SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No.

JULIUS A. WOLF, PETITIONER,

vs.

THE PEOPLE OF THE STATE OF COLORADO

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF THE STATE OF COLORADO

INDEX

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[fol. 1]

IN THE SUPREME COURT OF THE STATE OF COLORADO

No. 15670

JULIUS A. WOLF and CHARLES H. FULTON and BETTY FULTON, Plaintiffs in Error,

vs.

THE PEOPLE OF THE STATE OF COLORADO, Defendants in Error

Error to the District Court of the City and County of Denver.

Honorable Joseph E. Cook, Judge.

Abstract of Record

NOTE RE FILING OF INFORMATION

On May 18, 1944, information was filed charging Julius A. Wolf, Charles H. Fulton and Betty Fulton, with the crime of conspiracy to perform an abortion upon one, Agnes Vera Bashor.

[fol. 2] MOTION FOR SEVERANCE BY DEFENDANT WOLF AND DENIAL THEREOF

"Now comes the defendant, Julius A. Wolf, and respectfully moves this Honorable Court to sever the information herein and to grant to this defendant a separate trial and as grounds for this Motion shows unto the Court:

"1. That at the trial of this cause, there will be introduced in evidence matters that would be material and admissible as against the other defendants, and would be inadmissible as against this defendant if tried alone, and that such evidence so admissible and material as against the other defendants does not relate to the reputation of such co-defendants or either of them.

"2. That to try this defendant jointly with his co-defendants would greatly prejudice him in that such evidence affecting the other defendants would not be

admissible, whereas, if this defendant were tried separately such evidence would not be admissible.

"This Motion is supported by the Affidavit attached hereto.

AFFIDAVIT

"JULIUS A. WOLF, of lawful age, being first duly [fol. 3] sworn upon his oath deposes and says:

"That he is one of the defendants mentioned in the above-entitled cause. That this affiant is informed and believes and so states the fact to be, that on trial of this cause, evidence will be introduced by the State, which would be admissible and material as against the co-defendants, Charles H. Fulton and Betty Fulton, and inadmissible as against this defendant if he were tried separately and alone, and that such evidence does not relate to the reputation of said co-defendant.

"That a more particular statement of such evidence is, so this affiant is informed, substantially as follows:

"That after the arrest of this affiant, and while he was in custody, Louis Malach, a special investigator for the office of the District Attorney informed and stated to this affiant that Charles H. Fulton and Betty Fulton made incriminatory statements involving themselves and tending to show their complicity and participation in the offense alleged. That said alleged statements were made by said co-defendants outside of the presence of this defendant, and while the co-defendants, Charles H. Fulton and Betty Fulton were under arrest. [fol. 4] That the evidence of such incriminatory statements would not be admissible and material as against this affiant, if tried separately, but would be as against said co-defendants.

"That there will be other evidence, this affiant is informed, which would be admissible as against his co-defendants, and inadmissible as against him which does not relate to the reputation of said co-defendants, and this affiant cannot more definitely advise the Court as to the exact nature of said testimony.

"This Affidavit is made in support of a Motion for Severance in accordance with the Statute in such case made and provided.

(Sgd) Julius A. Wolf.

"Denied 8/26/44, by Judge Cook."

MOTION FOR SEVERANCE BY DEFENDANTS FULTON, AND DENIAL THEREOF

On June 2, 1944, defendants Charles H. Fulton and Betty Fulton filed a Motion for Severance, omitting the formal parts, is as follows:

"Come now, Charles H. Fulton and Betty Fulton and respectfully move this Honorable Court to sever the information herein and to grant to these defendants a [fol. 5] separate trial and as grounds for this Motion show unto the Court:

I

"That at the trial of this cause, there will be introduced evidence of matters that would be material and admissible as against the other defendant and which would be inadmissible as against these defendants if tried alone and that such evidence so admissible and material, as against the other defendant, does not relate to the reputation of said other defendant or so-called co-defendant.

II

"That in the event these defendants are tried jointly with the other defendant, they will be greatly prejudiced in that the evidence affecting the other defendant but not affecting these defendants would be admissible, whereas if these defendants are tried separately or are tried separate from the defendant, Julius A. Wolf, such evidence would not be admissible.

"This Motion is supported by Affidavits attached hereto.

Affidavit

"Betty Fulton being of lawful age, and being first [fol. 6] duly sworn upon her oath deposes and says:

"That she is one of the defendants in the above-entitled cause; that she has filed a Motion for Severance, together with her husband, Charles H. Fulton herein, and has, in said Motion, shown to the Court that there is evidence admissible as to the other defendant which will be admitted at the trial against said other defendant and that said evidence is not admissible as to herself and her husband if tried alone.

"That your affiant is informed that Julius A. Wolf, after his arrest and after the termination of the so-called or alleged conspiracy, made statements to the effect that he, the said Julius A. Wolf, had been sending cases to other people, numerous and sundry persons, the names of such persons being unknown to your affiant and that the said Julius A. Wolf made statements and admissions concerning himself, which do not involve these defendants in any conspiracy or criminality but which, if these defendants are tried jointly will reach the ears of the jurors to the irreparable damage and prejudice of the defendants and prevent them from having a fair trial under the statute.

[fol. 7] "Your affiant is further informed that Julius A. Wolf called upon individuals alleged to be involved in this alleged conspiracy and did things and made statements not admissible against these defendants if tried jointly but which would be admitted in evidence against Julius A. Wolf and therefore inherited by these defendants or admitted in the same trial if these cases are tried jointly but which would not be admitted if tried alone; that the admissions, statements and incriminations of Julius A. Wolf do not relate to the reputation of them.

"Further your affiant sayeth not.

(Sgd) Betty Fulton.

Affidavit

"Charles H. Fulton of lawful age and being first duly sworn upon his oath, deposes and says:

"That he is one of the defendants above named, that he has filed his Motion herein for Severance based upon the statutory ground of evidence admissible against him if tried jointly but inadmissible against this defendant if he and his wife, Betty Fulton, are tried separately.

"Your affiant is informed that at the trial of this [fol. 8] cause there will be evidence introduced of admission and statement of Julius A. Wolf not relating to reputation and not admissible against this defendant or his wife, Betty Fulton, if tried alone and your affiant is informed that Julius A. Wolf has made incriminating admissions, after the termination of the alleged conspiracy and has said that he forwarded cases

to persons unknown and unheard of by these defendants and has made other statements admissible to himself but not admissible against Charles H. Fulton and Betty Fulton, if tried alone.

"Further your affiant sayeth not.

(Sgd) Charles H. Fulton."

"Denied 8/26 by Judge Cook."

MOTION TO STRIKE MOTIONS FOR SEVERANCE AND DENIAL THEREOF

On June 9, 1944, District Attorney filed a Motion to Strike Motions for Severance on the ground that the same were vague, indefinite, and a sham, and insufficient in law to support the Motion.

On August 21, 1944, Motion to Strike Motions for Severances denied.

[fol. 9] MOTION OF DEFENDANT WOLF TO SUPPRESS AND RETURN EVIDENCE—Filed February 10, 1945

"Now comes the above-named defendant, Julius A. Wolf, and respectfully shows unto the Court as follows:

"1. That he, the defendant, was in possession of certain books and records, a more particular description of said books and records is hereinafter set forth, which books and records were kept by the defendant in his professional capacity as a physician and surgeon duly licensed, qualified, and practicing in the City and County of Denver, State of Colorado.

"2. That said books and records contained the names of his patients, the treatment which he was administering, and in some instances the ailments from which they were suffering. That it was necessary for the defendant to keep said books and records in order to carry on his profession. That while said books and records were in his possession, the District Attorney of the City and County of Denver, State of Colorado, wrongfully and unlawfully seized and took away the books and records of the defendant depriving him of their use, custody, and inspection, in violation of Article

2, Section 7 of the Constitution of the State of Colorado, [fol. 10] and of Amendments 4 and 5 of the Constitution of the United States.

3. "That said search and seizure was made by the attaches of the District Attorneys office without any search warrant or order of Court, or any other authority whatsoever, in violation of the Constitution of the State of Colorado, and of the Constitution of the United States, which gives to each person the right to be secure in the possession of their books and records.

"4. That on February 5, 1945, the District Attorney endorsed upon the information in the above-entitled cause, the names and addresses of five persons, to-wit:

Juliana Zurcher, 1826 Sherman Street
Prudence Rockman, 1120 Pearl Street
Eloise M. Gorman, 2531 Front View Crescent
Barbara Blitz, 1351 Grant Street
Margaret L. Rogers, 3534 West 45th Avenue

[fol. 11] whom the District Attorney intends to call and use as witnesses, but this defendant states that the testimony of said witnesses which the District Attorney intends to use was obtained wholly by his wrongful possession of the private books and records of this defendant, which he wrongfully seized in violation of the Constitution aforesaid.

"5. That if said witnesses are permitted to testify under the circumstances, the defendant will be compelled to give testimony against himself in a criminal case, all in violation of Article 2, Section 18 of the Constitution of the State of Colorado, and of amendments 4 and 5 of the Constitution of the United States.

"6. Further, the books and records used by this defendant in the course of his professional business were privileged and contained information which under the statute, in such case made and provided, can only be divulged and disclosed with the consent of the various persons named in said books and records, and that it is the defendant's obligation under the statute in such case made and provided to withhold the disclosure of any information communicated to him by any patient in his professional capacity, and the seizure and use of said books and records by the District Attorney is a violation of the statute which makes communication

[fol. 12] between the patient and physician privileged and inviolate.

"7. That the books and records so seized are more particularly described as:

One 1943 Day Book
One 1944 Day Book

which are now in possession of the District Attorney.

"Wherefore, defendant prays that this Honorable Court may enter an order herein directing the District Attorney to forthwith return the books and records to this defendant, and that the information obtained therefrom be suppressed, and that the testimony of the witnesses which the District Attorney obtained as a result of said wrongful seizure of said books and records be suppressed.

"STATE OF COLORADO,
City and County of Denver, ss:

Julius A. Wolf, of lawful age, being first duly sworn upon his oath, deposes and says:

That he has read the above and foregoing Motion, knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which [fol. 13] are therein stated on information and belief, and as to those matters, he believes them to be true.

Sgd. Julius A. Wolf."

ARGUMENT ON MOTION TO SUPPRESS AND RETURN EVIDENCE

"Mr. Hornbein (continuing): In support of this Motion, I would like to offer some oral testimony, and we will argue the Motion.

"Is Juliana Zurcher in the court?"

The District Attorney objects to the taking of any testimony.

"Mr. Hornbein: We are limiting the testimony to this motion, that is all. We simply want to ascertain from these witnesses whether they were patients, and we want to show in other words, that it was through the search and seizure in the doctor's office; private

office of his private books, a procedure that has never occurred in the history of jurisprudence in this country. We argued that fully before Judge Black. We took a couple of days, and the judge ruled as a matter of first impression, and without giving very serious thought, that we were permitted to introduce witnesses at that time, that is rather, to say, the Court required the [fol. 14] attendance of Mr. Humphreys and Mr. Malach of the District Attorney's office. We have that record. Here is the situation that is different in the case before Judge Black. In that case it was simply a case of the prosecuting witnesses; they found out from getting the books, of one Mildred Cairo. In this case they go out and get the books and records, and we will show these books which were seized are privileged and inviolate. They look up the names of the patients and go out and bring them in and ascertain from them what their ailments and trouble was, and that is all we want to show; that they get these women to become witnesses, and we will argue that after we hear the witnesses.

"I said that is all we are going into. We maintain that the District Attorney was absolutely without right to go into this doctor's private office without any warrant; without any order of court; and engage in a general raid, and take his private books, and then with those books, open them up and find out the names of the patients; this information which is privileged under the law, and go out and contact the patients to see whether any law had been violated. Now the grand jury, or the court would not have a right to compel a doctor to bring his books in and engage in a searching expedi- [fol. 15] tion, and look at his patients and find out who they were and check them up and see if any law was violated. That goes to the very confidential relationship. That is all we want to show. The difference between this case and the other one, it wasn't used as a drag-net it was used on one woman who was the prosecuting witness, but here these people are not prosecuting; they are strangers; all they know about it is they were patients in Dr. Wolf's office. And they check up and bring them in and find out what was the matter, and bring them in as witnesses; and I say, that is not right, and not constitutional, and we want to make a record and get this before the court, so we will know.

"Mr. Anderson: I wish to say this, your Honor. The situation is no different at all then it was when this entire matter was fully argued before Judge Black in Division VI; and that is the case; the same claim was made as against the prosecuting witnesses. Here that is not the situation; they have these five other witnesses. The first point is, to determine whether evidence obtained through any means is admissible or is not admissible. We took the position at the outset that legally obtained or illegally obtained it cannot be attack-collaterally. Suppose for the purpose of the argument you have illegal possession or seizure; this has nothing [fol. 16] to do with admissibility in the trial. Now Judge Black in that particular case did decide he wanted to find out whether it was obtained illegally; whether or not there was a violation of the search and seizure procedure, and that was determined, and his Honor found there had been no illegal search and seizure. And the only purpose of this motion is to attack and suppress these women's evidence. What evidence—the evidence that was obtained in a particular way. It does not make any difference how that evidence was obtained. It is admissible in the trial if it fulfills the other requirements of evidence, that is, that it is material and relevant, and that it is competent. How it was obtained—the jurisdiction of Colorado does not follow the Federal rule on that, and I recall arguing the matter fully at that time. There were any number of cases cited by the decisions of the federal courts, and all this attempt to present evidence and now bring the People's witnesses on to question them concerning one thing or another is entirely beside the point. It is beclouding the issue. It would seem to the People, at this time, as to whether or not the evidence is material and admissible, that that is not properly done in a collateral proceeding. These people have been endorsed as witnesses, yes, but it is entirely within the province of the [fol. 17] People whether they are going to present that evidence, or any at all, but if at the time the evidence is presented, the defendant at the time of trial will have ample opportunity to examine them, and offer any objection, if any they have, and the court will rule. To attack a collateral issue is not proper, and I submit this

entire motion should be dismissed, as an attempt to attack evidence collaterally.

