely related to the transaction upon which the defendant was being tried in point of time, in the areas where the burglaries were committed, and in the methods used in obtaining entrance." 186 Colo. at 200, 526 P.2d at 646. Furthermore, in Howe v. People, supra, evidence of a theft committed twelve days prior to the theft charged was held admissible since "(t)he same modus operandi was used on both occasions to relieve the same victim of its property." 178 Colo. at 265,496 P.2d at 1044. Consequently, it is apparent that in this case evidence of each burglary would have been admissible even in a separate trial for the other.
>
> The appellant is incorrect in asserting that evidence of similar crimes is admissible only when the crimes resulted in convictions. It is sufficient to introduce evidence of criminal acts; it is clear that the transaction need not be established beyond a reasonable doubt, McCormick, Evidence Sec. 190 at 451 (2d ed. 1972.")

Other cases on common scheme, plan or design or modus operandi as similar transactions are People v. Hosier, 525 P.2d 1161, (1974), People v. Moen, 526 P.2d 654, People v. Lamirato, 504 P.2d 661 (1972), People v. Simms, 523 P.2d 463, and People v. Henderson, 559 P.2d 1108 (1976).

The Hosier case concerned a murder of a child where the similar transaction admitted was the beating of the victim's sister by the defendant, who was the babysitter. The court said the similar offense was admissible to show defendant's plan, scheme, design, intent, guilty knowledge, or modus operandi.

Moen was a burglary case where a similar incident was admitted. The court cited the exceptions of intent, plan, motive, scheme or design and added "especially this is true where the other transactions are so connected in point of time with the offense under trial and so similar in character that a plan or scheme can be imputed as to all of them." The "so similar" language referred to the area of the burglaries and method of gaining entrance. Entry was gained by use of a plastic card to slip the locks on the doors.

Henderson was a shoplifting case where the defendant concealed the items under her clothing, removed them from the store and returned for more goods. She was arrested. The court said at page 1115: " The transaction here was in close proximity to the time and place of the acts with which the defendant was charged. The nature of the act, viewed in the light most favorable to the prosecution, was relevant to show scheme, plan or design to shoplift clothing from the store." See also Bacino v. People, 104 Colo. 229, 90 P:2d 5 (1973).

OTHER JURISDICTIONS

IV

A leading case where similar murders were introduced to show identity of the murderer is State v. King, 206 P.883 (Kansas 1922.) The facts and pertinent part of the case is this:

> "Dawson, J. The defendant Rufus King, was convicted of the murder of one John A. Woody, which crime occurred on or about the 1st of April, 1909. Woody was a young man who worked for King in the spring of that year. King then operated a livery barn at Maple Hill, in Wabaunsee county. About the 1st of April Woody disappeared and was never afterwards seen alive. In August, 1919, the skeleton of Woody was found buried face downward in the livery barn lot under the manure pile or thereabout. The hyoid bone of the throat of the skeleton had been fractured, indicating that Wood's death had occurred by strangulation or similar violent means. Woody was last seen alive by King, and after Woody's disappearance in 1909 King had in his possession and exercised rights of ownership over Woody's two horses, buggy, and harness, and even had such intimate personal effects of Woody's as his overcoat. (King was convicted of murder.) King appeals. The principal error or series of error upon which he relies for reversal relate to the admission in evidence of facts pertaining to two other murders which came to light about the time Woody's skeleton was found in the livery barn lot in 1919, and which in extenso were narrated to the jury. The facts involved in this evidence, the competency of which is strenuously challenged, tended to show that in 1906, while this same livery barn was in King's possession, one William T. Ringer, a Nebraska peddler, who wandered about the country attending public fairs and selling cheap jewelry which he made of copper wire and small shells, came to King's livery barn and made it his headquarters for some time. Ringer disappeared. He was last seen alive by King. After his

disappearance King had in his possession and exercised rights of ownership over all of Ringer's personal property-his deeds to properties in Nebraska, his spectacles, jewelry, and copper wire and shells for making jewelry, his collars, blankets, dog, horses, and wagon. In August, 1919, Ringer's skeleton was found buried face downward in the lot of the livery barn near Woody's body and the skull of Ringer's skeleton showed that it had been crushed by an axe or similar instrument.

The facts tending to show the third homicide which were developed over defendant's objection tended to show that in 1913 a young farmer named Reuben Gutschall residing a few miles from Maple Hill suddenly disappeared and was never afterwards seen alive, and all his property immediately came into the possession of King, and King exercised rights of ownership over it-Gutschall's chickens, hogs, household goods, horses, wagon, harness and sorghum.

What about the admissiblity of the evidence concerning these crimes involved in the deaths of Ringer and Gutschall when King was being tried for the murder of Woody? The admissibility of evidence touching other crimes perpetrated by a defendant on trial for any specified offense has been the theme of much discussion by courts and text-writers. The ordinary rule, of course, is that evidence of extraneous crimes is not admissible. But to that rule there are many well-recognized exceptions which are as potent as the rule itself. Any pertinent fact which throws light upon the subject under judicial consideration, the accused's guilt or innocence of the crime for which he is charged and on trial, is admissible; nor is such probative fact to be excluded merely because it may also prove or tend to prove that the accused has committed another crime or many crimes.

The circumstances surrounding the deaths of Woody, Ringer, and Gutshcall, so similar in their dominant aspects tended strongly to show that the murderer of one of these victims was the murderer of all three. The extended inquiry made into the details of the

three crimes was bound to aid materially in disclosing the identity of their common perpetrator. The evidence touching the similiar disappearances of Ringer and Gutschall, King's possession of their property upon their respective disappearances, his

> statements touching their disappearances, his statements explaining how he came to possess their effects, and the facts of the exhumation and discovery of their remains on premises that were or had been in his control, were competent and admissible to prove the common identity of the murderer of Woody, Ringer, and Gutschall, and to prove his motive and system of possessing himself of other men's property, by taking their lives and concealing their bodies to accomplish that object.

Another case, where identity and modus operandi of the defendant allowed the production of a similar homicide was People v. Peete, 169 P.2d 924 (Cal. 1946) where the court said, "The instruction that the Denton transaction tended to identify defendant as the murderer was likewise proper, since the method by which Jacob Denton was murdered, a bullet from behind severing the spinal cord at the neck, produced instant death with a minumum of resistance, and tended to identify defendant as the one who similarly attempted to sever Mrs. Logan's spinal cord." The gunshot wound missed Mrs. Logan's spinal cord but killed her anyway. See also Commonwealth v. Ransom, 82 A. 2d 547 (1951). (Robber-Rapist uses same method and admitted to show design.)

A final case which must receive further comment is People v. Haston, 444 P.2d 91 (Cal.1968). There the court at p.98 said: "When, as in the instant case, a primary issue of fact is whether or not defendant rather than some other person was the perpetrator of the crime charged, evidence of other crimes is ordinarily admissible if it discloses a distinctive modus operandi common to both the other crimes and the charged crime," citing People v. Peete, 169 P.2d 924, People v. Adamson, 225 Cal.App. 2d 74, People v. Houston, 219 Cal. App. 2d 187 and People v. McCarty, 164 Cal. App. 2d 322. The court goes on to say: "Several decisions have held that the test of admissibility of evidence of another offense offered to prove common design, plan, or modus operandi is whether there is some clear connection between that offense and the one charged so that it may be logically inferred that if defendant is guilty of one he must be

guilty of the other," citing People v. Cramer, 429 P.2d 582 (Cal. 1967).

