

DISTRICT COURT, BOULDER COUNTY, COLORADO 1777 Sixth Street Boulder, CO 80302	DATE FILED: April 29, 2024 8:11 AM
<b>PEOPLE OF THE STATE OF COLORADO</b>  v.  <b>AHMAD AL ALIWI ALISSA</b> Defendant	<b>COURT USE ONLY</b>
Michael T. Dougherty, District Attorney Adam Kendall, Chief Trial Deputy District Attorney 1777 Sixth Street Boulder, CO 80302  Phone Number: (303)441-3700 FAX Number: (303)441-4703 E-mail: akendall@bouldercounty.org Atty. Reg. #38905	Case No. 21CR497  Div: 13
<b>Motion for the Admission of Relevant Evidence (P-019)</b>	

Ahmad Al Aliwi Alissa (the “Defendant”) is charged with multiple counts of Murder in the First Degree and Attempt to Commit Murder in the First Degree (along with additional counts) for the mass shooting he committed on March 22, 2021 at the Table Mesa King Soopers in Boulder, Colorado. All actions taken by Defendant on March 22, 2021 were done in furtherance of and in conjunction with each count he is charged with are intrinsic in nature, related directly to each charged count, and do not need to be analyzed under C.R.E. 404(b).

However, under the lens of *Rojas v. People*, 22 CO 8, it is necessary to have this Court rule on the admissibility of certain actions of Defendant in the days and months before March 22, 2021.

**Relevant Facts**

On March 22, 2021, Defendant drove to the Table Mesa King Soopers store in Boulder armed with a semi-automatic Ruger AR-556 pistol (often referred to and described as an assault rifle), other guns, large capacity magazines, and a large amount of ammunition. Soon after he arrived at the store, he began shooting victims in the parking lot before continuing into the store and shooting other victims. Ultimately, he murdered 10 people, and shot in the direction of many others.

Immediately after the shooting, law enforcement began an extensive investigation into Defendant and his behavior and actions in the months before March 22, 2021.

**Offer of Proof of Defendant's Actions Before March 22, 2021<sup>1</sup>**

As part of law enforcements' investigation, they learned the following information about Defendant:

- Approximately 12 to 18 months before March 22, 2021, Defendant went to a gun range with his brother to shoot guns;
- Defendant was working long weeks – up to approximately 60 hours per week – just before March 22, 2021;
- Defendant's phone (which was partially downloaded immediately after the shooting but, after continuous, previous failed attempts to access his phone, was only able to be completely downloaded by experts using the latest technology in the last two months) contains the following information:
  - Note entries beginning on September 24, 2020 continuing through March 17, 2021, describing assault rifle components, how to properly handle an assault rifle, how to move and shoot when using an assault rifle, drills to become competent with an assault rifle;
  - Thousands of images and searches relating to assault rifles, tactical gear – to include bullet proof vests, ammunition vests, helmets, and other gear;
  - Search history and related images related to explosives, including images of fertilizer and other dangerous chemicals;

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<sup>1</sup> The People reserve the right to amend the list once the parties receive the sanity evaluation of Defendant that may highlight other actions or information about Defendant relevant to the sanity determination.

- Internet searches including “Christ Church Attacks,” “Are hollow point bullets more deadly,” and “What is the most deadly type of round bullet;”
- Experts have tagged 8,596 unique data points in the phone that are relevant and continue to comb through his phone to identify all relevant evidence and complete a report – the People anticipate additional highly relevant evidence to be identified (this trove of additional evidence has been largely consistent with previously known and disclosed information);
- On January 19, 2021, Defendant purchased ammunition from Westminster Arms in Westminster, CO;
- On March 16, 2021, Defendant purchased a Ruger AR-556 pistol from Eagles Nest Armory in Arvada, CO; and
- Defendant’s bedroom was searched by law enforcement on March 23, 2021 and contained the following items: a Ruger AR Rifle, magazines for that rifle, a Beretta 9 MM handgun, magazines for the Beretta, large amounts of ammunition for a 45 caliber weapon, a 5.56, a .223, and a 9 mm, along with acetone and hydrochloric acid.