"Mr. Dickerson: Now if your Honor please, we have an interest in this too, and counsel seems to avoid the thing that we are offering here. These girls do not have to testify if they don't want to, and they have been warned by previous judges they don't have to testify. But as a matter of practice, this is what happened: They go out and break that solemn right the girls have; as well as the doctor, and that is the question that is most seriously affected, as I see it here. And I don't care whether these girls want to have an abortion or what they want—they are entitled to have that confidential relationship held inviolate, and so is the doctor. If every woman that went to see a doctor about an abortion should be dragged into court and compelled to testify, in violation of the confidential relationship; that that is a sacred confidence; the courts wouldn't hold that; they must have the protective assurance the [fol. 18] court has set up. When the district attorney, all powerful, can go anywhere; if they can do that, they can go into your Honor's confidential records, or your practice, and see who consulted you about what; the confidential relationship established by statute is destroyed. The district attorney can violate all laws? He can't.

"Before your Honor can rule on this question, your Honor has to be advised, and whether your Honor can be advised, we have to find out from these people, and we have a right to know, and have a right to ask them all the questions we choose. That is why we are given a list of the names, in order that we may interview them or communicate with them, or whatever is necessary.

"But in this case, here is a case we will show by evidence that the district attorney seized the private records, and went through it and took the names of patients who had gone there under a confidential protection, and he shattered it and broke it and used it to prosecute somebody with, at the embarrassment of everybody concerned, and with this position there is no such thing as a confidential record or confidential relationship. Before this case is over we are going to find out about that; and the purpose these people are

[fol. 19] brought here for, and we are properly interested, because the harm falls on our shoulders; and in conspiracy cases that latitude is so wide, and Judge Black warned, when the girls were put on the stand, Judge Black warned them they didn't have to reveal these facts, and some of them elected not to."

Further arguments of counsel and district attorney.

DENIAL OF MOTION TO SUPPRESS AND RETURN EVIDENCE

Court sustains objection of district attorney; defendants excepted.

OFFERS OF PROOF

"Mr. Hornbein: I suppose we should make a record your Honor. The defendant wanted to call in support of the motion, the witnesses:

Juliana Zurcher
Prudence Rockman
Eloise M. Gorman
Barbara Blitz, and
Margaret L. Rogers,

and the defendant desires to prove by these witnesses that they were patients of the defendant Wolf, sometime in the month of April, and that at no time did they consent to have the nature of their ailment or trouble disclosed by the defendant Dr. Wolf.

[fol. 20] "And further, we want to show that the only way that the district attorney obtained knowledge of the fact that they were patients of the defendant, was because their names were entered into a book and record kept by the defendant Wolf in his professional capacity as a physician, and that is as far as we wanted to go with these girls. We wanted to prove by other witnesses that these books were obtained by wrongful search and seizure.

"Mr. Anderson: Let the record show at this point, your Honor, in pursuance of the offer of proof just read into the record, that subsequent to the arrest of these two defendants, the proposed witnesses have not been interviewed by the defendants or defendants' counsel,

and therefore the offer of proof as so stated can only be a mere suspicion, guess or surmise on the part of counsel as to what they would testify to concerning their willingness or unwillingness to have their testimony discussed.

"The Court: Overruled.

MOTION TO TAKE DEPOSITIONS AND DENIAL THEREOF

"Mr. Dickerson: At this time on behalf of Dr. Fulton and Betty Fulton, we request permission, in view of the fact these witnesses are present in court, to take the [fol. 21] depositions of these witnesses, in order to ascertain some of these facts, as well as to determine what their evidence is, and what its relationship is to this case. And we make a formal application to take the depositions of

Juliana Zurcher, 1826 Sherman Street
Prudence Rockman, 1120 Pearl Street
Eloise M. Gorman, 2531 Front View Crescent
Barbara Blitz, 1351 Grant Street, and
Margaret L. Rogers, 3534 West 45th Avenue.

They are present here in the court room and we desire to take their depositions.

"Mr. Anderson: Now, again we offer the following objection, your Honor. First that the deposition not being in accord with common law, you must follow the proceeding exactly as the statute lays it down, and that has not been done in this case. And by the admission of counsel, it partakes of attempts to discover, and there is no provision for the discovery of things in law. And I might state the witnesses will be available at the time of the trial.

"Mr. Hornbein: That is the trouble, when we get [fol. 22] into the trial. Is Mr. Malach, Mr. Thayer and Mr. Humphreys in here?

"Mr. Rice: You didn't subpoena them.

"Mr. Anderson: Have you subpoenaed them?

"Mr. Hornbein: I just asked the question.

"The Court: Would you like to call Mr. Malach and Mr. Humphreys?

"Mr. Hornbein: Yes. We have the record of Franklin Thayer, Ray Humphreys and Louis Malach. The

substance of that testimony is simply this: They went into Dr. Wolf's office without any search warrant, without any authority of court, or order of court and took his private books, and they examined his books, and from the examination they discovered the name of the woman in that case; Mildred Cairo, and from that they filed an information. Now the names of these girls are not listed, and Judge Black permitted us to show that.

"The Court: We can hear that later, when they are called in.

"Mr. Hornbein: Yes, except we don't like to have [fol. 23] to delay the trial.

"The Court: There is nothing to prevent you from calling them later.

"Mr. Hornbein: Yes, except we don't like to have to delay the trial.

"The Court: There is nothing to prevent you from calling them later.

"Mr. Hornbein: Won't you stipulate we need not go through this?

"Mr. Anderson: We submit, your Honor—

"Mr. Hornbein (interrupting:) I want to offer in support of this motion, the testimony of Franklin Thayer, Ray Humphreys and Louis Malach, given out of the presence of the jury concerning the circumstances under which the records and books which were the subject matter of this motion were taken out of the custody and private office of the defendant Wolf by these attaches of the district attorney's office.

"The Court: On Mr. Dickerson's (typographical error, should be Mr. Anderson's) Motion, the motion will be overruled.

"Mr. Dickerson: Exception.

"Mr. Hornbein: I am offering that in evidence.

[fol. 24] "Mr. Anderson: I will object, your Honor, and make the same objection I made before. I object to any consideration by the court; there is nothing before the Court.

"The Court: Sustained, and we will permit you the right to have them here at the time of the trial.

"Mr. Hornbein: And your Honor will go into that later after we go into the trial?

"The Court: Yes.

"Mr. Hornbein: The whole thing is open for consideration?

"The Court: Yes.

"Mr. Hornbein: I will withdraw the exhibit, and I understand the rule of the court is, the whole matter is left open until the time of the trial, when these matters can be raised.

"The Court: Yes.

"Mr. Hornbein: Whether the motion will be considered at the time of trial.

"Mr. Anderson: The motion here is to suppress and [fol. 25] return illegally obtained evidence. That is the only motion presented at this time on which he has argued, and this offer of proof has been presented you have ruled on at this time. That does not preclude the defendant——

"The Court (interrupting:) The court was about to rule on the whole motion.

"Mr. Hornbein: The court has not heard the main argument on the motion.

"The Court: Do you want to argue?

"Mr. Hornbein: Certainly.

"Mr. Anderson: Now what are you arguing on?

"Mr. Hornbein: On the motion. About the points of this motion. The court knows that there is a violation of the defendant's constitutional rights, when the district attorney went in there and took his books and records, without any warrant, without any authority.

Arguments and Citations.

(11:53 A. M. to 12:46 P. M.)

[fol. 26] "The Court: Gentlemen, we will decide the case at nine o'clock Tuesday morning. I want these books. We will adjourn until Monday morning at nine-thirty."

February 20, 1945, motion denied by the Court and exceptions saved by defendants.

PLEAS

August 26, 1944, defendants, Julius A. Wolf, Charles H. Fulton and Betty Fulton entered pleas of not guilty.

February 28, 1945, the case came on for trial before a jury.

Statement of Evidence

AGNES VERA BASHOR, a witness called on behalf of the People, testified as follows:

Direct examination:

My name is Agnes Vera Bashor, and for six weeks I have lived at 246 Hazel Court. I am not married and I am 26 years of age. In April of 1944, I lived in an apartment house at 975 Bannock Street. I know the defendant, Dr. Charles H. Fulton, his office is located in the Denver Theater Building. I went to see him and told him I was in trouble and wanted an abortion. He examined me and said that I was about five months along, and that his fee would be $1,000. He asked me where I was staying, and I told him [fol. 27] that I didn't have a phone at my apartment, and he told me that I would have to stay at a hotel. I left his office. I called him on the phone later and asked him if I could raise the money if he would arrange the operation. He said he didn't want to talk about it on the telephone, and told me to come to his office the first of next week. I saw him then and told him I could raise the money. He told me that Dr. Wolf was the doctor and he sent me over to see him for an examination. I went to Dr. Wolf's office in the Republic Building. He examined me, I had never seen him before. He gave me an external examination. Did you have any conversation with him? Question objected to by Mr. Zarlengo in behalf of the defendant, Betty Fulton.

"Mr. Zarlengo: After the conspiracy has once been done there is nothing to show; I object to it.

"The Court: I will reserve the ruling and you may renew it later."

Dr. Wolf asked while I was still in the examining room, "Why didn't you wait the whole nine months before you came to have anything done?"

> " 'Did you have any conversation about what you were to use these telephones——'
>
> "Witness: After Dr. Fulton performed the abortion [fol. 28] I was to call him when I needed him."

The only further conversation I had with Dr. Wolf was when I left he told me any time I needed him to call him, and he would come to me. After I left Wolf's office I went to Dr. Fulton's office.

Fulton told me that he would find a hotel for me and wanted to know what name I was going to give at the hotel so that Dr. Wolf would know who to call. I decided on the name of "Verna Brown."

The next time I saw Dr. Fulton was on April 27. He gave me his address and direction how to get there. The address was in Arapahoe County.

I own a 1941 Pontiac, four-door sedan. I got two checks and I took them to Colorado National Bank and cashed them at about three in the afternoon into ten $100 bills, which I took back to Fulton. I gave him the money and he put the bills in his bill fold.

I went to see him at his home at 5:30. A lady dressed in a nurse's uniform met me at the door. It was the first time I had seen her. I had a conversation with her. She said, "Is this Miss Bashor," and I said "yes." She took me into a room and helped me remove my clothing.

[fol. 29] She didn't talk very much, she just told me where to lay my clothing, and stayed with me in the room until the doctor came in.

As soon as Dr. Fulton came in she went out. He inserted some kind of tube and brought me some pills and gave me instructions how to take them.

> "Q. Just state what, if any conversation you had about those pills at that time.
>
> "A. There was an envelope with two pills in it, and he told me to take one as soon as I got to the hotel, and not to take the other one until Dr. Wolf came, and he gave me some pills in the box, and told me not to take those until Dr. Wolf came."

Counsel objects to any further testimony on the ground that the alleged conspiracy had been consummated, and that such evidence was not admissible against Dr. Wolf.

Objection overruled, exception saved.

People's Exhibit- "A" and "B" are identified.

When I was at Dr. Fulton's office he left something inserted and told me not to remove anything until Dr. Wolf came.

[fol. 30] I had a further conversation with Dr. Fulton. He told me that if I wanted Dr. Wolf at any time to call him and that he would come. He told me to take one pill and lie down as soon as I got to the hotel.

Betty Fulton helped me dress. I had no further conversation with her. I left. I went to the West Hotel in the 1300 block on California Street.

I went to the desk and told them who I was and that Dr. Fulton had reserved a room for me.

People's Exhibit "C" is marked for identification.

It is a card I filled out at the hotel. It is in my handwriting I went to my room, took the pill and laid down.

Witness is shown Exhibit "A," she identifies envelope from which she removed the pill.

I dozed off. The telephone rang about 10. I received two telephone calls. I went to the bath room and removed the tube which was about 12 inches long and flushed it down the toilet, and got dressed. I was not in much pain, but I was flowing.

I went to a cafe and called a friend.

[fol. 31] "Mr. Dickerson: We object to something about the Abbott Hotel.

"The Court: Objection sustained.

"Mr. Rice: Please read the last answer.

(Reporter): "I went to a cafe and called the Abbott Hotel, where I had a friend, and I told him what had happened and asked if he would drive the car for me."

"The Court: Objection overruled.

"Q. The court says you may continue.

"Mr. Dickerson: Is it overruled?

"The Court: Yes.

"Mr. Dickerson: Save an ex-tion."

I got my friend and we went to a cabin on West Colfax. He drove my car. It was about 1:30 after midnight. My friend's name was Jim Hayes. I have known him eleven or

twelve years. The camp was two or three miles out on [fol. 32] West Colfax. I registered. I was getting pretty sick and went to bed. The next morning about ten o'clock Hayes left for about thirty minutes.

"A. Well I was in so much pain he went and got some anacin for me to take, and he was getting pretty much disgusted by that time, he couldn't get a doctor, and he wanted to take me to the hospital.

"Mr. Dickerson: We object to that as not admissible.

"The Court: Yes, we will stop at the point of conversation.

"Q. State what you did, and Mr. Hayes did?

"A. I didn't want to go to the hospital, because I felt either Dr. Wolf or Dr. Fulton, one would show up after they had been called.

"Mr. Hornbein: Just a moment, if the court please we object to that. That is purely guess, she thought Dr. Wolf would show up, or Dr. Fulton would show up.

"Q. Had they been called on the telephone?

[fol. 33] "Mr. Hornbein: Did she call them on the telephone?

"Mr. Rice: No, you can find out——

"Mr. Hornbein: No, I object to the district attorney trying to get in evidence which is not proper. They are trying to get some evidence, or get in the idea this friend, whom we don't know, and whom we have never seen; they are trying to slip in the inuendo that he called or tried to call some doctor, and she didn't know anything about it.

"The Court: Any reference, she 'thought' would be stricken.