Respectfully Submitted,
Frank G.E. Tucker,
District Attorney

by _____
Milton K. Blakey, Deputy
District Attorney 2691

_____
George Vahsholtz, Deputy
District Attorney 7179
4th Judicial District

CERTIFICATE OF MAILING

I hereby certify that I have mailed a true and correct copy of the foregoing to Kenneth Dresner, advisory Attorney for Theodore Bundy, pro se, Jordon Bldg. Suite C.,307 N. Main Gunnison, Colorado 81230 and Kevin O'Reilley, advisory Attorney for Theodore Bundy, and Theodore Bundy, % of Garfield County Jail on the 28th day of October 1977.

_____

IN THE DISTRICT COURT WITHIN AND FOR

THE COUNTY OF PITKIN AND STATE OF COLORADO

Criminal Action No. C-1616

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff, vs. THEODORE R. BUNDY, Defendant,	MEMORANDUM OF LAW CONCERNING ADMISSIBILITY OF SIMILAR TRANSACTIONS

Frank G.E. Tucker,
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George Vahsholtz, Deputy
District Attorney

SIMILAR TRANSACTIONS

I.

The admissibility of similar offenses as proof of a defendant's conduct or state of mind on a particular occasion is a matter of law to be decided by the trial judge. Admissibility is essentially discretionary, so long as certain considerations are balanced and certain procedures followed, McCormick on Evidence, Sec. 186-191, p.442-459, Stull v. People, 140 Colo. 278, 344 P2d 1361.

The test of admissibility is basically the same in all jurisdictions. The similar offense must be substantially relevant for a particular purpose or a part of the Res Gestae of the crime charged. The judge balances relevance and probity against prejudice, confusion, delay and waste of time. In addition, the judge must consider the availability of other means of proof on that particular element of the offense, McCormick on Evidence 2d ed.,Sec. 190, p. 452, Advisory Committee's Note on Rule 404 of the Federal Rules of Evidence, Colorado Lawyer Vol. 5, No. 12, p.1810 (wherein Colorado Bar Association Evidence Code Review Committee indicates Colorado law and federal law on relevancy "are essentially the same.")

The House Committee on the Judiciary had this to say about introducing other offenses to establish motive, intent, preparation, design, modus operandi, knowledge, intent, identity or lack of mistake or accident;

> "This rule provides that evidence of other crimes, wrongs, or acts is not admissible to prove character but may be admissible for other specified purposes such as proof of motive.
>
> Although your committee sees no necessity in amending the rule itself, it anticipates that the use of the discretionary word "may" with respect to the admissibility of evidence of crimes, wrongs, or acts is not indended to confer any arbitrary discretion on the trial

> judge. Rather, it is anticipated that with respect to permissible uses for such evidence, the trial judge may exclude it only on the basis of those considerations set forth in Rule 403, i.e. prejudice, confusion or waste of time."

Before the court can allow a similar transaction into evidence, relevance and probity must be shown. That relevance and probity must go to motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi or absence of mistake or accidents unless the crime charged was part of the Res Gestae of the criminal episode, Warford v. People, 43 Colo. 107, 96 Pac.556, Stull v. People, 140 Colo. 278,344 P.2d 1361, Henson v. People, 442 P.2d 406, People v. Lobato, 530 P.2d 493, People v. Henderson, 559 P.2d 1108, Rule 404, Federal Rules of Evidence.

The burden of proof on the state to introduce a similar transaction is "sufficient to connect" the defendant to the offered offense, People v. Hosier, 525 P.2d 1161. McCormick indicates the evidence must be "substantial," McCormick on Evidence, 2d ed. Sec. 190, p. 452.

Relevancy must be "substantially relevant" for some other purpose than to show a probability that he (defendant) committed the crime on trial because he is a man of criminal character. There are numerous other purposes for which evidence of other criminal acts may be offered, and when so offered, the rule of exclusion is simply inapplicable, McCormick on Evidence, 2d ed., Sec. 190, p.447-478. Some of these purposes that McCormick refers to are found at pages 448-451 of his text. The ten he enumerates are:

> (1) "To complete the story of the crime on trial by proving its immediate context of happenings near in time and place. This is often characterized as proving a part of the "same transaction" or the "res gestae."

(2) "To prove the existence of a larger plan, scheme, or conspiracy, of which the present crime on trial is a part.

(3) "To prove other like crimes by the accused so nearly identical in method as to earmark them as the handwork of the accused. Here much more is demanded than the mere repeated commission of crimes of the same class, such as repeated burglaries or theft. The device used must be so unusual and distinctive as to be like a signature."

(4) "To show a passion or propensity for illicit sexual relations with the particular person concerned in the crime on trial. Other like sexual crimes with other persons do not qualify for this purpose. It has been argued that certain unnatural sex crimes are in themselves so unusual and distinctive that previous such acts by the accused with anyone are strongly probative of like acts upon the occasion involved in the charge, but the danger of prejudice is likewise enhanced here, and most courts have in the past excluded such acts with other persons for this purpose. More recent cases show signs of lowering this particular barrier to admission.

(5) "To show, by similar acts or incidents, that the act on trial was not inadvertent, accidental, unintentional, or without guilty knowledge."

(6) "To establish motive. This in turn may serve as evidence of the identity of the doer of the crime on charge, or of deliberateness, malice, or a specific intent constituting an element of the crime."

(7) "To show, by immediate inference, malice, deliberation, ill will or the specific intent required for a particular crime."

(8) "To prove identity. This is accepted as one of the ultimate purposes for which evidence of other criminal conduct will be received. It is believed, however, that a need for proving identity is not ordinarily of itself a ticket of admission, but that the evidence will usually follow, as an intermediate channel, some one or more of the other theories here listed. Probably the second (larger plan), the third (distinctive device) and the sixth (motive) are most often resorted to for this purpose."

(9) "Evidence of criminal acts of accused, constituting admissions by conduct, intended to obstruct justice or avoid punishment for the present crime."

(10) "To impeach the accused when he takes the stand as a witness, by proof of his convictions of crime.

If the prosecution can show a genuine need for the evidence contained in the similar offense, that should influence the court toward admissibility, providing the state shows adequate relevancy, 70 Yale Law Journal 764 (1961). This idea of "need admissibility" is strengthened by the comments of the Advisory Committee's Notes on the Federal Rules of Evidence, Rule 403 (Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion or Waste of Time). There the committee states: "unfair prejudice within its (Rule 403) context means undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Rule 403, is not designed to exclude relevant evidence except when its probative value is substantially outweighed by the danger of unfair prejudice, confusion, delay or waste of time. Thus, if similar offenses are a primary source of evidence of a necessary element, Rule 403 indicates that evidence should be admitted.

A leading law review article, Slough and Knightly, Other Vices, Other Crimes, 41 Iowa L. Rev. 325 (1956), cited under Rule 404 by the Advisory Committee, defines the elusive terms of motive, intent, plan or design, Identity and Inseparable Crimes, as used in the Federal Rules of Evidence (which Colorado has been asked to adopt by the Colorado Bar Association). There the authors say:

> "Motive may be defined as an inducement or state of feeling that impels and tempts the mind to indulge in a criminal act," citing 1 Wigmore, Evidence, Sec. 117,118 (3d ed. 1940).

> "Criminal Intent has been defined as that state of mind which negatives accident, inadvertance or casualty," citing 2 Wigmore, Evidence, Sec. 300,302,307,363 (3d ed. 1940). "Intent spells purpose to use a particular means to obtain a desired end, whereas motive supplies the reason that nudges the will and prods the mind to indulge the criminal." 41 Iowa L. Rev. 329-330.