### **Legal Authority**

The most recent charging document in this case was filed by the People on May 24, 2021. Defendant currently is facing 64 counts (counts 65 through 68 were dismissed by the People at the preliminary hearing and an additional 57 counts are sentencing enhancers). Ten of the counts are counts of Murder in the First Degree that require the People to prove that Defendant, after deliberation, and with intent to cause the death of a person other than himself, caused the death of another. *See* C.R.S. § 18-3-102(1)(a).

As this Court is aware, “after deliberation” requires the People prove that Defendant acted not only with intent, but that the decision to commit the act has been made after the exercise of reflection and judgment concerning the act. *See* C.R.S. § 18-3-101(3). An act committed after deliberation is never one which has been committed in a hasty or impulsive. *Id.*

Moreover, on November 14, 2023, Defendant pled Not Guilty by Reason of Insanity (“NGRI”). Insanity is an affirmative defense. § 18–1–805, C.R.S. (2023); § 18-1-802, C.R.S. (2023); *see also* § 16-8-104.5(1), C.R.S. (2023). Once credible evidence of insanity is introduced at trial, the People bear the burden of proving Defendant’s sanity beyond a reasonable doubt. § 18-1-407, C.R.S. (2023); *see also People v. Serravo*, 823 P.2d 128, 140 (Colo. 1992).

Evidence relevant to insanity is defined as evidence showing that “[a] person [] is so diseased or defective in mind at the time of the act as to be incapable of distinguishing right from wrong. . . [or] prevented the person from forming a culpable mental state.” § 16-8-101.5(1)(a),(b), C.R.S. (2023). C.R.S. § 16-8-106(3)(a) instructs that “[t]o aid [experts] in forming an opinion as to the mental condition of the defendant, it is permissible in the course of an examination under this section to use confessions and admissions of the defendant and any other evidence of the circumstances surrounding the commission of the offense, as well as the medical and social history of the defendant, in questioning the defendant.”

***a. Evidence Under Rojas v. People***

*Rojas* abolished the doctrine of *res gestae* and instead established a new framework for courts to use in its place. First, courts must determine if evidence is intrinsic or extrinsic to the charged conduct in the case. *Rojas*, 2022 CO 8, ¶44. Intrinsic evidence is that which directly proves the charged offense, or which occurred contemporaneously with the charged offense and facilitated its commission. *Id.*

If the evidence is intrinsic to the offenses, the trial court must evaluate the evidence under C.R.E. 401, 402, and 403 to weigh the probative value of the evidence. The same standard applies to extrinsic evidence that does not implicate a defendant's bad character. If evidence is extrinsic to the offenses and suggests bad character, courts must weigh it under C.R.E. 404(b) and *People v. Spoto*, 795 P.2d 1314, 1318-19 (Colo. 1990). *Id.* at ¶43.

Although *Rojas* does establish a prong for evidence that is contemporaneous with the charged offense, this does not apply to evidence which directly supports commission of the offense. *Rojas*, 22 CO 8. For instance, *Rojas* cited with approval the case of *United States v. Shea*, 159 F.3d 37 (1st Cir. 1998). *Rojas*, 2022 CO 8, ¶ 49-51.

In *Shea*, the defendant was charged with an attempted bank robbery. Prosecutors sought to admit evidence under 404(b) that a week after the attempted robbery, the defendant was arrested for an unrelated bank robbery and was in possession of a gun matching that used in the initial robbery. The First Circuit found that even though the second robbery took place a week after the charged robbery, the trial court did not need to go through a 404(b) analysis in order to admit evidence of the defendant's possession of the gun, because the defendant's possession of the same gun a week later was direct evidence of the first robbery. *Shea*, 159 F.3d 37, 38-39.

