WILLIAM G MONTGOMERY
MARICOPA COUNTY ATTORNEY
Michelle Ariño
Deputy County Attorney
Bar Id #: 023169
301 West Jefferson, 5th Floor
Phoenix, AZ 85003
Telephone: (602) 506-5999
mcaomjc2@mcao.maricopa.gov
MCAO Firm #: 00032000
Attorney for Plaintiff

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
Isabel Osuna
Filing ID 1044397
10/21/2011 3:50:23 PM

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA, Plaintiff, vs. MARISSA SUZANNE DEVAULT, Defendant,	CR 2009-030306-001 **STATE'S MOTION TO ADMIT EVIDENCE PURSUANT TO RULE 404(B)** (Assigned to the Honorable Susan Brnovich)

The State of Arizona, by and through undersigned counsel, requests the following evidence to be admitted at trial under Rule 404(b), Arizona Rules of Evidence. The State's motion is based upon the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTS:

The defendant and the victim, Dale Harrell, married in 1999. On January 14, 2009, the defendant used a hammer to bludgeon the victim multiple times in the head. On February 9, 2009, the victim died as a result of complications from his injuries.

Approximately 2 years prior to the victim's murder, the defendant began having an extramarital affair with Mr. Allen Flores. Prior to the murder, the defendant told Mr. Flores that she was going to be coming into a large sum of money because her step-father had passed away leaving her a large inheritance. This was not true. The defendant told Mr. Flores that the

estate was in litigation and asked him to borrow money. Mr. Flores allowed the defendant to borrow money but he kept a ledger of the money he loaned her and had her sign promissory notes. The final promissory note the defendant signed was for the amount of $362,000 plus interest to be paid by December 31, 2009.

In December of 2008 Mr. Flores began having suspicions that things with the defendant were not quite what they seemed. He began documenting statements the defendant made in case harm came to him. Mr. Flores documented, amongst other things, that the defendant had hurriedly sent in an insurance premium for the victim and told him about a plan to have the victim killed. This plan was to take place at a casino and be staged as a robbery.

On January 8, 2009, the defendant told Mr. Flores that the victim had attacked her and that, as a result, the victim was hit in the head with a tire iron. The defendant also told Mr. Flores that the victim died as a result of the blows; this was not true. On January 13, 2009, Mr. Flores went to visit the defendant to learn that the victim was not dead and that the victim and the defendant had gone out for the evening.

The following day (January 14, 2009), the defendant tried to kill the victim by hitting him in the head multiple times with a hammer. When police responded to the defendant's house to render aid to the victim, the defendant gave them a essentially the same story that she had previously given Mr. Flores.

On February 10, 2009, the defendant called Gilbert Police for assistance. Police found the defendant on the side of the road with injuries to her face and leg. That night, the defendant claimed that she has been assaulted by an unknown male and thrown onto the side of the road from a vehicle.

On February 12, 2009, the defendant was interviewed by police. She told them that on February 10, 2009 she left to go running at approximately 8:30pm. While she was running she alleged that an unknown male came up behind her and put her in a "lock hold". She could not provide any information about the attacker but claimed that she thought it was a male because the person was taller than her. The defendant told police that the only person that she could think would do this to her would be her husband (the victim) but that he should not be out of the

hospital yet. The defendant maintained that neither her roommate, Stanly Cook, nor her lover, Allen Flores, caused this injury.

On February 20, 2009, the defendant's roommate, Stanly Cook, went to Gilbert Police Department to confess to being the person responsible for the death of the victim, Dale Harrell. Mr. Cook was questioned in regards to the defendant's attack on February 10, 2009. Mr. Cook told police that he was the one who beat up the defendant at her request. Mr. Cook told police that the defendant was attempting to collect money from a life insurance policy.

Mr. Cook explained that the defendant wanted him to paralyze her because any type of paralysis to the defendant would result in her life insurance paying her $500,000. This would cover her debt to Mr. Flores. Mr. Cook explained that the only type of paralysis acknowledged by the life insurance policy would be sustaining a spinal cord injury. Mr. Cook told the defendant that the easiest way to accomplish a spinal cord injury would be a gunshot wound but he told the defendant that he could not shoot her because of the damage it would do to her body.

The defendant and Mr. Cook conspired for Mr. Cook to beat the defendant up and smash her ankle with a sledgehammer. The defendant took pain pills prior to the start of putting this plan into action. Mr. Cook punched the defendant numerous times in the face and then used the hammer to smash the defendant's ankle a couple times. This took place in the defendant's bathroom. After the assault, Mr. Cook carried the defendant to his car and dropped her off down the street. Throughout this time, Mr. Cook called the defendant's cell phone multiple times to corroborate the defendant's story that she had gone out jogging.

The defendant and Mr. Cook both later told police the story they had devised about the defendant being attacked while jogging.

