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<b>DISTRICT COURT OF OTERO COUNTY</b> <b>STATE OF COLORADO</b> 13 West 3 <sup>rd</sup> Street, Rm. 207 La Junta, CO 81050	DATE FILED: May 8, 2015 11:36 PM
<b>Plaintiff:</b> <b>PEOPLE OF THE STATE OF COLORADO</b>  v.  <b>Defendant:</b> <b>JAMES ADAM PATRICK ASHBY</b>	
<b>Attorneys for Defendant:</b> BRUNO, COLIN & LOWE, P.C. Michael T. Lowe, #33489 <a href="mailto:mloew@brunolawyers.com">mloew@brunolawyers.com</a> Carrie L. Slinkard, #40288 <a href="mailto:cslinkard@brunolawyers.com">cslinkard@brunolawyers.com</a> 1999 Broadway, Suite 4300 Denver, Colorado 80202 Telephone: (303) 831-1099 Facsimile: (303) 831-1088	▲ COURT USE ONLY ▲  Case No. 2014CR217  Division: A Courtroom 206
<b>REQUEST FOR NOTICE OF INTENT TO ADMIT PRIOR BAD ACTS EVIDENCE,          SIMILAR TRANSACTION EVIDENCE, AND RES GESTAE EVIDENCE D-10</b>	

COMES NOW, the Defendant, James Adam Ashby, by and through his undersigned counsel, who respectfully requests an order from this Court requiring the prosecution to provide Defendant with advance notice of the People's intent to offer prior bad act evidence, similar transaction evidence, and/or *res gestae* evidence at trial against the Defendant in the above captioned case. Defendant hereby renders his formal objection to the admission of any such evidence at trial, and further, requests a hearing to litigate the admissibility of such evidence in advance of trial, should the prosecution intend to present such evidence to the jury in the above captioned case. In support thereof, Defendant states as follows:

Certification of Conferral Pursuant to C.R.C.P. 121, §1-15(8)

Undersigned counsel hereby certifies that he made good faith efforts to confer with the District Attorney regarding this Motion. Undersigned counsel conferred about general objections with the District Attorney on May 6, 2015, noticing that he would thereafter call to confer on the remaining motions. Telephone messages were left for the District Attorney on the afternoon of May 8, 2015, for conferral on Defendant's remaining motions, but, counsel were not able to confer prior to filing this Motion. Counsel will continue to attempt to confer, and if any of Defendant's motions are unopposed notification of the same will be filed with the Court

1. The information disclosed thus far to the defense contains an extensive amount of information and documentation unrelated to the charged offenses in this case, and detailing events which occurred well in advance of the incident at issue. The defense has not yet received notice from the prosecution of the People's intent to introduce prior bad act evidence in this case, and at this time it is unknown whether additional undiscovered potential bad act evidence, similar transaction evidence, or *res gestae* evidence may be referenced by the prosecution at trial in this case. Based on the sheer amount of time, energy, and resources the People have dedicated to the collection of background information related, however tangentially, to Defendant, which information is entirely unrelated to the charged offenses at hand, it is apparent the prosecution is engaging in a widespread fishing expedition seeking information that, if presented to a jury, would do nothing more than attempt to prejudice the Defendant and tarnish his character and reputation, without providing any substantive relevant or material information to the jury in reference to this case.
2. The information sought out by the State during this extensive background investigation into the Defendant's personal and professional history, was in fact eventually obtained by the lead C.B.I. Agents who were assigned to investigate the circumstances surrounding this case. The information sought by the State, however, was collected by way of faulty search warrants that were not supported by probable cause and therefore, insufficient on their face.<sup>1</sup> The information collected included extremely detailed and otherwise *confidential* information about Mr. Ashby's personal background and private life, unrelated to his employment in law enforcement, as well as detailed records about his military career, psychological evaluations and counseling records, his entire employment history, job evaluations by employers entirely unrelated to law enforcement, medical documentation and health evaluations and prior worker's compensation claim details, in addition to confidential financial documents, confidential personnel files in entirety, and confidential internal affairs investigative files which – importantly – include *Garritized* statements by the Defendant that cannot be used against him as a matter of law in these criminal proceedings.
3. As such, given the thousands of pages of discovery received by the defense in this case – the bulk of which is entirely unrelated to the crimes charged, as neither offense includes as an element an “intentional” *mens rea* - undersigned counsel simply cannot prepare a defense for trial unless specific information the prosecution intends to offer is identified, along with the precise legal purpose for which such evidence would be admitted.
4. Colorado Rules of Evidence 103 and 104 envisage an opportunity for the Defendant to litigate the issues concerning the admissibility of potentially prejudicial and inadmissible evidence outside the presence of the jury and prior to trial. The Colorado Supreme Court has often indicated that it prefers the same procedure in the interests of efficiency and judicial economy. People v. Garner, 806 P.2d 366 (Colo. 1991); Stull v. People, 344 P.2d

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<sup>1</sup> A detailed Motion to Dismiss in reference to Defendant's assertions that the search warrants – upon which the prosecution subsequently obtained the documentation and records noted in this paragraph herein – were faulty and lacking in probable cause further stated in Defendant's pending Motion to Suppress [ ]

455 (Colo. 1960). This cannot occur without adequate notice to the defense and adequate opportunity to prepare and respond.