Additionally, the *Rojas* Court provided a hypothetical that explained the types of evidence that constitute character evidence. 2022 CO 8, ¶ 51-52. In the hypothetical, the *Rojas* court expanded on the fact pattern from *Shea* and created a fact pattern where the prosecution had evidence that the defendant had gone to the bank and cashed a check a week before the robbery and intended to use this evidence to argue that the defendant had gone in to case this bank. The *Rojas* Court explained that this would constitute extrinsic evidence but did not implicate the defendant's character because there is nothing criminal about cashing a check. *Id.* Thus, even

where the People may be able to argue nefarious intent from an act, if that act itself does not implicate a defendant's bad character, there is no need to undergo a 404(b) analysis. *Id.*

*Rojas* discussed and overturned another Colorado Supreme Court case, *People v. Greenlee*, 200 P.3d 363, 365–69 (Colo. 2009). *Id.* at ¶ 35. The discussion of *Greenlee* in the *Rojas* opinion is particularly instructive here. The *Greenlee* Court concluded that “the defendant's statement that he wanted to kill a woman and hide her body in a remote area, made two months before the murder at issue, was admissible under general relevancy rules (CRE 401–403) and not excludable under 404(b).” *Id.* The *Greenlee* Court ruled that, “because the statements were relevant independent of the impermissible inference about the defendant's character, 404(b) did not apply.” *Id.* *Rojas* tells us that *Greenlee* is incorrect and that “this criterion is simply part of the 404(b) analysis under *Spoto*, not a basis for avoiding Rule 404(b). If the proffered evidence is extrinsic to the charged crime, which the *Greenlee* court impliedly concluded these statements were, and if it implicates the defendant's character, its admissibility is governed by Rule 404(b). *Id.* (internal citations omitted).

***b. C.R.E. 401, 402, 403***

Barring conflict with the federal or state constitutions, the rules of evidence, or other statutory and case law, “[a]ll relevant evidence is admissible.... Evidence which is not relevant is not admissible.” C.R.E. 402.

Evidence is relevant when it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” C.R.E. 401. “Relevant evidence need not prove conclusively the proposition for which it is offered . . . but it must in some degree advance the inquiry.” *People v. Greenlee*, 200 P.3d 363, 366 (Colo. 2009)(internal citations omitted).

C.R.E. 403 states that relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” Under this rule, trial courts are given broad discretion in balancing the probative value of the evidence against the danger of unfair prejudice. *People v. Ibarra*, 849 P.2d 33, 38 (Colo.1993); *People v. Huckleberry*, 768 P.2d 1235, 1242 (Colo.1989). C.R.E. 403 strongly favors admissibility of relevant evidence, *People v. District Court of El Paso County*, 869 P.2d 1281, 1286 (Colo.1994), and “the balance should generally be struck in favor of admission when evidence indicates a close relationship to the event charged.” *People v. District Court*, 785 P.2d 141, 146 (Colo. 1990) (quoting *United States v. Moore*, 732 F.2d 983, 989 (D.C.Cir.1984)). Therefore, when reviewing a trial court's exercise of discretion in performing the balancing required by CRE 403, an appellate court must afford the evidence the maximum probative value attributable by a reasonable fact finder and the minimum unfair prejudice to be reasonably expected. *District Court of El Paso County*, 869 P.2d at 1285-86; *District Court*, 785 P.2d at 147.

***c. C.R.E. 404(b)***

C.R.E. Rule 404(b) prohibits the admission of evidence of an accused’s character to prove that he acted in conformity therewith. However, evidence of other acts may be admissible if the evidence complies with the requirements of *People v. Spoto*, 795 P.2d 1314 (Colo. 1990).

The four prong test articulated in *Spoto* requires the trial court to be satisfied by a preponderance of the evidence that: 1) the evidence relates to a material fact; 2) the evidence is logically relevant and tends to make the existence of the material fact more or less probable than it would be without the evidence; 3) the logical relevance must be independent of the prohibited inference that the defendant has bad character; and 4) the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice. *Spoto*, 795 P.2d at 1318; *see also*

*People v. Garner*, 806 P.2d 366 (Colo. 1991).