To be a similar offense, according to the authors, "Evidence of another crime must cast some light upon defendant's intent."..."It must be shown that the prior acts are similar, at least sufficiently so to allow for some probative value;"

> "Knowledge signifies awareness," 41 Iowa L. Rev. 329.

> "Plan or Design refers to an antacedent mental condition which evidentially points to the doing of the act planned," citing 2 Wigmore, Evidence, Sec. 300,304 (3d ed. 1940).

"If the facts surrounding crime A are strikingly similar to the facts surrounding crime B, the inherent value of such evidence is to identify the accused by means of proving a distinctive plan of behavior or operation. A peculiar method of doing things may strongly evidence plan in certain instances, but many plans are woven on the basis of dissimilar events," 41 Iowa L. Rev. p.330.

> "Identity - "The quality of sameness figures important when pondering the admission of other crimes to prove Identity. Here one seeks out common features in another crime to point up the liklihood that the accused was the perpetrator of the crime in question," citing - 2 Wigmore Evidence 306,410-413 (3d ed. 1940)

> "Inseparable Crimes - linked in point of time and circumstances with crime charged that one cannot be fully shown without proving the other," 41 Iowa L. Rev. p.330.

TENTH CIRCUIT CASES

II

Recently, March 22, 1977, the tenth circuit decided the case of U.S. v. Nolan, 551 F.2d 266. That case involved a two year old drug conviction in a foreign jurisdiction (England) which the prosecution asked to introduce to show intent, design, continuing course of conduct, guilty knowledge, capacity, habit, plan, motive or identity. The court allowed the other transaction because it was similar in these regards: (1) narcotics-cocaine in prior transaction, marijuana in case at issue; (2) source same - New Delhi, India; (3) Same kind of container - base of wooden lamp.

In deciding the case, the court noted long standing principles and rules for admitting similar offenses.

> "We have repeatedly held that evidence of uncharged crimes, wrongs or alleged prejudicial acts may be received for purposes proving motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. United States v. Freeman, 514 F.2d 1184 (10th Cir. 1975): United States v. Parker, 469 F.2d 884 (10th Cir. 1972); United States v. Pickens, 465 F.2d 884 (10th Cir. 1972); United States v. Pauldino, 443 F.2d 1108 (10th Cir. 1971), cert. denied, 404 U.S. 882, 92 S.Ct. 212, 30 D.ed.2d 163 (1971) United States v. Eagleston, 417 F.2d 11 (10th Cir. 1969). The evidence in question in each of the above cited cases was not that of a criminal conviction, but it was that of criminal activity. It follows, then, that the evidence introduced under this exception need not be a constitutionally valid criminal conviction. Even if Nolan's British conviction should not meet our federal constitutional demands, it is still admissible under this exception. Furthermore, Fed. Rules of Evid. Rule 404(b), 28 U.S.C.A. supports this conclusion by reference to admission of evidence of "Other crimes, wrongs, or acts." That rule does not require proof of a conviction such as that required under Rule 609 of the Federal Rules of Evidence."

We need not decide if a British conviction is admissible to prove guilt or enhance punishment. That issue is not before us.
We hold that an alien conviction is admissible for the purpose of proving a common plan, motive opportunity, intent, knowledge, identity or absence of mistake if relevant and material to the charges and issues raised in the federal prosecution. The proof of Nolan's British conviction was used for these purposes in the instant case."

"The general rule is that evidence of illegal activities other than those charged is ordinarily inadmissible. There are, however, several well-recognized exceptions to the rule, including receipt of such evidence in order to prove motive, opportunity, identity, absence of mistake or accident. United States v. Freeman supra; United States v. Burkhart 458 F.2d 201 (10th Cir. 1972); United States v. Pauldino, supra."

"We note that Rule 404(b) is not exclusionary in the sense of the above rule of our Court. Rather, it would allow the admission of uncharged illegal acts unless the only purpose for their admission is to prove the criminal disposition of the defendant. We hold that under either rule, however, the evidence of Nolan's prior conviction is admissible."

"The probative value of proof of the commission of the prior crime must outweigh the prejudice. Rule 403, supra. This determination is properly within the trial judge's discretion. United States v. Baca, 444 F.2d 1383 (10th Cir. 1976), U.S. Appeal Pending; United States v. Baca, 444 F.2d (10th Cir. 1971), cert. denied, 404 U.S. 979, 92 S.Ct. 347, 30 L.ed2d 294 (1971). A critical issue in the case at hand was Nolan's intent and knowledge. Proof of the British conviction was very relevant in the proof of those elements of the crime. In view of its obvious probative value, we hold that the trial court did not abuse its discretion in admitting this evidence."

"In United States v. Parker, supra, we announced some guidelines to test whether evidence of uncharged illegal acts should be admitted: (1) the evidence must tend to establish intent, knowledge, motive, identity, or absence of mistake or accident; (2) the evidence must be so related to the importation of contraband that it serves to establish intent, knowledge, motive, identity, or absence of mistake or accident; (3) the evidence must have real probative value, not just possible worth; and the uncharged illegal act must be close in time to the crime charged. See also: United States v. Burkhart, supra.

COLORADO CASES

III

The rules espoused in the preceding tenth circuit cases have long been the rules applicable in Colorado. In 1908, in the often cited case of Warford V. People, 43 Colo. 107, 96 Pac. 556, the Supreme Court stated the same rule and exceptions and held an assault, occurring three-quarters of an hour after the assault charged, involving the same parties, and a pistol wielded by the defendant, was admissible to show motive and intent. The court specifically said the similar transaction was not admitted as part of the Res Gestae but as a separate distinct transaction, similar enough to be admissible.

In numerous cases since then, the court would have allowed the other transaction, whether similar or dissimilar, on the theory that the separate crime was part of the Res Gestae, or so related and interwoven as to be inextricable from the crime at bar, Henson v. People, 442 p.2d 406, (checks), Segura v. People, 412 p.2d 227 (murder), Abshire v. People, 87 Colo. 507, 289 Pac. 1081 (murder), People v. Plotner, 534 P.2d 791 (2nd degree assault), Bell v. People, 406 P.2d 681 (murder), People v. Litsey, 555 P.2d 974 (kidnap-rapes).

Occasionally, the Colorado Supreme Court has justified admission of similar transactions on the Res Gestae - interwoven evidence rule and the other major rule of admissibility - similar or dissimilar crimes but remote in time. Probably the leading case in this area is William v. People, 158 p.2d 447 (1945). In that case a mother was charged with killing her infant. When the death was discovered, two other fetus' were found in the same trunk. Reference was made to the other two fetus'. The court said the reference was alright because both other deaths were similar offenses: (1) interwoven with the crime in issue and (2) "admissible otherwise in proof of deliberation in the crime charged, rather than the frantic hysteria of tragedy and inexperience, and also in proof of a preconceived plan of disposing of defendant's offspring...

Further, it strengthens the presumption and proof of life, and the possession of the three bodies strengthens the identification of defendant in whose possession they were found as the perpetrator of the crime." See also May v. People 29 Colo. 178, 240 p.697 (1925). The court indicated that a limiting instruction was needed when the similar offenses were admitted for specific purposes rather than as part of the Res Gestae. See also People v. Stull, 344 P.2d 555.