5. Judicial economy is greatly served by requiring the State to disclose its intentions with regard to such evidence, so as to prevent this Court and counsel from both sides from having to laboriously and needlessly litigate each and every particular point at trial. Further, allowing the Defendant the opportunity to address these issues pretrial prevents him from ending up in the untenable position of needlessly having to delay testimony during trial; or alternatively, waiving his right to a speedy trial so the parties can address these issues after undersigned counsel has been given notice and has had the opportunity to prepare.
6. CRE 404 restricts the use of prior bad act evidence against a defendant in a criminal case. It is a bedrock principle of criminal law that a person accused of a crime not be convicted upon proof that he committed other crimes or other bad acts. People v. Rath, 44 P.3d 1033, 1037 (Colo. 2002). Evidence of other bad acts offered to establish a person acted in conformity with that character, also known as “propensity evidence,” is generally inadmissible. Id at 1038; C.R.E. 404(b). Alleged prior bad acts are inadmissible absent a prosecutorial showing of the four-part relevancy test established in Garner, 806 P.2d at 373, and People v. Spoto, 795 P.2d 1314, 1318 (Colo.1990).
7. Should the prosecution seek to admit prior act evidence, the defense will supplement this motion with specific argument as to why such evidence does not meet the relevant prongs required for admissibility, as set forth by the Colorado Supreme Court in Garner and Spoto.
8. In addition, such evidence is also inadmissible under CRE 401 and 403. Should the prosecution seek to admit prior bad act or *res gestae* evidence, the Defendant will also supplement this motion with more specific arguments as to why the evidence is not relevant, why it may not be properly admitted as *res gestae* evidence, and why the probative value of the evidence would be substantially outweighed by its prejudicial effect.
9. Undersigned counsel requests the Court order the prosecution to provide notice of its intention to present evidence of prior bad acts, similar transactions, or *res gestae* evidence. Counsel also requests all discovery of any alleged incidents, including the specific dates and locations of the incidents, any and all information on any witnesses to the alleged acts, and all reports and physical evidence collected in reference to each individual incident.
10. Defendant also requests that this Court order the prosecution to disclose the specific evidentiary hypothesis upon which a material fact can be inferred from the prior bad act evidence, separate and apart from the impermissible uses otherwise forbidden by CRE 404(b). Garner, 806 P.2d at 373; Spoto, 795 P.2d at 1318.
11. Absent the requested safeguards, the Defendant will be deprived of his right to confront witnesses, his right to due process, his right to present a defense, his right to the effective assistance of counsel, and his right to a fair trial as guaranteed by both the United States and Colorado Constitutions.

12. The Defendant therefore moves this Court for a pretrial hearing on the matter well in advance of trial, should the prosecution provide notice to the defense of the People's intent to admit such evidence at trial. The Defendant renders his further objection to the prosecution proceeding by way of offer of proof on this issue.
13. Defendant makes this Motion and objection and all motions and objections in this case, whether or not specifically noted at the time of the making of the motion or objection, on and under the following grounds, authorities, and Clauses: Due Process, the Right to Trial by Jury, the Right to Counsel, Equal Protection, Cruel and Unusual Punishment, Confrontation, Compulsory Process, the Right to Remain Silent, and the Right to Appeal of both the federal and Colorado Constitutions; as well as the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitution, and Article II, Sections 3, 6, 7, 10, 11, 16, 18, 20, 23, 25, and 28 of the Colorado Constitution, and Crim. P. 16.

DATED this 8<sup>th</sup> day of May, 2015.

Respectfully Submitted,

BRUNO, COLIN & LOWE, P.C.

By: s/Michael T. Lowe

Michael T. Lowe

Carrie L. Slinkard

*Attorneys for Defendant*

In accordance with C.R.Crim.P. 49.5(g), a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by the other parties, or the Court upon request.

#### **CERTIFICATE OF SERVICE**

I hereby certify that on May 8, 2015, a true and correct copy of the foregoing **REQUEST FOR NOTICE OF INTENT TO ADMIT PRIOR BAD ACTS EVIDENCE, SIMILAR TRANSACTION EVIDENCE, AND RES GESTAE EVIDENCE D-10** was e-filed and e-served via ICCES E-System, addressed to the following:

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s/Marla A. Brock

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