Rule 404(b) provides that evidence of other acts may be admissible to show “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” This list is nonexclusive, and evidence can be admitted for other permissible purposes. *People v. Cousins*, 181 P.3d 365, 369 (Colo. App. 2007). Other acts evidence may also be admitted to show modus operandi, to show a common plan or scheme, or to refute a claim of self-defense. See *People v. Cook*, 22 P.3d 947 (Colo. App. 2000); *People v. McKibben*, 862 P.2d 991 (Colo. App. 1993); *People v. Groves*, 854 P.2d 1310 (Colo. App. 1992); *People v. Delgado*, 890 P.2d 141 (Colo. App. 1994); *Douglas v. People*, 969 P.2d 1201 (Colo. 1998).

The Colorado Supreme Court stated that “almost by definition, similar transaction evidence will suggest bad character and conformity therewith. The third prong of the *Spoto* test does not demand the absence of the inference but merely requires that the proffered evidence be logically relevant independent of the inference.” *People v. Snyder*, 879 P.2d 1076, 1080 (Colo. 1994).

Because the balance required by C.R.E. Rule 403 favors admission, a reviewing court “must afford the evidence *the maximum probative value* attributable by a reasonable fact finder and *the minimum unfair prejudice* to be reasonable expected.” *People v. Rath*, 44 P.3d 1033, 1043 (Colo. 2002) (*citing People v. Gibbens*, 905 P.2d 604, 607 (Colo. 1995)) (emphasis added).

Additionally, the court must consider the purpose for which the evidence is offered, the strength and length of the chain of inferences necessary to establish the proffered fact, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and, if appropriate, the potential effectiveness of a limiting instruction. *Yusem v. People*, 210 P.3d 458, 467–68 (Colo. 2009); *Vialpando v. People*, 727 P.2d 1090, 1096 (Colo.1986).



The standard of review for admission of evidence pursuant to C.R.E. 404(b) is abuse of discretion. As such, trial courts are accorded great discretion in deciding whether to admit evidence of other acts under C.R.E. 404(b), and abuse of that discretion will only be found “upon a showing that the ruling was manifestly arbitrary, unreasonable, or unfair.” *Rath*, 44 P.3d at 1043.

### **Analysis**

- a. Defendant’s actions in the days and months before March 22, 2021 amount to evidence that is either (1) contemporaneous with the charged offense or (2) extrinsic evidence that does not implicate Defendant’s character.**

As an initial matter, *Rojas* and *Shea* inform us that Defendant’s purchase of the Ruger AR-556 and ammunition in the days and weeks before the mass shooting is direct evidence of his crimes on March 22, 2021. *See Rojas*, 2022 CO 8, ¶¶ 49-51. Thus, this evidence directly supports the commission of the offense.

As to Defendant working long weeks just before March 22, 2021, patronizing a shooting range, collecting guns, ammunition, and other legal materials, and the note entries and searches on his phone, under *Rojas*, this evidence is best viewed as extrinsic evidence that does not implicate Defendant’s character. First, individuals go to shooting ranges daily – including law enforcement officers – to practice using guns. There is nothing about this lawful, regular behavior that implicates an individual’s character. The same goes for working hard, long hours. The analysis with regard to Defendant’s phone note entries and searches is nearly identical. Many individuals collect and own multiple firearms, purchase tactical gear for hunting or home protection, and have acid and acetone on hand. People will often study how to best use guns, and often shop for gun related merchandise. Further, searching for information on how to make explosives, mass-shootings, and information on bullets is also not in-and-of-itself illegal activity. This behavior is

not illegal or activity associated with providing false information, unlike the evidence at issue in *Rojas*.