Perry v. People, 181 P.2d 439 (1947), decided the issue of whether subsequent crimes could be admitted as similar transactions when they "tend to prove plan, system, habit or scheme of related offenses, or a design to commit a series of of like crimes," p.441. The court held that "Similar offenses subsequent to the crime charged are admissible to show system, as well as prior crimes," p.441. The case involved a series of burglaries and thefts. Another interesting case, Ray v. People, 125 Colo. 381,243 P.2d 762 (1952), on embezzlement, admitted similar transactions before and after the offense charged (couple of months before and one month after). The court said, "It has repeatedly been held by our court that it is competent to show that a defendant on trial for a specific offense has participated in similar offenses, in order to establish either motive, intent, plan, design or scheme, and establish defendant's identification, and that such evidence is not inadmissible merely because it establishes that defendant is guilty of another offense."

The court has been especially liberal allowing similar offenses to prove identity of the offender, People v. Ihme, 528 P.2d 380 (1974), as long as the People establish the necessary "logical connection between the two independent offenses" which was ruled necessary in Webb v. People, 97 Colo. 262, 49 P.2d 381.

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"It has been stated that this exception applies when the evidence shows a larger continuing plan to engage in a certain criminal activity, and it especially applies in cases where motive, identity of the actor, and intent are in dispute," (citing McCormick on Evidence, Sec. 190 (2d ed. 1972). See also Williams v. People, (I.D. motive and design case) supra, People v. Dago, 497 P.2d 1261 (Colo. 1972), (Identity case), People v. Orr, 566 P.2d 1361 (Colo. 1977), Leyba v. People, 174 Colo. 1, 481 P.2d 417.

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between them. (cites Kostal v. People, 144 Colo. 505, 357 P.2d 70.) In practice, the proximity in point of time and the degree of similarity is largely left to the discretion of the trial court," page 128. Later on that same page, the court notes that "admissibility of evidence to establish the exception may turn on the posture of the case." In the Clews case, another similar offense was admitted. The court found it to be a facsimile of the case being tried except for the victim, who was entirely different.

In the more recent cases, the Colorado Supreme Court has enlarged the number of exceptions to include modus operandi. People v. Martinez, 549 P.2d 758, a burglary case where another burglary was admitted as a similar transaction to show common scheme, plan or design, is illustrative. The court stated:

> It is the general rule, of course, that evidence of other criminal acts may not be admitted to show guilt. People v. Ihme, 187 Colo. 48, 528 P.2d 380 (1974); People v. Moen, 186 Colo. 196, 526 P.2d 654 (1974). There are exceptions, however, to the general rule. We have repeatedly held that evidence of similar criminal acts may be admitted to show a common scheme, plan, or design. People v. Simms, 185 Colo. 214, 523 P.2d 463 (1974); Howe V. People, 178 Colo. 248,496 P.2d 1040 (1972); Wilkinson v. People, 170 Colo. 336,460 P.2d 774 (1969). In People v. Moen, supra, evidence of one burglary was presented in a trial for another burglary. We held the evidence admissible since it "was of a transaction similar in nature and closely related to the transaction upon which the defendant was being tried in point of time, in the areas where the burglaries were committed, and in the methods used in obtaining entrance." 186 Colo. at 200, 526 P.2d at 646. Furthermore, in Howe v. People, supra, evidence of a theft committed twelve days prior to the theft charged was held admissible since "(t)he same modus operandi was used on both occasions to relieve the same victim of its property." 178 Colo. at 265,496 P.2d at 1044. Consequently, it is apparent that in this case evidence of each burglary would have been admissible even in a separate trial for the other.
>
> The appellant is incorrect in asserting that evidence of similar crimes is admissible only when the crimes resulted in convictions. It is sufficient to introduce evidence of criminal acts; it is clear that the transaction need not be established beyond a reasonable doubt, McCormick, Evidence Sec. 190 at 451 (2d ed. 1972.")

Other cases on common scheme, plan or design or modus operandi as similar transactions are People v. Hosier, 525 P.2d 1161, (1974), People v. Moen, 526 P.2d 654, People v. Lamirato, 504 P.2d 661 (1972), People v. Simms, 523 P.2d 463, and People v. Henderson, 559 P.2d 1108 (1976).

The Hosier case concerned a murder of a child where the similar transaction admitted was the beating of the victim's sister by the defendant, who was the babysitter. The court said the similar offense was admissible to show defendant's plan, scheme, design, intent, guilty knowledge, or modus operandi.

Moen was a burglary case where a similar incident was admitted. The court cited the exceptions of intent, plan, motive, scheme or design and added "especially this is true where the other transactions are so connected in point of time with the offense under trial and so similar in character that a plan or scheme can be imputed as to all of them." The "so similar" language referred to the area of the burglaries and method of gaining entrance. Entry was gained by use of a plastic card to slip the locks on the doors.

Henderson was a shoplifting case where the defendant concealed the items under her clothing, removed them from the store and returned for more goods. She was arrested. The court said at page 1115: " The transaction here was in close proximity to the time and place of the acts with which the defendant was charged. The nature of the act, viewed in the light most favorable to the prosecution, was relevant to show scheme, plan or design to shoplift clothing from the store." See also Bacino v. People, 104 Colo. 229, 90 P.2d 5 (1973).

OTHER JURISDICTIONS

IV

A leading case where similar murders were introduced to show identity of the murderer is State v. King, 206 P.883 (Kansas 1922.) The facts and pertinent part of the case is this:

> "Dawson, J. The defendant Rufus King, was convicted of the murder of one John A. Woody, which crime occurred on or about the 1st of April, 1909. Woody was a young man who worked for King in the spring of that year. King then operated a livery barn at Maple Hill, in Wabaunsee county. About the 1st of April Woody disappeared and was never afterwards seen alive. In August, 1919, the skeleton of Woody was found buried face downward in the livery barn lot under the manure pile or thereabout. The hyoid bone of the throat of the skeleton had been fractured, indicating that Wood's death had occurred by strangulation or similar violent means. Woody was last seen alive by King, and after Woody's disappearance in 1909 King had in his possession and exercised rights of ownership over Woody's two horses, buggy, and harness, and even had such intimate personal effects of Woody's as his overcoat. (King was convicted of murder.) King appeals. The principal error or series of error upon which he relies for reversal relate to the admission in evidence of facts pertaining to two other murders which came to light about the time Woody's skeleton was found in the livery barn lot in 1919, and which in extenso were narrated to the jury. The facts involved in this evidence, the competency of which is strenuously challenged, tended to show that in 1906, while this same livery barn was in King's possession, one William T. Ringer, a Nebraska peddler, who wandered about the country attending public fairs and selling cheap jewelry which he made of copper wire and small shells, came to King's livery barn and made it his headquarters for some time. Ringer disappeared. He was last seen alive by King. After his

disappearance King had in his possession and exercised rights of ownership over all of Ringer's personal property-his deeds to properties in Nebraska, his spectacles, jewelry, and copper wire and shells for making jewelry, his collars, blankets, dog, horses, and wagon. In August, 1919, Ringer's skeleton was found buried face downward in the lot of the livery barn near Woody's body and the skull of Ringer's skeleton showed that it had been crushed by an axe or similar instrument.

The facts tending to show the third homicide which were developed over defendant's objection tended to show that in 1913 a young farmer named Reuben Gutschall residing a few miles from Maple Hill suddenly disappeared and was never afterwards seen alive, and all his property immediately came into the possession of King, and King exercised rights of ownership over it-Gutschall's chickens, hogs, household goods, horses, wagon, harness and sorghum.