"Mr. Hornbein: And I asked these remarks be stricken out; she thought the doctor would come.

"The Court: The remarks will be stricken.

"Mr. Rice: I object to the remarks being stricken.

"The Court: I am talking about the remarks of the witness.

"Q. Go ahead Miss Bashor and tell us what occurred and what happened at the cottage camp?

[fol. 34] "A. There was telephone calls made, and about three-thirty he left and said he was going to do something.

"Mr. Dickerson: There they go again your Honor, and they continually do it; the witness should be cautioned your Honor.

"The Court: Miss Bashor, these conversations under the rules of law, conversations are not admissible, so don't tell what you said to him, or what he said to you.

"Witness: Well, I was all alone about four-thirty and I miscarried."

Observed two different objects, the afterbirth and the fetus.

I flushed the bowl.

I saw Mr. Humphreys of the district attorney's office first. I was in the cottage camp the night of the 27th, and the morning of the 28th of April.

I never paid the defendant Wolf any money, nor did I have any conversation with him concerning his fee.

I gave Mr. Humphreys Exhibits "A" and "B."

[fol. 35] Cross-examination:

I never saw a fetus before, but I knew that I miscarried.

I became pregnant the month of December.

"Q. Miss Bashor, describe to the jury what you saw?"

Objection sustained by the Court; exception saved.

I appeared before the Court in June, 1944, at the taking of my deposition.

"Q. And at that time and that place, were you asked these questions; reading from page 18? 'Do you know Mr. J. J. Hayes?' Answer: 'I do not.'

Objected to by Mr. Anderson.

Objection sustained by the Court.

"Q. Well, do you know any one by the name of Hayes?

"A. Yes.

"Q. But you swore in your deposition you didn't?

"A. Not J. J. Hayes.

[fol. 36] "Mr. Rice: We will object to that as not a proper question.

"The Court: Objection sustained.

"Q. You stated this however; 'You don't know anyone by this name?' And you answered, 'No.'

"Mr. Rice: I object to that, not even the law——

"The Court (interrupting): Objection sustained.

"Mr. Hornbein: If you have a deposition the witness has given, you can ask the witness whether she made such a statement, and find out whether there is a contradiction. He has gone further, he has asked if she knows a man by the name of Hayes; she says 'yes,' now he has a right to show before this very court, when her memory was even fresher than it is today; she got up on that stand and swore she didn't."

I have known Jim Hayes for twelve years. He is just a friend of the family.

"Q. Went out with him from time to time?

"A. No.

[fol. 37] "Q. You didn't?

"A. No.

"Q. You swore in your deposition you did, didn't you?

"A. Why sure, I have gone to shows with him.

"Q. Why did you say a moment ago you didn't go out with him?

"A. I wouldn't call that going out, in the sense you mean, no.

"Q. Do you know who was responsible for your pregnancy?

"Mr. Rice: We object as being immaterial in this case.

"The Court: Objection sustained."

Arguments by counsel; exceptions saved.
The Court sustains objections.

"Q. In your deposition you said that you drove the car out to the cottage camp—you don't need to look at the district attorney."

"Mr. Anderson: I was going to make an objection, [fol. 38] for the reason no proper foundation has been laid for any statement concerning that trip.

"The Court: Objection sustained.
"Mr. Dickerson: Save an exception.

"Q. In your deposition that you gave here in this court, which we have identified, you testified to the manner in which you got out to the cottage camp, didn't you?

"Mr. Anderson: We object to the question, on the ground, no foundation has been laid.
"The Court: Objection sustained.
"Mr. Dickerson: Save an ex-tion.

"Q. And you have previously sworn under oath that you drove your car out?

"Mr. Rice: If the court please, we ask the court at this time to instruct counsel not to make statements contrary to the ruling of the court.
[fol. 39] "The Court: Objection sustained.
"Mr. Rice: And we ask that the jury be instructed to disregard it.
"The Court: It will be stricken.
"Mr. Anderson: And we ask the court to reprimand counsel for overriding the court, which we can do by indirection.
"The Court: The court has ruled on the form of that question, and has sustained the objection.
"Mr. Dickerson: Now, your Honor, I want this in the record——

"Mr. Rice: We object to any further—any offer of proof.
"Mr. Anderson: We object to offer of proof before the jury.
"Mr. Dickerson: Maybe they better object to our defending the case.
"Mr. Anderson: Unless you can do it properly, yes, sir.
"The Court: Gentlemen, you will be excused from the room; retire to the jury room.
[fol. 40] Proffer.
"Mr. Dickerson: If your Honor please, we offer to prove that this witness previously made a sworn statement, under oath, contrary to the statements she made here this morning; not only one instance, but in

many many instances. And I offer to show by the transcript that was taken in this case; I offer to show now specifically in this matter, that this witness swore she drove out to this cottage camp; that is what I am offering to show."

Argument by counsel.

"The Court: Gentlemen, we will proceed, and if the object is to impeach, we will lay the proper foundation."

I made plans to destroy my child as soon as I knew I was pregnant.

Immediately after leaving the cottage camp, I went to a restaurant on Curtis Street.

I made no effort to get in touch with any doctor.

When we came into town we went to see a man on Market Street about who was a good lawyer to go to.

While I was at Fulton's house I saw two women in the [fol. 41] sitting room, one is employed by the District Attorney's office.

I went over my testimony with the members of the District Attorney's office.

I was examined by a doctor at the Denver General at the request of the District Attorney's office.

" 'Q. Did you know he was going to be at that restaurant?' " Reading verbatim from the record from page 31 of the record.

"Mr. Rice: I will object to any question from the deposition.

"The Court: Objection sustained.

"Mr. Dickerson: Save an exception.

" 'Q. When did you make arrangements to meet Mr. Hayes at that restaurant?'

"Mr. Rice: If the court please, we object.

"The Court: Objection sustained.

"Mr. Dickerson: And I want the court to know I [fol. 42] am reading these questions verbatim.

"The Court: Yes.

" 'Q. You don't know what day or what hour or what place or under what circumstances you made the

arrangements to meet Mr. Hayes at the American Cafe on Curtis Street?'

"Mr. Rice: I object to that because it was gone into this morning.

"Mr. Dickerson: That is verbatim; I am reading from page 32.

"The Court: Objection sustained.

"Mr. Dickerson: Save an exception.

"Mr. Rice: Is that objection sustained to any further questions?

"Mr. Dickerson: I would like to make that clear right now. Am I precluded from asking her any questions concerning what she swore to when her deposition was taken in this court, where it appears she swears opposite from what she testified to today?

[fol. 43] "Mr. Anderson: We want to make two objections. First; the matter was fully gone into by counsel this morning, and apparently now has devised new methods to adopt, and the method he has adopted still is not the proper way to lay a foundation.

"The Court: Objection sustained.

"Mr. Dickerson: I would like a ruling on the question I have just propounded.

"The Court: Yes, in that manner——

"Mr. Dickerson (interrupting): I am precluded from asking anything about the subject matter that this witness testified to when her deposition was taken in this case?

"The Court: No, when the foundation has been laid, but the subject has not been covered——

"Mr. Dickerson (interrupting): I offer to show by her——

"Mr. Rice (interrupting): We object to any offers of proof in front of the jury.

[fol. 44] "Mr. Dickerson: We will make them any way you want to, but I want that in this record.

"Mr. Rice: Your Honor, counsel knows it is improper to make the offer——

"Mr. Dickerson (interrupting): I don't know any such thing.

"The Court: Well gentlemen—(to the jury).

"Proffer:

"Mr. Dickerson: We are going to offer to prove that the witness Vera Bashor testified directly opposite to her testimony today, in the deposition that was taken in this court, which has been previously identified, and for greater certainty, we now identify it as deposition number 36383, Division 7, The People of the State of Colorado, versus Julius Wolf and Charles H. Fulton and Betty Fulton, The Deposition of Agnes Vera Bashor; the same witness who is now on the witness stand, taken in open court on Friday, June 30, 1944, before the Honorable Wm. A. Black, Judge of the District Court, in and for the City and County of Denver, State of Colorado, pursuant to notice and order to take said deposition of said witness for the [fol. 45] People in the above-entitled cause. And that the appearances were, at that time: William L. Rice, Esq., Deputy District Attorney, for the People; D. M. Shere and Philip Hornbein, Esq., for the defendant Wolf. F. E. Dickerson, Esq., for defendants Fulton. And that on that day, as appears from the transcript on page 31 of her deposition, among other things, the following things were said:

"Mr. Rice: If the court please, counsel is making their offer of proof quoted from the deposition heretofore taken in this case, and on page 33 of that deposition, the following questions were deleted:

"Q. Well, then, about what time on the 28th of April? A. Maybe 30 minutes before that.

"Q. Maybe 30 minutes before you met him at the restaurant? A. Yes."

"Now if the court please, with that addition to the record, the People wish to object to the offer of proof as made by counsel, for the reason that this matter has been thoroughly gone into upon cross examination by counsel this morning before the noon recess. That this is not the proper method or means or way to lay the foundation for impeachment, and, further that if [fol. 46] the court should allow impeachment upon these questions as have been set forth from this deposition, that it would be impeachment upon an immaterial matter, if they are able to show any impeachment at all. The People further submit that questions

and answers as read from the deposition are not different answers, when taken as a whole, than the testimony given by this witness on direct examination before the making of this offer of proof."

"Mr. Dickerson: I have another offer; does your Honor care to rule on that?

"The Court: Yes, objection sustained.

"Mr. Dickerson: Save an exception."

"Proffer:

"Mr. Hornbein: On page 18 of the deposition of Miss Bashor, I want to prove that she made statements under oath inconsistent and directly opposite to her testimony today. Which questions are as follows:

" 'Q. Do you know Mr. J. J. Hayes? A. I don't.
[fol. 47] "Q. You don't? A. No.

"Q. You don't know anyone by that name? A. No.'

"And then on page 24 of the same document:

"Q. A minute ago you swore you did not know J. J. Hayes.

"A. I don't know J. J. Hayes.

"Q. You knew whom I was talking about when I asked you if you knew Mr. Hayes. A. I answered your question truthfully, I don't know J. J. Hayes.

"Q. So you know James Hayes. A. Yes.

"Q. And you told me you didn't know him. A. I don't know a J. J. Hayes.

"Q. Now, Madam, let's get this straight. You knew to whom I referred when I asked you if you knew J. J. Hayes, didn't you? A. I answered your question, I didn't know J. J. Hayes.

"Q. What is Mr. Hayes' middle initial? A. L.'

"Now I say that is directly opposite to her testi-
[fol. 48] mony this morning; it all hinges on an initial, and we say that we are entitled to show that, so that we can argue it to the jury properly; that this witness did not testify truthfully; that she tried to conceal the fact that she knew this man, and that she knew absolutely who the man was; a Mr. Hayes whom we referred to, and we want to show to the jury that this witness is lacking in frankness and in candor; that if she had been frank as she should be, when she was asked 'Do you know a J. J. Hayes?' she would not

have dodged and equivocated by saying she didn't know him, when she knew there was a Mr. Hayes whom she did know, whom we were talking about. An honest answer that a frank and truthful witness on the stand, or off the stand, would make when he is asked the question: 'Do you know a Mr. J. J. Hayes?' a truthful and candid witness would say: 'I don't know his initial—' or, 'I do know his initials; but I do know a man by the name of Hayes, and I do know him very very well.' Which she did. Knew him well enough to call him at the Abbott Hotel to take her to a cottage and be with her all the next day, and take her to Boulder. And she said she didn't know him, merely because we had a wrong initial. And therefore, we are entitled to take that to the jury in our argument, as to whether [fol. 49] this witness, who is the principal, or prosecuting witness, upon her testimony, whether or not she is a frank and candid and truthful person or not; that is the purpose."

Court sustains objections and defendants save exceptions.

"Q. When you talked to any members of the District Attorney's office, or investigators, was anything said about punishing you for your crime?"

"A. No, all they said, they never had punished women."

Cross-examination.

By Mr. Hornbein:

I was at Dr. Wolf's office on just one occasion.

I told the girl in the reception room that I wanted to see Dr. Wolf.

Dr. Wolf came out of his office into the reception room and I went in. He never gave me any drugs, medicine, or used any instruments, but he called me by name.

Cross-examination.

By Mr. Zarlengo:

I never saw Betty Fulton in Dr. Fulton's office. I only [fol. 50] saw her at the place where she lives in Arapahoe County.

I used a number of alias-. After I left the cottage camp, I didn't call any doctor, I tried to get a good lawyer. Then we went to Boulder and I stayed at his house for four days.

Mrs. Fulton was dressed in white. She had no cap on, and I don't remember whether she had on white shoes and stockings. I don't remember seeing any insignia or name of a hospital. She didn't help me take my clothes off. She just stayed in the room and when the doctor came in she left. She never administered any drugs or used any instruments.

Louis Malach, a witness called on behalf of the People, testified as follows:

Direct examination:

My name is Louis Malach. I am an investigator for the District Attorney.

People's Exhibit- "D" and "E" are marked for identification, which are the books which Mr. Thayer, from the District Attorney's office, took from Dr. Wolf's office on April 27, 1944.

These books have been in our possession ever since.

[fol. 51] I was with Mr. Thayer when the books, which were the records of Dr. Wolf's business with the names of his patients, were taken.

Out of the presence of the jury, the following proceedings took place:

"Proffer.

"By Mr. Hornbein:

"Q. Now I want to make an offer of proof. Are you an attorney?

"Witness Malach:

"A. No, sir.

"Q. You are not any attorney?

"A. No, sir.

"Q. But you are an officer of the law?

"A. Yes, sir.

"Q. You are a deputy sheriff?

"A. That is right.

"Q. You are an investigator of the District Attorney's office?

"A. That is right.

"Q. Did you take an oath of office?

"A. I did.

[fol. 52] "Q. You did.

"A. Yes.

"Q. Did that oath of office that you took; do you remember swearing you would support the constitution of the State of Colorado? Did you?