Therefore, the Court need only consider whether this information is relevant under C.R.E. 401 and admissible under C.R.E. 403. “Unfair prejudice does not mean prejudice that results from the legitimate probative force of the evidence.” *People v. Gibbens*, 905 P.2d 604, 608 (Colo. 1995) (internal citations omitted). Defendant’s work schedule, his use of a shooting range, the contents of his bedroom, and his phone searches and notes are clearly relevant in this case. As mentioned above, the People are required to prove that Defendant acted with intent after deliberation when carrying out the murders in this case. Further, with Defendant’s NGRI plea, the People must also prove that he was sane at the time he committed his crimes. The People intend to rely on this evidence, to argue to the jury (1) that Defendant acted with intent after deliberation in carrying out his mass-murder plan and (2) his ability to work long hours and think about and plan his attack is significant evidence he was not insane when he acted on March 22, 2021.

Much like the check cashing hypothetical in *Rojas*, while the People may argue that the actions of Defendant show he planned his attack for months, the actions themselves do not implicate his character. Thus this is admissible, extrinsic evidence.

**b. Additionally, Defendant’s other actions are admissible under C.R.E. 404(b) and the People request the Court analyze all of his actions as C.R.E. 404(b) evidence.**

Under C.R.E. 404(b), the Defendant’s other actions are admissible, and the People request this Court analyze the statements and make findings accordingly. As previously mentioned, the People are obligated to prove beyond a reasonable doubt (1) that Defendant acted with intent after deliberation in carrying out his mass-murder plan and (2) that he was sane on March 22, 2021 when attacking the King Soopers. Defendant’s other actions described above directly relate to

material facts here, namely, that he acted with deliberation by planning out his attack over a series of days and months and that this planning shows that he was capable of distinguishing right from wrong and forming the culpable mental state.

Further, the evidence is relevant independent of an argument that Defendant is a person of bad character. The People are not arguing that Defendant's other actions show he is acting in conformity with any perceived bad character. Rather, each of the other acts is important because it indicates that he put together a plan to attack the King Soopers and put that plan into action. As described in the previous section, the other actions alone do not implicate Defendant's character, and to the degree they do, the evidence is still highly relevant.

Additionally, there is nothing about the proffered evidence to suggest that it would cause the jury to make a decision based upon an improper basis. Any minimally unfair prejudice to Defendant is substantially outweighed by the probative value in proving Defendant's months of planning to carry out his attack on March 22, 2021. The timing and circumstances of Defendant's actions have immense probative value because they directly show his planning and activities leading up to March 22, 2021, close in time to the murders.

Also, pursuant to C.R.E. 105 and caselaw, a contemporaneous limiting instruction and final jury instruction will be given to the jury in order to avoid the concern of unfair prejudice, and jurors are presumed to abide by and follow those juror instructions *See, e.g., People v. McNeely*, 68 P.3d 540, 542 (Colo. App. 2002).

### **Conclusion**

For the foregoing reasons, the People respectfully request that this Court allow evidence of Defendant's other actions detailed above to be admitted at trial. Applying the framework

established by *Rojas*, all of Defendant's other actions identified in this Motion are admissible under C.R.E. 401, C.R.E. 403, and C.R.E. 404(b).<sup>2</sup>

Respectfully submitted,

MICHAEL T. DOUGHERTY  
DISTRICT ATTORNEY

By:  
s/Adam D. Kendall  
Adam D. Kendall  
April 29, 2024

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CERTIFICATE OF SERVICE  
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I hereby certify that a true and correct copy of the above and foregoing served via the Colorado e-filing system on April 29, 2024, and addressed as follows:

Kathryn Herold  
Sam Dunn  
Office of the Colorado State Public Defender – Boulder  
2555 55th Street Suite. D-200  
Boulder, CO 80301

s/Adam D. Kendall  
Adam D. Kendall  
Adam D. Kendall

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<sup>2</sup> As mentioned previously, as the examination of Defendant's phone is ongoing and the parties have yet to receive the sanity evaluation in this case, the People reserve the right to amend this motion at a future date.