II. THE STATE INTENDS TO INTRODUCE THE FOLLOWING 404(B) EVIDENCE AS IT ESTABLISHES THE DEFENDANT'S FINANCIAL MOTIVE TO KILL:

1. The defendant was engaged in an extramarital affair with Mr. Allen Flores during her marriage to the victim.

2. The defendant and Mr. Cook conspired to trigger a $500,000 payout by injuring the defendant.

3. The defendant had a life insurance police that would payout $500,000 upon paralysis.

III. THE LAW:

A. Financial motive is 404(B).

Rule 404(b), Arizona Rules of Evidence, states:

> (b) Other crimes, wrongs, or acts. Except as provided in Rule 404(c) evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In *State v. Terrazas*, 189 Ariz. 580, 582, 944 P. 2d 1194, 1196 (1997), the Arizona Supreme Court adopted a new "clear and convincing" standard of proof for Rule 404(b) evidence. This standard is higher than that required by the United States constitution. *See Huddleston v. United States*, 485 U.S. 681, 690 (1988). The *Terrazas* Court, however, continued to retain the other requirements of *Huddleston* for admission. They are (1) the evidence must be admitted for a proper purpose, that is, it must be legally or logically relevant; (2) the evidence must be factually or conditionally relevant; (3) the trial court, if requested, must determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice; and (4) the trial court, if requested, must give a limiting instruction informing the jury that the evidence was admitted only for a limited purpose. *State v. Gulbrandson*, 184 Ariz. 46, 60, 906 P. 2d 579, 593 (1995), *see also State v. Van Adams*, 194 Ariz. 408, 415, 948 P.2d 16, 23 (1999).

Under Rule 404(b), Ariz. R. Evid., other acts evidence is only excluded when these acts of prior misconduct are proffered solely to prove the character of the person accused. If other acts are relevant and offered for admission in order to advance a "noncharacter" theory, then this evidence must be deemed admissible. *State v. Via*, 146 Ariz. 108, 121, 704 P.2d 238, 251

(1985). Evidence of subsequent conduct of the defendant is also admissible. *State v. Ashelman*, 137 Ariz. 460,464, 671 P.2d 901,905 (1983).

B. <u>The Evidence that the State Seeks to Introduce Goes Directly to the Defendant's Financial Motive to Kill.</u>

The evidence that the State seeks to introduce regarding the defendant's second attempt to obtain insurance money on February 10, 2009 and her extramarital affair goes directly towards the defendant's motive to kill her husband. "[I]t is well settled that in a murder prosecution the presence or absence of motive is relevant." *State v. Hunter*, 136 Ariz. 45, 50, 664 P.2d 195, 200 (1983).

One of the reasons the defendant killed her husband was to collect money from an insurance policy. Less than a month prior to the defendant's attack on the victim, a life insurance policy worth $500,000 obtained for the victim. The defendant and her daughters were the beneficiaries of that life insurance policy.

After the victim's death, the investigation revealed that the defendant was in debt to Allen Flores and had signed a promissory note in the amount of $362,000 plus interest. The defendant had initially told Mr. Flores that her step-father had passed away leaving her a large inheritance that was tied up in litigation. The defendant told Mr. Flores that once she received her settlement, she would pay the amount of the promissory note. The investigation confirmed that the defendant's step-father is alive and the defendant has no inheritance pending.

The defendant was in need of a large sum of money to pay off her debt to Mr. Flores. The defendant was using the insurance policy as a way to obtain this money. The defendant's initial attack on the victim occurred on January 14, 2009. The victim did not pass until February 9, 2009. During that time, the defendant was unable to collect on the insurance policy as she had planned. In another attempt to collect on an insurance policy, the defendant and Mr. Cook devised the plan to injure the defendant so that the insurance policy would pay out. This staged attack on the defendant supports the State's theory of the defendant's motive in killing the victim because it shows that the defendant's intent was to collect money from an insurance policy.

This second attempt to secure money from an insurance policy is another act in regards to the same motive.

This evidence not only shows motive but it also rebuts the defense that will be presented in this case. On May 20, 2009, the defense noticed Domestic Violence/Battered Woman's Syndrome as a defense in this case. The defense alleges that defendant suffered abuse at the hands of the victim. As a result of this abuse, the defendant suffered from Battered Woman's Syndrome. The defense is that the defendant killed the victim because she was again abused by the victim and because she was suffering from Battered Woman's Syndrome, she killed the victim. Evidence of the defendant's motive to collect insurance money rebuts the defense that will be presented in this case.

The State is seeking to introduce evidence that the defendant engaged in an extramarital affair with Allen Flores that began before the victim's murder. This affair is evidence of the defendant's motive to kill her husband so that she could pursue a relationship with Mr. Flores, a man who could financially provide the defendant the lifestyle she desired. This evidence not only goes to motive as to why the defendant would want her husband dead but it is also critical in the analysis of the defendant as a battered woman. In *State v. Andriano*, 215 Ariz. 497, 161 P.3d 540 (2007), the court addressed the issue of extramarital affairs being used as motive under 404(b). In that case, the State introduced evidence of the defendant engaging in an extramarital affair as motive for her committing the murder of her husband. The court held that the evidence was admissible under Rule 404(b). Additionally, the court held "the evidence was also admissible under Rule 404(b) to rebut the defense theory that Andriano was a domestic violence victim who lived in fear of her abusive husband, whom she bludgeoned to death in self-defense." *Id.* at 503, 546.

IV. CONCLUSION:

In conclusion, the State requests this Court to admit the other act evidence pursuant to evidence rule 404(B).

Submitted October 21, 2011.

WILLIAM G MONTGOMERY
MARICOPA COUNTY ATTORNEY

BY/s/_____
/s/ Michelle Ariño
Deputy County Attorney

Copy of the foregoing
mailed\delivered this
21st day of October, 2011,
to:

The Honorable Susan Brnovich
Judge of the Superior Court

Alan Tavassoli
Andrew Clemency
Office of the Public Defender
620 West Jackson, Suite 4015
Phoenix, AZ 85003
Attorney for the Defendant

BY/s/_____
/s/ Michelle Ariño
Deputy County Attorney