"A. Just a moment and I will take a look at this.

(Witness taking paper from his pocket.)

"Q. How is that?

"The Court: He wants to refer to his oath.

"Q. That is right, he ought to.

(Witness looking at paper.)

"Q. Was the 'constitution' in that oath?

"A. That is right."

I was told by Mr. Humphreys that I could take books and records incident to an arrest and other evidence.

I swore to uphold the constitution, but this was never mentioned.

I looked up the names of Dr. Wolf's patients from his [fol. 53] books and brought the women to our office for questioning. I got the names of Juliana Zurcher, Prudence Rockman, Eloise M. Gorman, Barbara Blitz, and Margaret L. Rogers, from these books.

I don't remember whether we showed them the book. They were naturally embarrassed.

Arguments of counsel.

FRANKLIN THAYER, a witness for the People, testified as follows:

I am deputy district attorney for the City and County of Denver. I was so employed in April, 1944, on which date I went to Dr. Wolf's office in the Republic Building with Mr. Malach. I was present when Dr. Wolf was placed under arrest. I first saw People's Exhibits "D" and "E" in Dr. Wolf's office.

Exhibit "E" was on a table in the reception room.

Exhibit "D" was on a book case at the side of the wall.

I picked up these two exhibits and delivered them to Louis Malach.

Cross-examination.

By Mr. Dickerson:

I did not ask the defendants Dr. Fulton or Betty Fulton [fol. 54] any question about either of these exhibits.

RAY HUMPHREYS, a witness for the People, testified as follows:

Direct examination:

I am the chief investigator for the district attorney's office. I arrested Charles H. Fulton and Betty Fulton on April 27.

"A. Well, we entered the house at 1030 East Amherst, and in the living room Mrs. Fulton attempted to stop me.

"Mr. Zarlengo: We object to that and ask it be stricken, as being improper, and the witness knows it.

"Mr. Hornbein: I will object to it on the ground, and enter it of record, that we made a motion for severance, and to which the district attorney assured the court there would not be any evidence of this kind, that would be binding on our client who was not there.

"Mr. Rice: If the court please, in regard to the motion for severance; at the time that was argued, I stated to the court there would not be any evidence admissible against one and not against the other, in this case. We [fol. 55] take the position the evidence now offered is admissible as against all defendants; their acts of conspiracy, and under the law of the case, is admissible as against all. And the statement of counsel, I said I would not offer any evidence of this nature; I challenge that statement.

"Mr. Zarlengo: We object to this answer.

"The Court: Objection sustained as to the answer.

"Q. Mr. Humphreys, will you state just what happened when you went into the house; what was said by you, and what was said or done by anybody else at that time?

"Mr. Hornbein: The defendant Wolf renews his objection.

"The Court: Objection overruled."

Mr. Humphreys identifies Exhibit "F" as ten $100 bills taken from Dr. Fulton the night of the arrest.

Mr. Humphreys also identifies Exhibits "G", "H", and "I", as slips of paper taken from Dr. Fulton's shirt pocket.

I saw a girl leave Fulton's house; she was Vera Bashor. [fol. 56] She left the house, got in her car, and drove east. People's Exhibit "F" offered; offer objected to.

Objection overruled; exception saved.

Cross-examination.

By Mr. Dickerson:

It was a private house, but I walked in without a search warrant of any kind.

Betty Fulton had on a nurse's uniform; she didn't have on a nurse's cap.

Exhibits "E" and "F" are shown to the jury.

ELOISE M. GORMAN, a witness for the People, testified as follows:

I am acquainted with the defendant.

"The Court: The court has indicated she has that privilege, if she wants to she may claim it; that is as far as the court will state."

I went to Dr. Wolf's office and he gave me Dr. Fulton's address.

I went to Dr. Fulton's and paid him and had it.

Witness identified People's Exhibit "I" with her name on it.

[fol. 57] Witness identifies her name and address in People's Exhibit "E".

I never paid Dr. Wolf any money.

I paid Dr. Fulton $200.

I only saw Dr. Wolf and Dr. Fulton once.

Motion made to strike out witness's testimony on the ground that there was no showing that she was pregnant and no showing that she was ever aborted, and that this is not such a similar offense as would make the evidence admissible.

Motion denied.

Cross-examination.

By Mr. Hornbein:

I made no complaint to the district attorney's office against either Dr. Wolf or Dr. Fulton.

The district attorney sent for me; I didn't go voluntarily.

Mr. Humphreys told me that I could be prosecuted.

Cross-examination.

By Mr. Zarlengo:

Mrs. Fulton let me in to their private family residence. [fol. 58] I had no conversation with her at all. She wasn't present when I had any conversation with the doctor.

JULIANA ZURCHER, a witness for the People, testified as follows:

I know the defendants. I went to Dr. Fulton's office.

Objected to on the ground that the testimony would be inadmissible. Objective overruled; exceptions saved.

I went to Dr. Fulton's house to have an abortion. I paid him $150, and he gave me Dr. Wolf's phone number so that I might call if anything went wrong. I went to Dr. Wolf's office and told him that Dr. Fulton had sent me.

Dr. Wolf examined me, and I went out to Dr. Fulton's the next day.

I went back to Dr. Wolf's two or three days later and he told me that I was O. K.

Witness identifies People's Exhibit "H".

Counsel moves to strike witness's testimony; motion denied.

Cross-examination.

By Mr. Dickerson:

I signed a statement in the district attorney's office. [fol. 59] I was informed that I could be prosecuted, but that if I cooperated that most likely nothing would be done. I gathered this impression from Mr. Humphreys.

He used the word "cooperation". He told me that I had committed a crime and asked for my cooperation.

Mr. Malach showed me my statement this morning.

Cross-examination.

By Mr. Hornbein:

I did not go to the district attorney's office voluntarily. I objected to coming to the district attorney's office, and they said they would send the wagon out, so I said I would come down peacefully. I am not married.

I was in the district attorney's office for several hours. At first I refused to cooperate, but after two hours I told them my story.

Cross-examination.

By Mr. Zarlengo:

They threatened to bring me down in the patrol. Again I refused to talk for almost an hour. They told me that I was an accomplice and that I had committed a crime, but they led me to believe that if I cooperated I would not be prosecuted.

[fol. 60] Betty Fulton was not in the room when I talked with the doctor. She gave me nothing but a glass of water. I asked her for the water. She used no instruments and she wasn't present when the doctor was there.

PRUDENCE ROCKMAN, a witness for the People, testified as follows:

I know the defendants. I went to see Dr. Fulton. Counsel objects to the testimony of this witness on the same grounds as to the testimony of the previous witness.

I went to see Dr. Fulton to have an abortion performed. He examined me.

Counsel objects to asking the witness leading questions.

"The Court: The witness is reluctant.

"Mr. Zarlengo: Then I ask that this witness be advised of her right not to testify.

"Mr. Dickerson: She doesn't have to testify.

"Mr. Zarlengo: I ask she be advised and warned of her constitutional rights in the matter.

"Mr. Rice: The witness has already elected to testify.

[fol. 61] "Mr. Zarlengo: In view of the testimony we had here this morning, unless they should be warned—

"The Court: (interrupting) Objection overruled

"Mr. Zarlengo: Save an exception."

Dr. Wolf came to my home, gave me an examination and said that I was all right.

I saw Dr. Wolf again a week later in his office.

Witness identifies her name in Exhibit "E". People offer page of Exhibit "E" in evidence.

Counsel objects; objections overruled, exceptions saved.

Cross-examination.

By Mr. Dickerson:

I gave the district attorney a statement.

I was asked to come to court by Ray Humphreys.

Cross-examination.

By Mr. Zarlengo:

Betty Fulton let me in her home and told me to take my garments off.

Motion made to strike testimony of witness. Motion overruled; exceptions saved.

[fol. 62] Ray Humphreys recalled by the People.

Witness identifies Exhibits "A" and "B".

Exhibits "A" and "B" offered in evidence. Objections overruled and exceptions saved.

MARGARET L. ROGERS, a witness for the People, testified as follows:

I know the defendants. I met Dr. Fulton in his office.

I told him that I was pregnant, and we discussed what we were going to do. The following day he examined me in his office. He told me to come to his home at 6 that evening. He gave me Dr. Wolf's phone number and said that he would take care of me after I got home.

After I left Fulton's house I went home and went to bed. I called Dr. Wolf the next day. I told him that I was suffering. He left some medicine and said that he would return the next morning.

I never paid Dr. Wolf any money.

Witness identifies Exhibit "G" which bears her name and phone number.

Witness identifies Exhibit "E" upon which her name appears.

[fol. 63] Objection made to both exhibits. Objection overruled; exception saved.

Cross-examination.

By Mr. Hornbein:

I only saw Dr. Wolf on two occasions. He visited my home when I was sick and needed medical care. He gave me the medical care I needed. That is all I had to do with him.

I didn't voluntarily make a complaint against them. I was taken to the district attorney's office. I was questioned by Mr. Humphreys and two men. They said they wanted me to cooperate with the district attorney. I was scared and nervous.

Cross-examination.

By Mr. Zarlengo:

I only saw Mrs. Fulton in her home. She was not present when the doctor examined me.

I signed a statement in the district attorney's office that was prepared by their secretary. They told me to read it before I came on the stand.

BARBARA BLITZ, a witness for the People, testified as follows:

I know the defendants. I had a conversation with Dr. Wolf in the Republic Building. He examined me and said [fol. 64] that I was two months pregnant.

He told me that another doctor would perform the abortion for me. He told me to go to 1030 South Amherst Street, and I went that night.

Mrs. Fulton let me in her house. She put me on a table and left the room. Dr. Fulton came in. I paid him $200 and he gave me some pills, inserted something, and said that Dr. Wolf would see me at the West Hotel.

I saw Dr. Wolf at his office some two weeks later. At that time he said I was perfectly all right, and that there was no necessity to come back.

People's Exhibit "J" is identified as the registration card at the West Hotel.

Witness identifies her name in People's Exhibit "E". District attorney offers pages of Exhibit "E".

Counsel objects. Objection overruled, exceptions saved.

Cross-examination.

By Mr. Dickerson:

I am single and work for the Telephone Company. I was called to come to the district attorney's office by Mr. Humphreys. He informed me that I might be prosecuted. I signed a statement.

[fol. 65] I asked him what would come of all this and he said that he hoped nothing, but that I had been in on it, and that my abortion was a crime.

Cross-examination.

By Mr. Zarlengo:

The only time I saw Betty Fulton was in her home. Mrs. Fulton wasn't around there at that time. She had nothing to do with it. She wasn't present at any time that I was treated.

Cross-examination.

By Mr. Hornbein:

I saw Dr. Wolf three times. He gave me the medical attention that was needed. He didn't use any drugs or instruments.

BARTON MURRAY, a witness for the People, testified as follows:

I am employed at the West Hotel as day clerk. I know Dr. Julius Wolf.

Witness identifies People's Exhibit "C" and "J".

Objection is made to the introduction of registration card. Objection overruled, exceptions saved.

I registered the two persons into the hotel myself.

[fol. 66] Mr. Humphreys asked me to come to the district attorney's office.

Exhibit "E" is shown to the jury. Identifies pages to the jury as have been identified by the witnesses.

People rest.

MOTIONS FOR DIRECTED VERDICT AND DENIALS THEREOF

Motion in behalf of Betty Fulton for a directed verdict.

Motion denied. Exceptions saved.

Motion in behalf of Julius A. Wolf for a directed verdict.

Motion overruled; exceptions saved.

Motion in behalf of Dr. Charles H. Fulton for a directed verdict.

Motion overruled; exceptions saved.

Defendants rest.

Statement of the court to the jury.

> "The Court: Gentlemen, during one of the recesses of the court, it was mentioned, in a statement by the witness Bashor; 'This was Betty Fulton on the telephone,' and it was stricken, and the court orders that stricken, and you are now instructed to disregard it.
>
> [fol. 67] "The evidence having been completed gentlemen, you will kindly listen to the reading of the instructions:"

INSTRUCTIONS TO THE JURY

No. 1

Statement of the charge as is alleged in the information and to which the defendants entered a plea of not guilty, which are the issues to be tried.

No. 2

Information is a mere accusation.

No. 3

Stock instruction in re date.

No. 4

Stock instruction as to definition of a crime.

No. 5

Stock instruction on intent.

No. 6

Definition of a conspiracy.

No. 7

Definition of an abortion.

No. 8

Stock instruction on presumption of innocence.

No. 9

Stock instruction on burden of proof.

[fol. 68] No. 10

Stock instruction on reasonable doubt.

No. 11

Instruction that no formal agreement is necessary to establish or prove a conspiracy.

No. 12

The court instructs the jury, as a matter of law, that to constitute the crime of conspiracy it is not necessary that the conspirators should succeed in their design; it is enough if the common design was formed, in manner and form as charged in the information. If the conspiracy charged in the information has been proven to the satisfaction of the jury, beyond a reasonable doubt than the act of any one of the conspirators in furtherance of the common design, if proved, will be regarded as the act of the other.

No. 13

The court instructs the jury, as a matter of law, that all who take part in a conspiracy after it is formed, and while it is in execution, and aid in executing it, are fellow conspirators. They commit the offense when they become parties to the transaction, or further the original plan, with knowledge of the conspiracy.

No. 14

The court instructs the jury that it is incumbent upon the People to prove to your satisfaction, beyond a reasonable [fol. 69] doubt, that the crime charged in the information was committed in the City and County of Denver.

In that connection it is not necessary that the alleged conspiracy shall have originated in the City and County of Denver, or that all of the defendants participated in the conspiracy in the City and County of Denver, for if you find from the evidence, beyond a reasonable doubt, that the defendants, or any of them, did any act in the City and County of Denver which manifested an intention to commit the alleged conspiracy, that is sufficient.

No. 15

The jury is instructed that it is not incumbent upon the State to prove the alleged conspiracy by direct evidence. It may be established by circumstantial evidence or by evidence both direct and circumstantial.