What about the admissiblity of the evidence concerning these crimes involved in the deaths of Ringer and Gutschall when King was being tried for the murder of Woody? The admissibility of evidence touching other crimes perpetrated by a defendant on trial for any specified offense has been the theme of much discussion by courts and text-writers. The ordinary rule, of course, is that evidence of extraneous crimes is not admissible. But to that rule there are many well-recognized exceptions which are as potent as the rule itself. Any pertinent fact which throws light upon the subject under judicial consideration, the accused's guilt or innocence of the crime for which he is charged and on trial, is admissible; nor is such probative fact to be excluded merely because it may also prove or tend to prove that the accused has committed another crime or many crimes.

The circumstances surrounding the deaths of Woody, Ringer, and Gutshcall, so similar in their dominant aspects tended strongly to show that the murderer of one of these victims was the murderer of all three. The extended inquiry made into the details of the

three crimes was bound to aid materially in disclosing the identity of their common perpetrator. The evidence touching the similiar disappearances of Ringer and Gutschall, King's possession of their property upon their respective disappearances, his

> statements touching their disappearances, his statements explaining how he came to possess their effects, and the facts of the exhumation and discovery of their remains on premises that were or had been in his control, were competent and admissible to prove the common identity of the murderer of Woody, Ringer, and Gutschall, and to prove his motive and system of possessing himself of other men's property, by taking their lives and concealing their bodies to accomplish that object.

Another case, where identity and modus operandi of the defendant allowed the production of a similar homicide was People v. Peete, 169 P.2d 924 (Cal. 1946) where the court said, "The instruction that the Denton transaction tended to identify defendant as the murderer was likewise proper, since the method by which Jacob Denton was murdered, a bullet from behind severing the spinal cord at the neck, produced instant death with a minumum of resistance, and tended to identify defendant as the one who similarly attempted to sever Mrs. Logan's spinal cord." The gunshot wound missed Mrs. Logan's spinal cord but killed her anyway. See also Commonwealth v. Ransom, 82 A. 2d 547 (1951). (Robber-Rapist uses same method and admitted to show design.)

A final case which must receive further comment is People v. Haston, 444 P.2d 91 (Cal.1968). There the court at p.98 said: "When, as in the instant case, a primary issue of fact is whether or not defendant rather than some other person was the perpetrator of the crime charged, evidence of other crimes is ordinarily admissible if it discloses a distinctive modus operandi common to both the other crimes and the charged crime," citing People v. Peete, 169 P.2d 924, People v. Adamson, 225 Cal.App. 2d 74, People v. Houston, 219 Cal. App. 2d 187 and People v. McCarty, 164 Cal. App. 2d 322. The court goes on to say: "Several decisions have held that the test of admissibility of evidence of another offense offered to prove common design, plan, or modus operandi is whether there is some clear connection between that offense and the one charged so that it may be logically inferred that if defendant is guilty of one he must be

guilty of the other," citing People v. Cramer, 429 P.2d 582 (Cal. 1967).

Respectfully Submitted,
Frank G.E. Tucker,
District Attorney

by _____
Milton K. Blakey, Deputy
District Attorney 2691

_____
George Vahsholtz, Deputy
District Attorney 7179
4th Judicial District

CERTIFICATE OF MAILING

I hereby certify that I have mailed a true and correct copy of the foregoing to Kenneth Dresner, advisory Attorney for Theodore Bundy, pro se, Jordon Bldg. Suite C.,307 N. Main Gunnison, Colorado 81230 and Kevin O'Reilley, advisory Attorney for Theodore Bundy, and Theodore Bundy, % of Garfield County Jail on the 28th day of October, 1977.

_____

IN THE DISTRICT COURT WITHIN AND FOR

THE COUNTY OF PITKIN AND STATE OF COLORADO

Criminal Action No. C-1616

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff, vs. THEODORE R. BUNDY, Defendant.	MEMORANDUM BRIEF IN SUPPORT OF PEOPLES POSITION IN OPPOSITION TO DEFENDANTS MOTION FOR BILL OF PARTICULARS

In order to properly consider the People's position concerning the Defendants' Motion for Bill of Particulars, the principles behind the bill and the law pertaining to the bill should first be examined. It is the People's position that the Defendant, through his Motion, is attempting to procure disclosures of the prosecutions evidence, conclusions of law, and theories of the case. It is further submitted that most of the particulars are subterfuges for discovery and the Defendants own investigation of the evidence in the case. These purposes, masked in the tacit design to do indirectly what the Defendant will not do directly, are not the proper purposes for which the bill of particulars is designed. As the cases point out this is not the appropriate use of a Bill of Particulars and, in fact, such use would greatly hinder the efficient prosecution or this case through the unnecessary limitation of evidence which, characteristically, is the hidden effect of a Bill of Particulars.

At first glance, the law surrounding the determination of whether or not a bill of particulars should issue, is strikingly amorphous and general in its wording. Thus, statements like, "the proper office of a Bill of Particulars in criminal cases is to furnish to the Defendant further information respecting the charge stated in the indictment when necessary to the preparation of his defense, and

to avoid prejudicial surprise at the trial" US v. United States Gypsum Co. 37 F. supp 398 (DC Dist. Col; 1941), are seen throughout the law pertaining to a Bill of Particulars. In the interstices of the generalities, however, one can glean the more specific rules and principles which should be applied.

There is no doubt, absent an express statutory provision to the contrary, that the grant or refusal of a motion for such a bill generally rests in the sound discretion of the trial Court, and its action will not be disturbed on writ of error in absence of an abuse of discretion. Balltrip v. People 157 Colo. 108, 401 P2d. 259 (1965).

The purpose of a Bill of Particulars is to define more specifically the offense charged. "It is not its purpose to disclose in detail the evidence upon which the prosecution expects to rely (emphasis added)" Balltrip v. People (Supra); Fischer v. United States, 212 F2d. 441 (10th Cir. 1954). In general, the factors involved in determining whether a Bill of Particulars should be granted include, among others,such matters as (1) the nature of the particulars demanded; (2) the possible necessity of further information that is furnished the accused by the indictment or information, or which he acquires from other sources, in order that he may prepare his defense, and (3) the possibility that such a bill is necessary in order to protect him from a second prosecution for the same offense. Annotation; "Right of accused to Bill of Particulars" 5 ALR 2d 444). Thus it has been held that a provision authorizing a Bill of Particulars does not entitle a defendant to explore at will all the evidence which the government may hold against him. Morgan v. Us (CA9 Cal) 380 F2d 686, cert den 390 US 962, 19L Ed 2d 1160, 885 Ct. 1064.

It is clear, from the cases, that a Bill of Particulars may have several objects as its purpose. That purpose is generally ascertainable by the way in which the bill was drafted, or, in most of the cases, the actual specific requests made therein. One such tactical object is to limit the prosecutions evidence. The rule is clear that Bill of Particular Motions are seldom granted where to do so would unduly limit the prosecutions evidence. US v. Greater Kansas City Retail Coal Merchants Assoc. (DC Mo) 85 F. Supp 503. This is particularly true where the underlying objectives of the motion are satisfied by the states voluntary disclosure of the case file. US v. Schembari (CA4 VA) 484 F2d 931. One Court characterized such strategy as follows: "While pinning down the government may be incidental boon to a defendant in a situation where a motion for Bill of Particulars is allowed, it is not the prime consideration in allowing or disallowing the motion, and the motion should be denied where the indictment properly acquaints the defendant with the nature of the charges pending against him." US v. Pellegrini (DC Mass) 198 F Supp 440.