In proving the agreement or conspiracy it is not necessary to prove the language in which it was made. The conspiracy may be shown, as stated above, by evidence more or less circumstantial in its character. It may be shown by what is said and done by each of the parties in the further-

ance of the common design, if any acts are done, or by what system or concert of action between them appears from their acts when viewed as a whole.

In determining whether or not the defendants entered [fol. 70] into a conspiracy to commit an unlawful act, to wit: a felony, which felony was procuring an abortion by wilfully, knowingly, unlawfully and feloniously administering and causing to be administered and taken, poisons and noxious and destructive substances and liquids, and using and causing to be used instruments in and upon the body of one Agnes Vera Bashor, the said Agnes Vera Bashor being then and there a woman with child, with the intent then and there to procure the miscarriage of the said Agnes Vera Bashor, you will consider, so far as shown by the evidence, all that was said and done by the defendants, whether or not they acted in concert for the accomplishment of a common purpose, what that common purpose was, if the same was shown, and from these facts and all the facts and circumstances shown by the evidence you must determine, beyond a reasonable doubt, whether the defendants entered into an agreement or conspiracy amongst themselves to commit the crime charged in the information.

No. 16

A common design and unlawful purpose by two or more persons is the essence of the charge of conspiracy, and this common design and unlawful purpose must be proved in order to warrant a conviction, either by direct evidence or by proof of such circumstances as naturally tend to prove it, and sufficient in themselves to satisfy the jury of the [fol. 71] existence of such common design beyond a reasonable doubt.

No. 17

Stock instruction that at least two persons must participate before a crime or conspiracy can be committed.

No. 18

The jury is instructed that although you believe from the evidence that one of the defendants committed an abortion on the witness Agnes Vera Bashor, that is not sufficient in itself to convict the defendants of conspiracy, unless you further believe from all the evidence, beyond a reasonable doubt, that said abortion was committed in pursuance and

in the furtherance of and as a part of a conspiracy as hereinbefore defined.

And if the evidence does not so convince you, you must acquit the defendant.

No. 19

There can be no conspiracy without at least two persons participating therein. If after a consideration of all the evidence in this case, there is a reasonable doubt as to the guilt*y* of two of the defendants, it is your duty not only to acquit the defendants concerning whose guilt there is a reasonable doubt, but also to acquit the other defendant.

No. 20

While you may convict upon the uncorroborated testi- [fol. 72] mony of Agnes Vera Bashor, still you should act upon her testimony with great caution, subjecting it to careful examination in the light of the other evidence in the case, and you are not to convict upon such testimony alone unless clearly convinced after such careful examination of its truth. If not so convinced you cannot convict without such corroboration of the same as will satisfy you beyond a reasonable doubt, and in the absence of such corroboration your verdict should be not guilty.

Corroborating evidence means such evidence, either direct or by proof of surrounding facts and circumstances as tends to establish the participation of the defendants in the commission of the offense.

No. 21

What is meant by circumstantial evidence in criminal cases is the proof of facts and circumstances connected with or surrounding the commission of the crime charged; and if these facts and circumstances are sufficient to satisfy you of the guilt of the defendant beyond a reasonable doubt, such proof is sufficient to authorize a verdict of guilty.

Where a conviction is sought on circumstantial evidence alone the People must not only show beyond a reasonable doubt that the alleged facts and circumstances are true, [fol. 73] but the facts and circumstances must be such as are absolutely incompatible, upon any reasonable hypothesis, with the innocence of the defendants, and incapable of explanation upon any reasonable hypothesis other than that of the guilt of the defendants.

No. 22

Stock instruction on credibility of witnesses.

No. 23

There is some evidence with reference to another transaction than that charged in the information. This evidence is admissible only as bearing upon the question of whether or not the defendants had a plan or design to produce a result of which the act charged in the information was a part, and you can consider such evidence for no other purpose. The defendants cannot be tried for or convicted of any offense not charged in the information.

No. 24

The court instructs the jury: That while the statute of this state provides that a person charged with crime may testify in his own behalf, he is under no obligation to do so, and the statute expressly provides that his neglect or refusal to testify shall not create any presumption against him. And in this case, a failure of the defendants to testify should not be taken or considered by the jury as any evidence of their guilt or innocence.

[fol. 74] No. 25

The court instructs you that you have nothing whatever to do with the punishment to be administered in this cause in case of a conviction, and you will not consider it for any purpose; but it is your duty to try this case upon the law and the evidence, and upon that alone, and to render a true verdict thereon.

No. 26

Stock instruction on arguments and statements of counsel and that no one instruction contains all the law.

Counsel for defendants object to giving of instructions Nos. 12, 13, 14, 15, 16, 21, and 23, and except to the refusal of the Court to give defendants' tendered instructions Nos. 1 to 13, inclusive.

Counsel argues to the jury. District Attorney opens argument.

Mr. Zarlengo for defendant, Betty Fulton.

Mr. Hornbein for defendant, Julius A. Wolf.

Mr. Dickerson for defendant, Charles H. Fulton.
Mr. Anderson closing for the People.

EXCERPTS FROM MR. ANDERSON'S REMARKS

From Mr. Anderson's remarks:

[fol. 75] "Let me show you what would happen. You may as well say to the bunch, 'go ahead with your abortion business,' give them all licenses to commit abortions, because we have this situation, gentlemen, and I am reading the court's instruction number 24. Now remember the district attorney has filed on the doctor who performed the abortion and the lady who got it too; we are now trying these two people, but while the statute of this state provides a person who is charged with crime may testify in his own behalf; and that is also true of his or her own behalf; he is under no obligation to do so, and the statute expressly provides that his neglect or refusal to testify shall not create any presumption against him.

"All right, where is that evidence? What has happened to the state's evidence, where you file on both the doctor and the woman, and you bring them in and try them? How are you going to attack; how are you going to fasten anything against them? We can't force them to take the witness stand.

"Mr. Hornbein: We make the objection on the ground that is a violation of the instructions and the statute of the state, and is an indirect method, and directly, [fol. 76] of commenting on the fact the defendants did not take the stand.

"Mr. Anderson: Not at all your Honor.

"Mr. Hornbein: That is what our objection is; we didn't take the stand and explain to the jury, and he has no right under our law to comment on that.

"Mr. Dickerson: Your Honor, the last statement he made, was, they didn't take the stand, and I want the record to show he turned and pointed to the doctor; turned to the right, indicating their direction, and said 'we can't make them take the stand,' and he has no right, and we object.

"Mr. Zarlengo: And we make the same objection.

"Mr. Anderson: Let the record show previous to making this statement, my remarks were substantially

these: That we are now trying the doctor and the woman, and they have both been filed on for this offense, and this has reference to—(interrupted)

"The Court: Objection overruled.

"Mr. Dickerson: Exception.

"Mr. Zarlengo: Exception.

[fol. 77] "Mr. Anderson: Now, gentlemen, here is the situation where we find ourselves, and an unfortunate one we agree it is. But you are never going to enforce the abortion law, not in this jurisdiction you are not, if you do what counsel has suggested. It is a bad situation; nothing we can do about it, and there under instruction number 24 is the reason why.

"Mr. Hornbein: We object to that statement about that instruction, and we make the same objection——

"The Court: Objection overruled.

"Mr. Hornbein: May I make my objection?

"The Court: Yes.

"Mr. Hornbein: Referring to the statute of this state; that the district attorney may not comment on the fact the defendant does not take the stand. He is doing it, after we made our objection and doing it again.

"Mr. Dickerson: Let the record show our same objection; he is violating—(interrupted)

"Mr. Zarlengo: The same objection.

[fol. 78] "The Court: Objection overruled.

"Mr. Zarlengo: Save an exception.

"Mr. Anderson: Well, gentlemen, we are not going to dwell on that situation any longer, but just bear that in mind when you reconsider the remarks made by counsel in their arguments."

Verdicts

Jury finds defendant Julius A. Wolf guilty of conspiracy.

Jury finds defendant Charles H. Fulton guilty of conspiracy.

Jury finds defendant Betty Fulton guilty of conspiracy.

Defendants except to the entry of the verdict and are granted 20 days within which to file a motion for a new trial.

DEFENDANTS TENDERED INSTRUCTIONS

No. 1

"Where circumstantial evidence is relied upon to secure a conviction in a criminal case, it is not sufficient that the circumstances proven coincide with or render probable the theory of guilt to warrant a conviction.

"To warrant a conviction the circumstances proven must exclude the existence of every reasonable hypo- [fol. 79] thesis, save and except the hypothesis of guilt. Otherwise, the defendants must be acquitted.

No. 2

"The jury is instructed that while it is not necessary that there be a formal agreement to constitute a conspiracy, yet it is necessary that there be wilful, conscious, corrupt and active participation in carrying out and furthering a common criminal design. The mere fact that a defendant may have had knowledge that his alleged co-conspirator was committing a crime and that a defendant acquiesced therein, is not sufficient to constitute a conspiracy.

No. 3

"If you believe from the evidence that Agnes Vera Bashor was pregnant, and if you believe that she suffered a miscarriage, and that such miscarriage was brought about by any drugs or poison or liquids administered to her by some one other than one of the defendants in this case, or if you believe that such miscarriage was brought about by any other act on the part of anyone other than one of the defendants in this case, or if from the evidence upon this question you have a reasonable doubt as defined in these instructions, then your verdict should be not guilty.

No. 4

"The jury is instructed that while it is not necessary that there be a formal agreement to constitute [fol. 80] a conspiracy, yet it is necessary that there be wilful, conscious, corrupt and active participation in carrying out and furthering a common criminal de-

sign. The mere fact that a defendant may have had knowledge that his alleged co-conspirator was committing a crime and that a defendant acquiesced therein, is not sufficient to constitute a conspiracy.

No. 5

"The defendants are on trial for a conspiracy to commit an abortion on Agnes Vera Bashor. That is the information that has been read to you, and the defendants cannot be convicted of any other crime. Evidence has been admitted to show similar offenses, but this evidence can be considered by you only for the purpose of corroboration, and although you may believe that other crimes were committed, yet the defendants cannot be convicted unless you are satisfied beyond a reasonable doubt that the particular and specific crime charged, namely, conspiracy to commit an abortion on Agnes Vera Bashor, is proven beyond all reasonable doubt.

No. 6

"The jury is instructed that the defendant Wolf is a duly licensed and practicing physician. That it is his right and privilege to treat persons requiring medical attention no matter who they are, or regardless of what their ailment might be. And the fact, if it be a fact, that the defendant Wolf treated patients [fol. 81] who had theretofore had an abortion committed, is not sufficient to make him a conspirator.

No. 7

"The jury is instructed that although you believe from the evidence that one of the defendants committed an abortion on the witness Agnes Vera Bashor, that is not sufficient in itself to convict the defendants of conspiracy, unless you further believe from all the evidence, beyond a reasonable doubt, that said abortion was committed in pursuance and in furtherance of and as a part of a conspiracy as hereinbefore defined.

"And if the evidence does not so convince you, you must acquit the defendants.

No. 8

"The jury is instructed that the examination of the prosecuting witness for pregnancy by Dr. Wolf, does not make him a co-conspirator with the defendants Fulton, although he may have known at the time he examined the prosecuting witness that it was her purpose to procure an abortion.

No. 9

"If after a consideration of all the evidence there is a reasonable doubt in your minds as to whether the defendant Wolf knowingly, unlawfully, wilfully and feloniously, and in the furtherance of a common design to abort the prosecuting witness, participated therein, [fol. 82] the defendants should be acquitted.

No. 10

"If after a consideration of all the evidence there is a reasonable doubt in your minds as to whether the defendant Betty Fulton knowingly, unlawfully, wilfully and feloniously, and in the furtherance of a common design to abort the prosecuting witness, participated therein, she should be acquitted.

No. 11

"The court instructs the jury that it is incumbent upon the People to prove to your satisfaction, beyond a reasonable doubt, that the crime charged in the information was committed in the City and County of Denver.

"If you believe from the evidence that the offense alleged in the information was committed in the County of Arapahoe, or if after consideration of all the evidence there is a reasonable doubt in your minds as to whether the offense was committed in the City and County of Denver or in the County of Arapahoe, you shall find the defendants not guilty.

No. 12

"You are instructed that to warrant a conviction upon circumstantial evidence the facts and circumstances proven must be such as are consistent only

with the guilt of the party or parties charged, and such [fol. 83] as cannot be consistent with any other reasonable hypothesis other than that of guilt.

"If any single material fact is proved by the evidence to the satisfaction of the jury which is inconsistent with the defendant's guilt, it is your duty to find the defendant or defendants not guilty.

No. 13

"The court instructs the jury that a duly licensed physician and surgeon may lawfully examine a patient for the purpose of ascertaining whether she is pregnant, and it is also lawful and right to attend her when in pain, when suffering from any cause whatsoever."

DEFENDANT WOLF'S MOTION FOR A NEW TRIAL, OMITTING THE FORMAL PARTS

"Comes now the defendant, Julius A. Wolf, and moves this Honorable Court for a new trial, and to set aside the verdict heretofore rendered, and as grounds for this Motion, shows unto the court:

"1. That the court erred in overruling the Motion of the defendant, Julius A. Wolf, to suppress as evidence a 1944 Day Book taken from the possession of the defendant, which book contained the names of patients and the nature of their ailment, and other matters which were of a wholly private and confidential nature. Said book being marked as an exhibit in this case. For the reasons that said book was taken without a search [fol. 84] warrant or any other process of law, and in violation of the rights of this defendant under Article 2, Section 7, and Section 18 of the Constitution of the State of Colorado and the 4th Amendment of the Constitution of the United States.

"2. The court erred in overruling the objection of the defendant, Julius A. Wolf, to the introduction of said exhibit for the further reason that the admission in evidence of said exhibit violated the statutes of the State of Colorado, which prohibits a doctor from testifying as to privileged communications received by him from his patients, which statements were given to

assist the physician in his treatment and diagnosis, and said exhibit contained the ailments from which patients were suffering and its introduction in evidence was, therefore, violative of the statute in such case made and provided.

"3. The court erred in overruling the objection of the defendant, Julius A. Wolf, to the introduction of said book, on the ground that it was unlawfully obtained by the officers of the District Attorney's office in violation of Article 2, Section 7, and Article 2, Section 18 of the Constitution of the State of Colorado, and in violation of the 4th Amendment to the Constitution of the United States.

"4. The court erred in restricting the cross examination of the People's witness, Agnes Vera Bashor, and [fol. 85] in not permitting the defendant to impeach her by showing that she made contrary statements in a deposition given by her in this case in open court on June 30, 1944.

"5. The court erred in not permitting the defendant to interrogate the witness, Agnes Vera Bashor, as to statements she had theretofore made in a sworn deposition, and in not permitting the defendant to read said deposition to the said witness, or any part thereof, for the reason that the witness made inconsistent statements in said deposition with her testimony taken at the trial.

"6. The court erred in denying the defendant the right to prove that the witness, Agnes Vera Bashor, did make statements in her deposition contrary to the statements made in open court in many particulars, all of which were presented to the court by formal offers of proof. That said formal offers of proof made to the court set forth the questions propounded to and the answers given by the witness, Agnes Vera Bashor, in her deposition. From said questions and answers it appears that her testimony at the trial was at variance and inconsistent with her testimony in the deposition.

"7. The court erred in overruling the objection of the defendant to the testimony of the witnesses, Prudence Rockman, Eloise M. Gorman, Barbara Blitz, Margaret [fol. 86] L. Rogers, and Juliana Zurcher, for the reason that said testimony related to matters and occurrences

that were wholly unrelated and independent of the matters charged in the information in this case, and that such testimony was not admissible on the theory of similar offenses because it had no bearing whatsoever on the issue in this case.

"8. The court erred in overruling the Motion of the defendant, Julius A. Wolf, made at the conclusion of the State's case for a directed verdict of 'not guilty' for the reason that the evidence affirmatively showed that the defendant did nothing except that which was lawful for him to do in accordance with the practice of his profession, and that the evidence was wholly insufficient to establish any conspiracy to which the defendant was a party, and the court further erred in overruling the Motion of the defendant, Julius A. Wolf, made at the conclusion of all the testimony for a directed verdict of 'not guilty' for the same reason.

"9. The court erred in giving instruction No. 13 and particularly the last sentence thereof, which is as follows: 'They commit the offense when they become parties to the transaction, or further the original plan, with knowledge of the conspiracy.' For the reason that said statement is ambiguous, misleading, and improper, in that one may be a party to a transaction and not be a [fol. 87] conspirator. To make one a conspirator, it is not only necessary that he be a party to the transaction, but that he actively and corruptly aid in the execution thereof.

"10. The court erred in giving instruction No. 15 for the reason that the same is argumentative and is in the nature of advocacy, and that it is repetitious and unduly emphasizes the State's theory of the case.

"11. The court erred in giving instruction No. 16 in that it ignores the rule as to circumstantial evidence namely that the circumstances proved must not only be consistent with the theory of guilt but must exclude every other reasonable hypothesis except the theory of guilt.

"12. The court erred in giving instruction No. 23 because it is inapplicable to the facts in this case in that said instruction is unintelligible, for the reason that the evidence referred to matters wholly distinct and independent of the matters charged in this case, and the

acts charged in the information could not possibly be a part of any result, and it is impossible to ascertain the meaning of the language as to whether or not the defendant had a plan or design to produce a result of which the act charged in the information was a part. That the act charged in the information was not a substantive or objective offense, and the only result of the [fol. 88] act charged in the information had to do with the case of Agnes Vera Bashor and no other person.

"13. The court erred in refusing to give defendant's tendered instructions Nos. 1 to 13, inclusive.

"14. The court erred in overruling the objection of the defendant as to certain remarks made by the District Attorney in his closing argument to the jury, in which the District Attorney commented upon the failure of the defendant to take the stand in his own defense. Said remarks being as follows:

> " 'All right, where is that evidence; what has happened to the state's evidence, where you file on both the doctor and the woman, and you bring them in and try them? How are you going to attack; how are you going to fasten anything against them? We can't force them to take the witness stand.'

And again,

> " 'Now, gentlemen, here is the situation where we find ourselves, and an unfortunate one we agree it is. But you are never going to enforce the abortion law, not in this jurisdiction you are not, if you do what counsel has suggested. It is a bad situation; *nothing we can do about it, and there under instruction number 24 is the reason why!*'

[fol. 89] For the reason that said argument of the District Attorney was a comment on the failure of the defendant to testify in direct violation of the statute that no presumption should be drawn against the defendant because of his failure to testify.

"15. The court erred in overruling the defendant's Motion for Severance for the reason that it appeared at the trial that the District Attorney offered evidence that would not have been admissible against the defend-

ant Wolf had he been tried alone, but was admissible because he was tried jointly with the other defendants."

MOTION FOR A NEW TRIAL FILED ON BEHALF OF DEFENDANTS CHARLES H. FULTON AND BETTY FULTON, OMITTING THE FORMAL PARTS

"Comes now the defendants, Charles H. Fulton and Betty Fulton, and move this Honorable Court for a new trial, and that this Honorable Court set aside the verdict herein rendered, and as grounds therefore shows unto this court:

"1. That the court erred in permitting in evidence one, certain, so-called Day Book alleged to have been taken from the possession of Julius A. Wolf, a co-defendant herein; that said book was inadmissible against these defendants if tried alone; and that heretofore these defendants filed their motions for severance [fol. 90] which, had the court granted the same, would have made said Day Book inadmissible as to them, and that, therefore, said book was inadmissible and the court should not have permitted the same to be produced in evidence against these defendants.

"2. That said book was taken without the knowledge of these defendants and was in no wise connected with them and was, if anything, a mere statement written by a third person without the knowledge of these defendants, and these defendants were in no wise connected with the same in any manner.

"3. That the court erred in refusing counsel for these defendants permission to cross examine the witness, Agnes Vera Bashor, concerning statements conflicting with her sworn testimony, and in not permitting these defendants to impeach her by showing that she made statements that were entirely contrary and opposite in a deposition given by her on demand of the District Attorney in this case in Open Court on June 30, 1944.

"4. That the court erred in not permitting these defendants to interrogate the witness, Agnes Vera Bashor, regarding her sworn statements therefore made in a deposition in this case; and that the court erred in not permitting the defendants to read from

said deposition to said witness, or any part of it, for [fol. 91] the reason that the witness swore opposite to and inconsistent with her sworn statements in her said deposition taken before the trial on June 30, 1944.

"5. That the court erred in refusing these defendants the right to prove that the witness, Agnes Vera Bashor, swore to alleged facts in her deposition which were contrary to her sworn statements made in Open Court in many particulars, all of which were presented to the court during the trial by formal offers of proof; that the said formal offers of proof made to the court set forth the questions propounded to and a-swers given by the witness, Agnes Vera Bashor, in her deposition, and from the said questions and answers given by her in the deposition, it appears that her testimony at the trial conflicted with it, was at variance with it, was vitally inconsistent with it, and that either she swore falsely at the time of her deposition or during the trial.

"6. That the court erred in overruling the objection of the defendants to the testimony of the witnesses, Prudence Rockman, Eloise M. Gorman, Barbara Blitz, Margaret L. Rogers, and Juliana Zurcher, for the reason that said testimony related to matters and occurrences that were wholly unrelated and independent of the matters charged in the information in this case, and that such testimony was not admissible on [fol. 92] the theory of similar offenses because it had no bearing whatsoever on the issue in this case.

"7. That the court erred in overruling the motion of these defendants made at the conclusion of State's case, for a directed verdict of 'not guilty' for the reason that no conspiracy was ever shown, and that the offense, if any, which was shown by the evidence would tend to prove an abortion committed in another jurisdiction.

"8. That the court erred in giving instruction No. 13, for the reason that it is tantamount to an instruction of guilt and tended to confuse the jury and to represent to the jury that the offense was assumed to have been committed by the court; and for the further reason that it erroneously makes one a conspirator if he has anything to do with a transaction.

"9. That the court erred in giving instruction No. 15 for the reason that the same is argumentative and is in

the nature of advocacy, and that it is repetitious and unduly emphasizes the State's theory of the case.

"10. That the court erred in giving instruction No. 16 in that it ignores the rule as to circumstantial evidence, namely, that the circumstances proved must not only be consistent with the theory of guilt, but must exclude every other reasonable hypothesis except the theory of guilt.

[fol. 93] "11. That the court erred in giving instruction No. 23 because it is inapplicable to the facts in this case, in that said instruction is unintelligible, for the reason that the evidence referred to matters wholly distinct and independent of the matters charged in this case, and the acts charged in the information could not possibly be a part of any result, and it is impossible to ascertain the meaning of the language as to whether or not the defendants had a plan or design to produce a result of which the act charged in the information was a part. That the act charged in the information was not a substantive or objective offense, and the only result of the act charged in the information had to do with the case of Agnes Vera Bashor and no other person.

"12. The court erred in refusing to give defendants' tendered instructions Nos. 1 to 13, inclusive.

"13. That the court erred in permitting the District Attorney to refer to the defendant, Betty Fulton, as follows: 'Look at her, isn't she cute? Yes, she is cute all right.'

"14. That the court erred in overruling the objections of the defendants to the remarks of the District Attorney in his closing argument to the jury in which the District Attorney directly commented on the failure of these defendants to take the stand in their own de-

[fol. 94] fense, and turned and pointed to them and told the jury that he could not make them take the stand, and again told the jury, 'And there, under instruction No. 24, is the reason why we can do nothing about it.'

"15. That the argument of the District Attorney positively, directly and prejudicially was on the failure of the defendants to testify, and by his actions the District Attorney violated the statute and endeavored to take away the presumption of innocence, and en-

deavored to take away that statute that provides that no presumption shall be drawn against a defendant because of his failure to testify.

"16. That the court erred in overruling the motion of the defendants for severance for the reason that at the trial *of* the District Attorney offered evidence inadmissible as to these defendants if tried alone and offered evidence which was only admissible because they were tried jointly with the defendant, Julius A. Wolf."

Affidavit of S. T. Anderson, Assistant District Attorney.

Affidavit of William L. Rice, Chief Deputy District Attorney.

Affidavit of Philip Hornbein, attorney for defendant, Julius A. Wolf.

[fol. 95] Motion to strike affidavits of S. T. Anderson and William L. Rice, filed by F. E. Dickerson.

Motion to strike affidavits of S. T. Anderson and William L. Rice, filed by Anthony F. Zarlengo.

Affidavit of F. E. Dickerson.

Affidavit of Anthony F. Zarlengo.

Affidavit of S. T. Anderson.

Affidavit of Harry L. Moore, one of the jurors.

Affidavit of Louis D. Turrentine, one of the jurors.

Certificate of Court Reporter.

Order of Court that the last paragraph of the affidavit of the District Attorney be stricken; District Attorney excepts.

ORDER OVERRULING MOTION FOR NEW TRIAL

Court overrules Motion for a New Trial. Defendants granted a 60-day stay of execution and 60 days within which to tender a bill of exceptions.

Exhibit A attached.

Exhibit B attached.

Exhibit C attached.

Photostatic pages of Exhibit E attached. (The original [fol. 96] book being Exhibit C in case No. 15666 in the Supreme Court entitled Julius A. Wolf and A. H. Montgomery, plaintiffs in error v. The People of the State of Colorado, defendants in error, reference to which is made for greater certainty.)

Exhibit G attached.

Exhibit H attached.
Exhibit I attached.
Exhibit J attached.

Certificate of trial judge signed August 23, 1945.

SENTENCES

Sentence of Julius A. Wolf to not less than 15 months or more than 5 years in the State Penitentiary.

Sentence of Charles H. Fulton to not less than 15 months or more than 5 years in the State Penitentiary.

Sentence of Betty Fulton to not less than 1 year or more than 2 years in the State Penitentiary.

Formal motion for a new trial denied.

Stay of execution of 60 days and 60 days to tender a bill of exceptions.

Additional stay of execution for 60 days and additional time for preparing bill of exceptions.

Formal order permitting substitution of photostatic copies.

[fol. 97] Additional stay of execution and time.

Additional stay of execution and time.

Stay of execution and time to September 4, 1945.

Certificate of Clerk of the District Court signed August 23, 1945.

Certificate of trial judge signed August 27, 1945.

ASSIGNMENTS OF ERROR OF JULIUS A. WOLF

Assignments of error, omitting the formal parts, is as follows:

Comes now Julius A. Wolf, one of the above-named plaintiffs in error, and respectfully represents to this Honorable Court that at the trial and in the proceedings in the Court below there were manifest and material errors to the prejudice of this plaintiff in error, a specification of said errors being as follows:

1. That the court erred in overruling the motion of the defendant, Julius A. Wolf, to suppress as evidence a 1944 Day Book taken from the possession of the defendant, which

book contained the names of patients and the nature of their ailment, and other matters which were of a wholly private and confidential nature. Said book being marked as Exhibit E in this case. For the reason that said book was taken without a search warrant or any other process of law, [fol. 98] and in violation of the rights of this defendant under Article 2, Section 7, and Section 18 of the Constitution of the State of Colorado and the 4th Amendment of the Constitution of the United States.

2. The Court erred in overruling the objections of the defendant, Julius A. Wolf, to the introduction of said exhibit for the further reason that the admission in evidence of said exhibit violated the statutes of the State of Colorado, which prohibits a doctor from testifying as to privileged communications received by him from his patients, which statements were given to assist the physician in his treatment and diagnosis, and said exhibit contained the ailments from which patients were suffering and its introduction in evidence was, therefore, violative of the statute in such case made and provided.