Some Courts have characterized their ruling on a Bill of Particulars Motion by the way of establishing a burden. This has particularly been true in cases of requests for disclosure of information relating to facts surrounding potential witnesses. U. v. Robinson (DC NY) 42 FRD 421; State v. Costello, 5 Conn Cir 51, 241 A2d 548. In fact, the general rule is that an accused cannot require a Bill of Particulars if the specifications asked for are within his own knowledge, or readily accessible to him. US v. Hedges (CA 10) 458 F2d 188; State v. Hill, 211 Kan 287, 507 P2d 342; King v. US (CA 10) 402 F2d

289; US v. Ansani (CA f Ill) 240 F2d 216, cert den 353 US 936. This is particularly true if the specifications asked for are evident from an examination of the pleadings as a whole, or may be procurred through other means readily accessible to him. Talmadge v. US (CCA 7th Ill) 4 F2d 372; cert den 268 US 694; Hood v. US (CCA 10th) 78 F2d 150; Gates v. Us 122 F2d 571 (CA 10; 1941), cert den 314 US 698; Commonwealth v. Barron (Mass) 252 NE2d 220. This rule is entirely consistent with the defendants discovery rights under Colorado Rule of Criminal Procedure 16. One Court responded: "It is not an abuse of discretion in denying defendants motion for Bill or Particulars where the state at all times has been ready, willing, and able to provide him with a list of state's witnesses and permit him to confer with them had request been made." State v. McCabe, 1 NC App 461, 162 SE2d 66.

Consistent with the above is another universally accepted rule: An accused is not entitled as of right to the granting of a motion for Bill of Particulars which calls merely for conclusions of law or the legal theory of the prosecutors case. US v. Dilliard (CCA 2d NY) 101 F2d cert den 306 US 635; US v. Ansani (CA 7th Ill) 240 F2d 216, cert den 353 US 936; US v. Schillaci (DC NY) 166 F Supp 303. This rule may not, at first glance, appear to operate in many cases. Its applicability, however, is more apparent when one looks at the affect the disclosure of particular facts, which become limiting through the medium of a Bill of Particulars, has on the Peoples case. The effect is to require the District Attorney to choose, prior to trial, which theory or strategy he will proceed. Facts make the theory of the case, not lawyers. Thus, while it is encumbant upon the accused to anticipate the

prosecutors case and be prepared, the defense is not entitled to a Bill of Particulars of the prosecutors theory of proof or the evidence which he intends to introduce. US v. Fruehauf (DC NY) 196 F Supp 198. It is submitted that by granting the Defendant's Motion, the People would be required to elect, prior to trial, which theory to proceed on without adequate knowledge of the facts.

The theory of the Peoples case is, by necessity, inextricably tied to the facts of that given case. Facts, of course, often develop differently at trial then prior to trial and, therefore, a given theory or argument will change as the complexion of the facts develop. All of this is dependant upon an analysis of the facts by the prosecuting attorney. By requiring the People to limit their choices, prior to trial, by a Bill of Particulars, the Court would, ispo facto, be limiting the relevant theories by which the People may proceed.

The courts have long recognized the tactical misuses of the Bill of Particulars. As a result, a long standing rule exists that a Bill of Particulars, the furnishing of which would amount to a disclosure of the prosecutor's evidence, will not be granted. US v Long (CA 8 Mo) 449 F2d, cert den 405 US 974, 31, L Ed 2d 247, 92 S Ct 1191, US v. Addonizio (Ca 3 NJ) 451 F 2d 49, cert den 405 US 936; State v. Ciaveu, 215 Kan 546, 527 P 2d 1003; Fischer v. US (CA 10 Colo.) 212 F 2d 441; Cefalu v. US (Ca 10, Colo.) 234 F2d 522. The real purpose of a Bill of Particulars is to better apprise the defendant of the crime charged, not to furnish him in advance with the governments evidence. And, therefore, a motion of this character which would unduly limit the evidence of the government should not be granted. Mulloney v. United States (1935, CCA Mass) 79 F 2d 566, cert den 296 US 658. The key distinction

between a Bill of Particulars and discovery rights lies in the effect of the Bill of Particulars to limit proof. US v. Kessler (DC NY; 1942) 43 F Supp 408. Indeed, merely because the disclosures would be helpful to the defense, motions of this sort are "usually not granted for the purpose of disclosing evidence." US v. Goldstein (DC Del) 56 FRD 52. Where the Court has granted the defendant full discovery, as it has here, it has been held that the defendants request, by motion of Bill of Particulars, as to day, time, and place of the commission of the offenses and his role of participation therein should be denied. US v. Clay (CA 9 Ariz) 476 F 2d 1211. It is submitted that the defendants motion for Bill of Particulars is designed as a subterfuge for discovery and represents, in reality, an attempt for disclosure of the prosecutors evidence, the effect of which, unlike discovery, would limit the proof at trial.

The cases show consistent denials for Bills of Particulars when specific evidence information is requested. It has been held in a prosecution for murder, that the court did not abuse its discretion in refusing to grant a motion for a bill of Particulars that requested those facts the state contended showed premeditation and malice, in addition to the specific acts which the defendant allegedly committed. Wilson v. State 4 Md App 192, 242 A2d 194 cert den 394 US 975, 22 LEd 2d 754, 89 S. Ct. 1467. This is precisely the nature of the Defendants motion before the Court now. The Defendant is asking the prosecution to analyze its facts and then state which aggravating factors are present. The error in this request is the affect it has on the limitation of evidence, facts which

should not be so limited if relevant and admissible.

Because of the peculiar nature of the bifurcated trial, where death is a possibility, the above rules are even more relevant and take on added strength. For example, CRS (1973), 16-11-103 (b)(d) lists the aggravating factor of; "He intentionally killed a person kidnapped or being held as a hostage by him or by anyone associated with him." The potential scenarios as to how the District Attorney could either argue this circumstantially or learn of it at trial are not hard to imagine. The most obvious examples; the witness who recounts his previous statements or evidence which is recently discovered during the course of trial (especially a lengthy one) are often common. If a Bill of Particulars is granted the People would be precluded from arguing those factors and its corresponding evidence.

Finally, it is submitted that the Defendants motion is misphrased. The motion should be entitled "Motion for Discovery." It is the Peoples position that each and every potential aggravating factor can readily be determined by Discovery. That motion is more appropriate for two reasons: one; it does not limit the Peoples evidence at trial, and; two, it protects the Defendant from surprise and allows him to prepare his defense based upon all of the information which the prosecution has knowledge of. This is particularly true given the fact that discovery is ongoing and attachs the moment new evidence arises. Colorado Rule Criminal Procedure 16 (I) (a) (4) and (III) (b).

In summation, it is the Peoples position that the affect and intent of the Defendants' bill is to limit the prosecutor's evidence, require the People to elect as to their trial strategy and theories of the case and, not incidently, merely limit the Defendant's preparation for trial on the matter. This is clearly not the design nor appropriate use of the Bill of Particulars. US v. Kenny (CA NJ) 462 F2d 1205, cert den 409 US 914, 34 L Ed 2d 176, 93 S Ct 233, 234.