3. The Court erred in overruling the objections of the defendant, Julius A. Wolf, to the introduction of said book, on the ground that it was unlawfully obtained by the officers of the District Attorneys' office in violation of Article 2, Section 7, and Article 2, Section 18, of the Constitution of the State of Colorado, and in violation of the 4th Amendment to the Constitution of the United States.

4. The Court erred in restricting the cross examination of the People's witness, Agnes Vera Bashor, and in not permitting the defendant to impeach her by showing that she made contrary statements in a deposition given by her in this case in open court on June 30, 1944.

5. The Court erred in not permitting the defendant to [fol. 99] interrogate the witness, Agnes Vera Bashor, as to statements she had theretofore made in a sworn deposition, and in not permitting the defendant to read said deposition to the said witness, or any part thereof, for the reason that the witness made inconsistent statements in said deposition with her testimony taken at the trial.

6. The Court erred in denying the defendant the right to prove that the witness, Agnes Vera Bashor, did make statements in her deposition contrary to the statements made in open court in many particulars, all of which were presented

to the Court by formal offers of proof. That said formal offers of proof made to the Court set forth the questions propounded to and the answers given by the witness, Agnes Vera Bashor, in her deposition. From said questions and answers it appears that her testimony at the trial was at variance and inconsistent with her testimony in the deposition.

7. The Court erred in overruling the objection of the defendant to the testimony of the witnesses, Prudence Rockman, Eloise M. Gorman, Barbara Blitz, Margaret L. Rogers, and Juliana Zurcher, for the reason that said testimony related to matters and occurrences that were wholly unrelated and independent of the matters charged in the information in this case, and that such testimony was not admissible on the theory of similar offenses because it had no bearing whatsoever on the issue in this case.

8. The Court erred in overruling the motion of the defendant, Julius A. Wolf, made at the conclusion of the State's case, for a directed verdict of "not guilty," for the [fol. 100] reason that the evidence affirmatively showed that the defendant did nothing except that which was lawful for him to do in accordance with the practice of his profession, and that the evidence was wholly insufficient to establish any conspiracy to which the defendant was a party, and the Court further erred in overruling the motion of the defendant, Julius A. Wolf, made at the conclusion of all the testimony, for a directed verdict of "not guilty" for the same reason.

9. The Court erred in giving instruction No. 13 and particularly the last sentence thereof, which is as follows: "They commit the offense when they become parties to the transaction, or further original plan, with knowledge of the conspiracy." For the reason that said statement is ambiguous, misleading, and improper, in that one may be a party to a transaction and not be a conspirator. To make one a conspirator, it is not only necessary that he be a party to the transaction, but that he actively and corruptly aid in the execution thereof.

10. The Court erred in giving instruction No. 15 for the reason that the same is argumentative and is in the nature of advocacy, and that it is repetitious and unduly emphasizes the State's theory of the case.

11. The Court erred in giving instruction No. 16 in that it ignores the rule as to circumstantial evidence, namely, that the circumstances proved must not only be consistent with the theory of guilt, but must exclude every other reasonable hypothesis except the theory of guilt.

[fol. 101] 12. The Court erred in giving instruction No. 23 because it is inapplicable to the facts in this case, in that said instruction is unintelligible, for the reason that the evidence referred to matters wholly distinct and independent of the matters charged in this case, and the acts charged in the information could not possibly be a part of any result, and it is impossible to ascertain the meaning of the language as to whether or not the defendant had a plan or design to produce a result of which the act charged in the information was a part. That the act charged in the information was not a substantive of objective offense, and the only result of the act charged in the information had to do with the case of Agnes Vera Bashor and no other person.

13. The Court erred in overruling the objection of the defendant as to certain remarks made by the District Attorney in his closing argument to the jury, in which the District Attorney commented upon the failure of the defendant to take the stand in his own defense. Said remarks being as follows:

> "All right, where is that evidence; what has happened to the State's evidence, where you file on both the doctor and the woman, and you bring them in and try them? How are you going to attack; how are you going to fasten anything against them? We can't force them to take the witness stand."

And again,

> "Now, gentlemen, here is the situation where we find ourselves, and an unfortunate one we agree it is. But [fol. 102] you are never going to enforce the abortion law, not in this jurisdiction you are not, if you do what counsel has suggested. It is a bad situation; *nothing we can do about it, and there under instruction number 24 is the reason why.*

For the reason that said argument of the District Attorney was a comment on the failure of the defendant to testify in direct violation of the statute that no presumption should

be drawn against the defendant because of his failure to testify.

15. The Court erred in overruling the defendant's Motion for Severance for the reason that it appeared at the trial that the District Attorney offered evidence that would not have been admissible against the defendant Wolf had he been tried alone, but was admissible because he was tried jointly with the other defendants.

16. That as to the refusal to give said tendered instructions the defendant, Julius A. Wolf, duly saved his exceptions, and he further saved his exceptions to the instructions hereinabove challenged. The defendant saved his exceptions to such of his objections as were overruled.

17. The verdict of the jury is against the law and the evidence, and the evidence is insufficient to sustain any verdict or judgment save and except a verdict of not guilty.

[fol. 103] ASSIGNMENTS OF ERROR OF BETTY FULTON

Assignments of error, omitting the formal parts, is as follows:

Comes now Betty Fulton, one of the above-named plaintiffs, in error, and respectfully represents to this Honorable Court that at the trial and in the proceedings in the Court below there were manifest and material errors to the prejudice of this plaintiff in error, a specification of said errors being as follows:

1. That the Court erred in permitting in evidence one, certain, so-called Day Book alleged to have been taken from the possession of Julius A. Wolf, co-defendant herein; that said book was inadmissible against this defendant if tried alone; and that heretofore this defendant filed her motion for severance which, had the Court granted the same, would have made said Day Book inadmissible as to her, and that, therefore, said book was inadmissible and the Court should not have permitted the same to be produced in evidence against this defendant.

2. That said book was without the knowledge of this defendant and was in no wise connected with her and was, if anything, a mere statement written by a third person without the knowledge of this defendant, and this defendant was in no wise connected with the same in any manner.

3. That the Court erred in refusing counsel for this defendant permission to cross examine the witness, Agnes [fol. 104] Vera Bashor, concerning statements conflicting with her sworn testimony, and in not permitting this defendant to impeach her by showing that she made statements that were entirely contrary and opposite in a deposition given by her on demand of the District Attorney in this case in Open Court on June 30, 1944.

4. That the Court erred in not permitting this defendant to interrogate the witness, Agnes Vera Bashor, regarding her sworn statements theretofore made in a deposition in this case; and that the Court erred in not permitting the defendant to read from said deposition to said witness, or any part of it, for the reason that the witness swore opposite to and inconsistent with her sworn statements in her said deposition taken before the trial on June 30, 1944.

5. That the Court erred in refusing this defendant the right to prove that the witness, Agnes Vera Bashor, swore to alleged facts in her deposition which were contrary to her sworn statements made in Open Court in many particulars, all of which were presented to the Court during the trial by formal offers of proof; that the said formal offers of proof made to the Court set forth the questions propounded to and answers given by the witness, Agnes Vera Bashor, in her deposition, and from the said questions and answers given by her in the deposition, it appears that her testimony at the trial conflicted with it, was at variance with it, was vitally inconsistent with it, and that either she swore falsely at the time of her deposition or during the trial.

[fol. 105] 6. That the Court erred in overruling the objection of the defendant to the testimony of witnesses Prudence Rockman, Eloise M. Gorman, Barbara Blitz, Margaret L. Rogers, and Juliana Zurcher, for the reason that said testimony related to matters and occurrences that were wholly unrelated and independent of the matters charged in the information in this case, and that such testimony was not admissible on the theory of similar offenses because it had no bearing whatsoever on the issue in this case.

7. That the Court erred in overruling the motion of this defendant made at the conclusion of the State's case for a directed verdict of "not guilty" for the reason that no conspiracy was ever shown, and that the offense, if any, which

was shown by the evidence would tend to prove an abortion committed in another jurisdiction.

8. That the Court erred in giving instruction No. 13, for the reason that it is tantamount to an instruction of guilt and tended to confuse the jury and to represent to the jury that the offense was assumed to have been committed by the Court; and for the further reason that it erroneously makes one a conspirator if he has anything to do with a transaction.

9. That the Court erred in giving instruction No. 15 for the reason that the same is argumentative and is in the nature of advocacy, and that it is repetitious and unduly emphasizes the State's theory of the case.

[fol. 106] 10. That the Court erred in giving instruction No. 16 in that it ignores the rule as to circumstantial evidence, namely, that the circumstances proved must not only be consistent with the theory of guilt, but must exclude every other reasonable hypothesis except the theory of guilt.

11. That the Court erred in giving instruction No. 23 because it is inapplicable to the facts in this case, in that said instruction is unintelligible, for the reason that the evidence referred to matters wholly distinct and independent of the matters charged in this case, and the acts charged in the information could not possibly be a part of any result, and it is impossible to ascertain the meaning of the language as to whether or not the defendant had a plan or design to produce a result of which the act charged in the information was a part. That the act charged in the information was not a substantive or objective offense, and the only result of the act charged in the information had to do with the case of Agnes Vera Bashor and no other person.

12. The Court erred in refusing to give defendant's tendered instructions Nos. 1 to 13, inclusive.

13. That the Court erred in permitting the District Attorney to refer to the defendant, Betty Fulton, as follows: "Look at her, isn't she cute? Yes, she is cute all right."

14. That the Court erred in overruling the objection of the defendant to the remarks of the District Attorney in his closing argument to the jury in which the District At-

[fol. 107] torney directly commented on the failure of this defendant to take the stand in her own defense, and turned and pointed to her and told the jury that he could not make

her take the stand, and again told the jury, "And there, under instruction No. 24, is the reason why we can do nothing about it."

15. That the argument of the District Attorney positively, directly, and prejudicially was on the failure of the defendant to testify, and by his actions the District Attorney violated the statute and endeavored to take away the presumption of innocence, and endeavored to take away that statute that provides that no presumption shall be drawn against a defendant because of his failure to testify.

16. That the Court erred in overruling the motion of the defendant for severance for the reason that at the trial the District Attorney offered evidence inadmissible as to this defendant if tried alone and offered evidence which was only admissible because she was tried jointly with the defendants, Charles H. Fulton and Julius A. Wolf.

17. That as to the refusal to give said tendered instructions the defendant, Betty Fulton, duly saved her exceptions, and she further saved her exceptions to the instruction hereinabove challenged. The defendant saved her exceptions to such of her objections as were overruled.

18. The verdict of the jury is against the law and the evidence, and the evidence is insufficient to sustain any verdict [fol. 108] or judgment save and except a verdict of not guilty.

Assignments of Error of Charles H. Fulton

Assignments of error, omitting the formal parts, is as follows:

Comes now Charles H. Fulton, one of the above-named plaintiffs in error, and respectfully represents to this Honorable Court that at the trial and in the proceedings in the Court below there were manifest and material errors to the prejudice of this plaintiff in error, a specification of said errors being as follows:

1. That the Court erred in permitting in evidence one, certain, so-called Day Book alleged to have been taken from the possession of Julius A. Wolf, a co-defendant herein; that said book was inadmissible against this defendant if tried alone; and that heretofore this defendant filed his motion

for severance which, had the Court granted the same, would have made this Day Book inadmissible as to him, and that, therefore, said book was inadmissible and the Court should not have permitted the same to be produced in evidence against this defendant.

2. That said book was without the knowledge of this defendant and was in no wise connected with him or was, if anything, a mere statement written by a third person without the knowledge of this defendant, and this defendant was in no wise connected with the same in any manner.

[fol. 109] 3. That the Court erred in refusing counsel for this defendant permission to cross examine the witness, Agnes Vera Bashor, concerning statements conflicting with her sworn testimony, and in not permitting this defendant to impeach her by showing that she made statements that were entirely contrary and opposite in a deposition given by her on demand of the District Attorney in this case in Open Court on June 30, 1944.

4. That the Court erred in not permitting this defendant to interrogate the witness, Agnes Vera Bashor, regarding her sworn statements theretofore made in a deposition in this case; and that the Court erred in not permitting the defendant to read from said deposition to said witness, or any part of it, for the reason that the witness swore opposite to and inconsistent with her sworn statements in her said deposition taken before the trial on June 30, 1944.

5. That the Court erred in refusing this defendant the right to prove that the witness, Agnes Vera Bashor, swore to alleged facts in her deposition which were contrary to her sworn statements made in Open Court in many particulars, all of which were presented to the Court during the trial by formal offers of proof; that the said formal offers of proof made to the Court set forth the questions propounded to and answers given by the witness, Agnes Vera Bashor, in her deposition, and from the said questions and answers given by her in the deposition, it appears that her testimony at the trial conflicted with it, was at variance with it, was vitally inconsistent with it, and that either she swore falsely at the time of her deposition or during the trial.

[fol. 110] 6. That the Court erred in overruling the objection of the defendant to the testimony of witnesses Prudence Rockman, Eloise M. Gorman, Barbara Blitz, Margaret L. Rogers, and Juliana Zurcher, for the reason that

said testimony related to matters and occurrences that were wholly unrelated and independent of the matters charged in the information in this case, and that such testimony was not admissible on the theory of similar offenses because it had no bearing whatsoever on the issue in this case.

7. That the Court erred in overruling the motion of this defendant made at the conclusion of the State's case for a directed verdict of "not guilty" for the reason that no conspiracy was ever shown, and that the offense, if any, which was shown by the evidence would tend to prove an abortion committed in another jurisdiction.

8. That the Court erred in giving instruction No. 13, for the reason that it is tantamount to an instruction of guilt and tended to confuse the jury and to represent to the jury that the offense was assumed to have been committed by the Court; and for the further reason that it erroneously makes one a conspirator if he has anything to do with a transaction.

9. That the Court erred in giving instruction No. 15 for the reason that the same is argumentative and is in the nature of advocacy, and that it is repetitious and unduly emphasizes the State's theory of the case.

10. That the Court erred in giving instruction No. 16 in that it ignores the rule as to circumstantial evidence, [fol. 111] namely, that the circumstances proved must not only be consistent with the theory of guilt, but must exclude every other reasonable hypothesis except the theory of guilt.

11. That the Court erred in giving instruction No. 23 because it is inapplicable to the facts in this case, in that said instruction is unintelligible, for the reason that the evidence referred to matters wholly distinct and independent of the matters charged in this case, and the acts charged in the information could not possibly be a part of any result, and it is impossible to ascertain the meaning of the language as to whether or not the defendant had a plan or design to produce a result of which the act charged in the information was a part. That the act charged in the information was not a substantive or objective offense, and the only result of the act charged in the information had to do with the case of Agnes Vera Bashor and no other person.

12. The Court erred in refusing to give defendant's tendered instructions Nos. 1 to 13, inclusive.

13. That the Court erred in overruling the objection of the defendant to the remarks of the District Attorney in his closing argument to the jury in which the District Attorney directly commented on the failure of this defendant to take the stand in his own defense, and turned and pointed to him and told the jury that he could not make him take the stand, and again told the jury, "And there, under instruction No. 24, is the reason why we can do nothing about it."

14. That the argument of the District Attorney positively, directly, and prejudicially was on the failure of the defendant to testify, and by his actions the District Attorney [fol. 112] violated the statute and endeavored to take away the presumption of innocence, and endeavored to take away that statute that provides that no presumption shall be drawn against a defendant because of his failure to testify.

15. That the Court erred in overruling the motion of the defendant for severance for the reason that at the trial the District Attorney offered evidence inadmissible as to this defendant if tried alone and offered evidence which was only admissible because he was tried jointly with the defendants, Betty Fulton and Julius A. Wolf.

16. That as to the refusal to give said tendered instructions the defendant, Charles H. Fulton, duly saved his exceptions, and he further saved his exceptions to the instructions hereinabove challenged. The defendant saved his exceptions to such of his objections as were overruled.

17. The verdict of the jury is against the law and the evidence, and the evidence is insufficient to sustain any verdict or judgment save and except a verdict of not guilty.

Respectfully submitted, Philip Hornbein, Donald M. Shere, F. E. Dickerson, A. F. Zarlengo, William F. Dwyer, Attorneys for Plaintiffs in Error, Symes Building, Denver, Colorado.

[fol. 113] IN SUPREME COURT OF COLORADO

MOTION FOR LEAVE TO FILE SUPPLEMENTAL ASSIGNMENT OF ERROR—Filed February 18, 1947

Comes now the plaintiff in error, Julius A. Wolf, defendant below, and moves this Honorable Court to grant a leave to file a supplemental assignment of error as follows:

1. That the court erred in overruling the motion of the defendant, Julius A. Wolf, to suppress as evidence a 1944 Day Book taken from the possession of the defendant, which book contained the names of patients and the nature of their ailment, and other matters which were of a wholly private and confidential nature. For the reason that said books and records were taken by the District Attorney of the City and County of Denver, a State Officer, without a search warrant or any other process of law, and violation of the rights of the defendant under the due-process clause of the Fourteenth Amendment of the Constitution of the United States, and the defendant specifically invokes the protection of the Fourteenth Amendment against said unlawful search and seizure.

(S) Philip Hornbein, Donald M. Shere, Attorneys for Plaintiff in Error, Julius A. Wolf, 620 Symes Building, Denver, Colorado—Ta. 5174.

Filed February 18, 1947.

[fol. 114] IN SUPREME COURT OF COLORADO

OBJECTION TO MOTION FOR LEAVE TO FILE SUPPLEMENTAL ASSIGNMENT OF ERROR—Filed February 21, 1947

Come now the defendants in error by H. Lawrence Hinkley, Attorney General, Duke W. Dunbar, Deputy Attorney General, and James S. Henderson, Assistant Attorney General, and objects to the motion to file heretofore tendered by the plaintiff in error, Julius A. Wolf, in the above-entitled cause, and as grounds therefor the Attorney General shows unto the Court that the matters and things therein referred to are, in substance, covered by the assignments of error presently on file in this Court; that all of the briefs have been written in this case, and the matter is now on the calendar of this Court for oral argument on the 3rd of March, A. D. 1947; and that under the circumstances the

said motion comes too late to be considered in this cause and tends only to augment an already lengthy record and to inject in other words a proposed assignment of error already covered by the assignments on file.

H. Lawrence Hinkley, Attorney General; Duke W. Dunbar, Deputy Attorney General; James S. Henderson, Assistant Attorney General, Attorneys for Defendants in Error, Address: 104 State Capitol, Denver Colorado.

[fol. 115] IN SUPREME COURT OF COLORADO

[Title omitted]

ORDER DENYING MOTION FOR LEAVE TO FILE SUPPLEMENTAL ASSIGNMENT OF ERROR—February 27, 1947

Upon consideration of the motion of the plaintiffs in error, and also the objections of the Attorney General thereto, asking leave to file supplemental assignments of error herein, the Court now being well advised, doth deny said motion.

[fol. 116] IN SUPREME COURT OF COLORADO

15670

JULIUS A. WOLF, CHARLES H. FULTON and BETTY FULTON, Plaintiffs in Error,

vs.

THE PEOPLE OF THE STATE OF COLORADO, Defendant in Error

Error to the District Court of the City and County of Denver

JUDGMENT—November 24, 1947

This cause having been brought to this Court by writ of error to review the judgment of the District Court of the City and County of Denver, and having been heretofore argued by counsel and submitted to the consideration and judgment of the Court upon the matters assigned as con-

stituting error in the proceedings and judgment of said District Court, and it now appearing to the Court that there is no error in the proceedings and judgment of said District Court,

It is therefore ordered and adjudged that the judgment of said District Court be, and the same is hereby, affirmed, and that it stand in full force and effect; and that this case be remanded to said District Court for such other and further proceedings, according to law, as shall be necessary to the final execution of the judgment of said District Court in the cause, notwithstanding the said writ of error.

[fol. 117] IN SUPREME COURT OF COLORADO

No. 15670

JULIUS A. WOLF, CHARLES H. FULTON and BETTY FULTON, Plaintiffs in Error,

vs.

THE PEOPLE OF THE STATE OF COLORADO, Defendant in Error

Error to the District Court of the City and County of Denver. Hon. Joseph E. Cook, Judge

En Banc. Judgment Affirmed

OPINION—November 24, 1947

Mr. Chief Justice Burke delivered the opinion of the Court.

Plaintiffs in error are hereinafter referred to as defendants or by name. They were charged by information with conspiracy to commit an abortion. The woman involved was one Agnes Vera Bashor. On verdicts of guilty as to all Wolf and Fulton each received a sentence of fifteen months to five years in the penitentiary and Betty Fulton a sentence of one to two years. To review judgments entered accordingly they prosecute this writ. Their numerous assignments are somewhat complicated and largely repetitious. Those requiring any notice may however be properly classified approximately as they have been by the People in the brief of the Attorney General, i. e.: 1—The ver-

dict is unsupported by the evidence; 2—Erroneous admission of evidence; 3—Limitation of cross examination; 4—Admitting evidence of similar offenses; 5—Overruling motions for separate trials; 6—Erroneous instructions; 7—[fol. 118] Misconduct by the district attorney.

This is practically a companion case to No. 15666 decided by this court November 3, 1947, in that the principal question there considered is the principal one here. That case was tried December 4, 1944 before district judge Black and this February 25, 1945 before district judge Cook. Wolf is a plaintiff in error in each and the Fultons stand in this case in the position of Montgomery in the other. Save for Mr. Zarlengo, who did not appear in 15666, counsel in the cases were the same and they were argued together here. Exhibits A and C in the former case are Exhibits D and E here.

1—Assuming that the other alleged errors are without merit the evidence of the guilt of these defendants was overwhelming and what we said in the former case as to the plan of the conspiracy and the part each played in it is equally true here. Betty Fulton was the wife of Charles H. Fulton and assisted him in his work at his home. It should be added that no defendant in the instant case took the stand and no evidence was offered in their behalf.

2—This point relates to the admission of Exhibits D and E. The disposition of the question of their admissibility was disposed of in said case 15666 and is disposed of here in the same way and on the same authority and the opinion in that case must be read in connection herewith.

3—This point relates to an attempt to cross-examine the witness Bashor on an immaterial matter for the purpose of impeachment. Nothing more need be said about it.

4—The "similar offenses" of which evidence was admitted related entirely to the plan or scheme followed by defendants in the present case and was definitely limited to that purpose by the court's instruction.

5—A motion for separate trials was filed jointly by Charles and Betty Fulton. It was not pressed by the latter on the trial. The action of the defendants in respect to the offense charged was so interwoven and their plan to [fol. 119] work together so palpable and definitely disclosed by the evidence as to clearly support the ruling of the court.

6. Defendants tendered their instructions numbered 6, 8, 10 and 13. Numbers 6, 8 and 13 are based upon the theory that Wolf could not be convicted if he merely examined the patient to determine the question of pregnancy, or simply treated her after an abortion had been performed. Those instructions were properly refused because there was no evidence to support them. Instruction No. 10 attempts to apply the rule of reasonable doubt specifically to Betty Fulton. Counsel's reliance therefor is based upon the case of Payne v. People, 110 Colo. 235; 132 Pac. (2d) 442. The ruling in that case rested specifically upon evidence given by the plaintiff in error. This defendant did not testify and the record is entirely devoid of evidence to support such an instruction. Its substance was correctly stated in instructions given.

7. This assignment rests upon the contention that the district attorney in his closing argument commented upon the fact that defendant did not take the stand. It rests entirely upon counsel's construction of what was said. It appears that what was said was prompted by the argument of counsel for the defendants to the effect that those upon whom the alleged offense was committed were the real criminals and not being prosecuted, that it would be unjust to "permit these and other criminals, the real criminals, to roam the streets" and challenged the district attorney to explain to the jury in his address why Agnes Vera Bashor had not been charged with a criminal offense and why the witnesses called for the People were allowed to walk out of the court room without any charge being filed against them. The record contains a counter showing to this but enough is disclosed to make it perfectly evident to the court that the language of the district attorney here objected to was prompted by some similar incident. It further appears that the district attorney did little more than mention the fact of the court's instruction concerning the failure of defendants to take the stand and discloses not the slightest attempt to use that failure against defendants. These arguments [fol. 120] are omitted from the record.

> "In ordinary circumstances a judgment will not be reversed for improper argument where all arguments are not in the record so that it can be ascertained

whether the parts questioned were provoked or made in response to arguments of opposing counsel."

Pietch v. United States, 110 Fed. (2d) 817, 822.
Fries v. People, 80 Colo. 430; 252 Pac. 341.

It is clear that these defendants had a fair trial and that the record discloses no prejudicial error.

The judgment is accordingly affirmed.

Mr. Justice Hilliard dissenting.

[fol. 121] IN SUPREME COURT OF COLORADO

[Title omitted]

ORDER AS TO PETITIONS FOR REHEARING—December 4, 1947

Upon consideration of the motion of the plaintiff in error, Julius A. Wolf, and also the receipt of the defendant in error for a copy thereof; it is this day ordered that the petition for rehearing heretofore filed in No. 15666, being Julius A. Wolf and A. H. Montgomery versus the People of the State of Colorado, be the petition for rehearing in this case.

[fol. 122] IN SUPREME COURT OF COLORADO

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—December 15, 1947

The Court having considered the petition of the plaintiffs in error for a rehearing in this cause, and now being well and fully advised in the premises, doth order that said petition be, and the same is hereby, denied.

[fol. 123] IN SUPREME COURT OF COLORADO

[Title omitted]

ORDER STAYING EXECUTION—December 19, 1947

On consideration of the motion of the plaintiff in error, Julius A. Wolf, requesting stay of execution pending application for a writ of certiorari and the representations therein made; it is ordered by the Chief Justice of the Supreme Court of the State of Colorado that the execution of the sentence herein against said plaintiff in error be and the same is hereby stayed for a period of sixty days from this date upon the giving of a good and sufficient bond, in the sum of Five Thousand Dollars ($5,000.00), conditioned as by law provided and approved by the undersigned and to be substituted for any bond heretofore given, whereupon execution shall be stayed as prayed and no remittitur shall issue during said period of sixty days.

Done and signed this 19th day of December, 1947.

(Signed) H. P. Burke, Chief Justice of the Supreme Court of the State of Colorado.

[fols. 124-126] Stay Bond on Appeal for $7,500.00 approved and filed December 19, 1947, omitted in printing.

[fol. 127] CLERK'S CERTIFICATE

Supreme Court of the State of Colorado.

I, O. E. Rickerson, Clerk of the Supreme Court of the State of Colorado, do hereby certify the foregoing as full, true and complete copies except full captions, titles and endorsements, omitted in pursuance of the rules of the Supreme Court of the United States of the following:

1. Abstract of Record.
2. Motion for Leave to File Supplemental Assignment of Error.
3. Objection to Motion for Leave to File Supplemental Assignment of Error.
4. Ruling of Court denying Motion for Leave to File Supplemental Assignment of Error.
5. Judgment of Court.

6. Opinion of Court.

7. Order that Petition for Rehearing in No. 15666 be considered as Petition for Rehearing in this case.

8. Order denying Petition for Rehearing.

9. Order Staying Execution.

10. Recognizance.

Had and filed in the Supreme Court of the State of Colorado in case No. 15670 wherein Julius A. Wolf and Charles H. Fulton and Betty Fulton were plaintiffs in error and the People of the State of Colorado were defendants in error, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the Supreme Court of the State of Colorado at my office in Denver, Colorado, this 23rd day of January, 1948.

O. E. Rickerson, Clerk of the Supreme Court of the State of Colorado. C. W. Sheafor, Deputy. (Seal.)

[fol. 128] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 26, 1948

The petition herein for a writ of certiorari to the Supreme Court of the State of Colorado is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.