Respectfully submitted,

FRANK G.E. TUCKER
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By _____
Milton K. Blakey, 2691
Deputy District Attorney

_____
Lance Sears
Deputy District Attorney
Fourth Judicial District

2. Due to recent developments and work load in the District Attorney's Office of the Fourth Judical District, counsel has been unable to do the research necessary to response to the Defendant's brief and has likewise, been unable to complete the additional research and rewriting of the memorandum opposing the Defendant's Motion for Bill of Particulars.

3. Counsel for the People believes that adequate presentation of this issue of the law requests such additional time and that such extention as requested here will not be prejudicial to the Defendant.

Wherefore, the People move this Court for an extention of time to file briefs in Opposition to Defendant's Motion to Strike Death Penalty and Motion for Bill of Particulars. It is requested that the time be extented until July 15, 1977, to file the brief in opposition to Motion for Bill of Particulars and until July 29, 1977 to file brief in Opposition to Defendant's Motion to Strike Death Penalty.

The People further moves the Court to grant this Motion ex parte and to grant defendant such extentions as would be reasonable required by this delay.

Respectfully submitted,

FRANK G.E. TUCKER
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By _____ 2691
Milton K. Blakey
Deputy District Attorney

IN THE DISTRICT COURT WITHIN AND FOR

THE COUNTY OF PITKIN AND STATE OF COLORADO

Criminal Action No. C-1616

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff, vs. THEODORE R. BUDNY, Defendant.	PEOPLE'S MEMORANDUM OF LAW CONCERNING SEARCH AND SEIZURE

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PEOPLE'S MEMORANDUM OF LAW CONCERNING SEARCH AND SEIZURE

ISSUE I

SEARCH OF DEFENDANT'S VEHICLE ON AUGUST 16, 1975, AND THE SEIZURE OF ITEMS THEREFROM WAS LAWFUL PURSUANT TO DEFENDANT'S KNOWING AND INTELLIGENT CONSENT TO SEARCH.

At the hearing on the Motion to Suppress the court heard testimony from Sergeant Hayward, of the Utah Highway Patrol concerning the stopping of defendant's vehicle on August 16, 1975. He testified that he had stopped the defendant in a residential area near his (Sergeant Hayward's) home for attempting to evade an officer. After stopping the defendant, Sergeant Hayward observed the right front seat of the car was lying in the back seat and that there was a crowbar and a satchel sitting next to the driver's seat in the defendant's vehicle.

Sergeant Hayward indicated that he asked the defendant for permission to search his car and the defendant responded, "Go ahead." Sergeant Hayward described the defendant as being cooperative throughout the entire contact after he was stopped.

At the request of Sergeant Hayward, Detective Daryl Ondrak, Salt Lake County Sheriff's Office, came to the scene and after being told by Sergeant Hayward that the defendant had given consent to search his vehicle, he proceeded to search the vehicle and to recover various items of evidence from the interior of the vehicle and from the trunk area.

The testimony of Detective Ondrak further establishes the cooperative attitude of the defendant and the amicable nature of the contact with defendant during the search of the vehicle.

The only reasonable conclusion to be drawn from an overall evaluation of the evidence is that the "totality of the circumstances" in this case show that the defendant gave his consent voluntarily, knowingly and intelligently.

BURDEN OF PROOF

In a Motion to Suppress Evidence the prosecution has the burden of proving by a "preponderance of the evidence" that consent has been given to effect a warrantless search. That burden is set forth in United States v. Matlock, 415 U.S. 164 (1974). The court referred to its decision in Lego v. Twomey, 404 U.S. 477(1972), as the primary authority on the issue of burden of proof in suppression hearings.

In Lego v. Twomey, the court considered the petitioner's claim that when evidence is attacked on constitutional grounds its admissibility must be established beyond a reasonable doubt. The court rejected this position and held that there was no evidence that Fourth Amendment rights were endangered by the "preponderance standard." The court went on to state:

> "Without good cause, we are unwilling to expand currently applicable exclusionary rules by erecting additional barriers to placing truthful and probative evidence before state juries and by revising standards applicable in collateral proceedings". 404 U.S. at 488-489.

In that case the court indicated clearly that the use of the "preponderance standard" best protected the public interest as well as the constitutional rights of an accused.

> "...It is very doubtful that escalating the prosecution's burden of proof in Fourth and Fifth Amendments suppression hearings would be sufficiently productive... to outweigh the public interest in placing probative evidence before juries for the purpose of arriving at truthful decisions about guilt or innocence." 404 U.S. at 489.

It is clear then that the burden of proof is upon the People to establish "consent" by "a preponderance of the evidence."

REQUIREMENTS OF A VALID CONSENT

The United States Supreme Court set down the requirements for a valid consent to search in Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041,(1973). In that case,the Supreme Court stated the principle that to be constitutionally valid a consent search must be "voluntary." The court went on to hold that a question whether a search was "voluntary" or the product of duress or coercion, was one to be determined from the "totality of all the circumstances."

It was urged upon the court that a concept of "wavier" as put forth in Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, (1938). The court specifically rejected the position stating:

> "In short, there is nothing in the purpose of application of the waiver requirements of Johnson v. Zerbst, that justifies, much less compels, the easy equation of a knowing waiver with a consent search. To make such an equation is to generalize from the broad rhetoric to make such an equation as to generalize and to ignore the substance of the differing constitutional guarantees. We decline to follow what one judicial scholar has termed "the domino method of constitutional adjudication...wherein every explanatory statement in the previous opinion is made the basis for extension to a wholly different situation". Schneckloth v. Bustamonte, 412 U.S. at 246.

The Colorado courts have looked at the requirements of a valid consent search and have likewise adopted the requirement that a consent to a warrantless search be given voluntarily, knowingly and intelligently and that determination in a particular case is to be determined by "the totality of circumstances" test. Phillips v. People, 462 P.2d 594 (1969); People v. Wieckert, 554 P.2d 688 (1976); People v. Hancock, 525 P.2d 435 (1974). Capps v. People 426 P.2d (1967) and People v. Hayhurst, S.Ct.27748, decided November 21, 1977. (opinion attached)

The courts have reviewed many factors within the "totality of circumstances" that maybe viewed in determining the issue of "voluntariness."

The courts will look at the time of the search, the custody or non-custody of the defendant and other pertinent surrounding factors that will indicate the presence or absence of "coercoin or duress," Capps v. People, supra. People v. Benson , 544 P.2d 646, (1975); Phillips v. People, supra; Hayhurst v. People, supra.

The court's attention is particularly drawn to the Hayhurst case regarding the issue of advisment of the right to withhold consent to search. That case, citing Schneckloth and others, makes clear that in spite of the possibility that our state constitution and statutes may impose on police activity greater restrictions than those mandated by the Federal Constitution, such will not be done by the Supreme Court of Colorado in this instance. The court notes, "...while proof that an express advisement was given in a particular case certainly would lighten that burden, and such a warning--if given--would be a persuasive factor to be considered in determining voluntariness, other evidence is quite often adequate to prove that a consent was voluntary, knowing, and intelligent."

It is quite clear then under the law of Colorado, following that set forth by the U.S. Supreme Court, that an expressed advisement is not required.

In conclusion, it is clear from the uncontradicted testimony of Robert Hayward and Daryl Ondrak that the "totality of the circumstances" surrounding the consent to search the defendant's Volkswagon on August 16, 1975, was clearly given and that the fruits of that search are therefore admissible.

SEARCH OF DEFENDANT'S APARTMENT
AUGUST 21, 1975

THE TOTALITY OF THE CIRCUMSTANCES SHOWS A VOLUNTARY CONSENT TO WARRANTLESS SEARCH OF THE DEFENDANT'S APARTMENT AUGUST 21, 1975.

The law applicable to the consent to search the defendant's apartment is essentially the same as the law previously stated concerning consent to search defendant's vehicle. Here a review of the evidence likewise shows a voluntary consent to warrantless search. The uncontradicted testimony of Detective Ben Forbes, indicates that he went to Mr. Bundy's cell where he had been placed after his arrest and requested Mr. Bundy execute a consent to search his apartment. The evidence shows that Mr. Bundy's attitude was one of cooperation and that clearly he understood what he was doing at that time. The evidence indicates that Detective Forbes gave Mr. Bundy his Miranda rights during that same conversation prior to the execution of the search waiver and that the defendant understood the nature of his Miranda warning. The evidence is clear from the testimony and the signed consent to search in evidence before this court that the defendant knew what he was doing and that this waiver was voluntary and not the product of coercion or duress.

The evidence indicates that he was taken from the Salt Lake County jail to his arartment a few hours later by Deputies bernardo and Warren, and was driven to his apartment so he could be present during the search. During the search, the evidence indicates that the defendant was cooperative, appeared to understand what was going on around him and at no time requested that the search be terminated. The People therefore submit that based upon the applicable law that the prosecution has established by a preponderance of the evidence, considering the totality of the circumstances, that there was a voluntary consent for a warrantless search of the defendant's apartment and that at no time during the conduct of that search was that voluntary consent revoked or altered.

AUTO SEARCH
OF OCTOBER 3, 1975

THE DEFENDANT HAS NO STANDING TO OBJECT TO THE SEIZURE OF THE VOLKSWAGON PREVIOUSLY OWNED BY HIM ON OCTOBER 3, 1975, ANY SEARCH OF THAT VEHICLE OR THE ADMISSION OF ANY PROPERTY TAKEN FROM THAT VEHICLE ON OR AFTER OCTOBER 3, 1975.

It is well established law that one who seeks application of the exclusionary rule by alleging a violation of his constitutional rights must establish "standing" to object. The basis of our U.S. constitutional law of "standing" is Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 1960. Prior to the Jones decision standing to contest an unlawful search was largely determined on the basis of the common law rules of trespass and property interest. The Jones case broadened our concept of standing to encompass all persons who have an "interest" in the premises or place searched. Therefore, standing can be based upon defendant's relationship to the situs of the search either by having a present possessory interest in the property searched, legimate presence upon the premises, or upon defendant's relationship to the property seized. It is well accepted today that the Fourth Amendment protects persons in any area in which there is a reasonable expectation of freedom from state intrusion. Katz v. United States, 389 U.S. 347 88 S.Ct. 507(1967); Alderman v. United States, 394 U.S. 165 89 S.Ct. 961(1969).

However, there clearly must be some "interest in" the things seized or the place searched before the defendant has standing to assert any constitutional violations. If the defendant does not carry his burden of showing that he is an aggrieved person his motion should properly be denied. People v. Towers, 176 Colo. 29,49 P.2d 302(1971); People v. Parker, 541 P.2d 74 (1975).

It is equally clear that a person who has abandoned an automobile has no standing to object to evidence seized in a warrantless search of the car. Kurtz v. People, 177 Colo. 306, 494 P.2d 97 (1972).

It is also been held in Colorado that automatic standing does not result from mere possession of a vehicle, People v. Trusty, 516 P.2d 423 (1973).

Two Colorado cases further indicate that the defendant has the burden of showing a colorable interest in the vehicle which is searched. Two Colorado cases indicate agreement with the majority of view that a person in unauthorized possession of the vehicle or in stolen vehicle has no standing to object to a search of that vehicle. People v. Pierson, 546 P.2d 1259 (1976), People v. Velasquez, Colo. Ct. App. No-75-938, Non-published opinion April 7, 1977.

WARRANT SEARCH

THE VOLKSWAGON PREVIOUSLY OWNED BY THE DEFENDANT WAS SEIZED OCTOBER 3, 1975, FROM THE OWNER BRIAN SEVERSON, PURSUANT TO A WARRANT.

It is axiomatic that once the search has been conducted pursuant to a warrant that the defendant has the burden of going forwarding and establishing by a prepondance of the evidence any illegality which renders a warrant invalid. The People submit that the court has before it a warrant properly obtained and signed which has not been shown to suffer from defects in its execution and therefore, carries the presumption of validity.

The existence of a warrant places the burden on the defendant to go forward and attack the warrant. Theodor v. Alfinito, 211 N.E. 2d (1965).

If the defendant attacks the issuance of the warrant as being supported by material misrepresentation of fact, it is defendant's burden to go forward and establish the material misrepresentation by a preponderance of the evidence. State v. Iowa District Court in and for Johnson County, 247 N.W. 2d 241(1976).

However, there are other jurisdictions that hold that it is impermissible to go behind the warrant at all. The Oklahoma Courts hold:

> "We are of the opinion that the rule followed in Illinois is the better rule and therefore reaffirm our holding in Gaddis v. State, supra, wherein at page 45, citing a long line of Oklahoma cases we stated:
> "Where an affidavit to procure a search warrant is in positive terms one will not be permitted to go behind the affidavit and show the officers did not have knowledge of the charges alleged in the affidavit."
> "To this we add that the claim of perjury does not avoid this rule; the remedy for perjury in the securing of a search warrant is to punish the affiant rather than to exclude the evidence." See, Jakuboski, supra.

This rule has been followed by many states. Arizona v. Raboy, 24 Ariz.App.586,540 P.2d 712(1975). The split of authority has not been ultimately decided by the U.S. Supreme Court. North Carolina v. Wren, 417 U.S. 973, 94 S.Ct. 3180(1974).

STANDING-BURDEN OF PROOF

THE BURDEN OF PROOF AS TO STANDING IS CLEARLY UPON THE DEFENDANT.

A detailed review of the law concerning defendant's burden to establish standing is set out in an opinion by Mr. Justice Moylan, In Duncan v. State, 27 Maryland App., 302, 340 A.2d 722 (1975).

The evidence at the suppress hearing was clear and uncontradicted that the defendant had sold the vehicle on or about September 17, 1975, to one Brian Severson. The evidence indicates that Mr. Bundy delivered the title to Mr. Severson, Mr. Severson paid Mr. Bundy eight hundred dollars ($800.00). Mr. Bundy gave Mr. Severson a bill of sale at the time Mr. Severson took possession of the car. It is very clear from the record that after December 17, 1975, the defendant Theodore R. Bundy, had no proprietary or possessory interest in that vehicle.

If the defendant seeks to assert here an expectation of privacy, protected by the Fourth Amendment, then the People submit that clearly his actions are inconsistent with any reasonable expectation of privacy.

The People submit that the facts before the court establish that the defendant had met the purchaser, Brian Severson, only once prior to the transaction. That on the date of the transaction, September 17, 1975, the defendant handed over to Brian Severson, the notarized title and a hand written bill of sale. The evidence shows that there was no conversation concerning Mr. Bundy's future use or possession of that vehicle and there is nothing in the evidence that is consistent with any agreement that Mr. Bundy at any time after September 17, 1975 would have any possessory or proprietary interest in the Volkswagon sold to Mr. Severson. Therefore, if that is the defendant's contention, it certainly falls under the overwhelming weight of the evidence.

CONCLUSION

The People submit that based upon the facts and the record and the applicable law pertaining to consent to search, standing, and search pursuant to a warrant, that the defendant's motion to suppress must be denied by the court.

Respectfully submitted,

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