Randall K. Spencer (6992)
FILLMORE, SPENCER LLC
Attorneys for Defendant
3301 North University Avenue
Provo, Utah 84604
Tel: (801) 426-8200
Fax: (801) 426-8208
Email: rspencer@fslaw.com

Susanne Gustin (5962)
Attorney at Law
WELLS FARGO CENTER
299 South Main Street, Suite 1300
Salt Lake City, UT 84111
Tel: (801) 535-4343; (801) 243-2814
Fax: 801-536-3300
Email: defendmenow@aol.com

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. MARTIN J. MACNEILL, Defendant.	**REPLY MEMORANDUM IN SUPPORT OF MOTON TO EXCLUDE TESTIMONY FROM ANNA OSBORNE WALTHALL** CASE NO. 121402323 JUDGE DEREK P. PULLAN

Defendant, MARTIN MACNEILL, by and through his counsel, RANDALL K. SPENCER and SUSANNE GUSTIN, submits this REPLY MEMORANDUM IN SUPPORT OF MOTION TO EXCLUDE TESTIMONY FROM ANNA OSBORNE WALTHALL.

INTRODUCTION

The Utah County Attorney's Office (hereinafter, UCAO) misapplies the Utah Rules of

Evidence in its opposition to MacNeill's motion. Its primary argument is that because MacNeill's alleged statements to Anna Osborne are not hearsay under Rule 801(d)(2), the statements are admissible. The UCAO fails to recognize that Rule 801(d)(2) is only a basis for a determination of hearsay vs. non-hearsay, and the balance of the Utah Rules of Evidence still apply to admissibility of non-hearsay: "[Anna's] testimony is evidence that Defendant said he had killed before using medication and drowning, and that he knew how to disguise murder through his medical training, not that he had done any of these things. This distinction puts her testimony under rule 801(d)(2), not rule 404(b)." *See* UCAO Response at p. 9.

The irony if the UCAO's assertion is that by its logic, if someone had actually killed someone in the past, it would likely be inadmissible in a future homicide trial; however, if a person only spoke about killing someone, and the UCAO doesn't know or care whether it is true, it would be admissible under Rule 801(d)(2). Not only is the UCAO's assertion illogical, it is demonstrably erroneous pursuant to the Utah Supreme Court's opinion in *State v. Mead*, 2001 UT 58, 27 p.3d 1115 at ¶¶'s 61 to 64. (court determined admissibility of statements of defendant about killing his wife pursuant to U.R.E. 404(b)).

Next, alternatively, the prosecution argues that MacNeill's alleged statements to Osborne are admissible under Rule 404(b). The prosecution again seems to not understand the application of Rule 404(b). The prosecution generally asserts that MacNeill's "statements to [Osborne] are admissible 'as proof of…motive, opportunity, intent, preparation,…knowledge,…or absence of mistake or accident.'" *See* UCAO Response at p. 10. However, the UCAO fails to identify and

develop any argument as to why statements alleged to have been made in 2005 that are not related to Michele MacNeill manifest a permissible non-character purpose under Rule 404(b). The UCAO admits that its true purpose in admitting the subject evidence is to demonstrate propensity or action in conformance with a prior bad act: "Finally, Defendant offered to kill [Osborne's] ex-husband to solve the marital difficulties she was experiencing during their divorce. This is consistent with the way he solved the conflict between his extramarital affair with Gypsy Willis and his marriage to Michele." *Id.* at 12.

Last, the UCAO argues that Osborne's testimony should not be excluded pursuant to Rule 403, and asserts that MacNeill improperly raised numerous examples of statements by Osborne that seriously question her credibility. As a rebuttal, the UCAO attaches statements from numerous inmates and claims the inmates' testimony corroborates Anna's, and therefore, Anna's testimony is admissible. The UCAO improperly applies Rule 403. The Utah Supreme Court explained in *State v. Verde*, 2012 UT 60, 296 P.3d 673, that proposed bad act evidence that has a purpose with a dual inference (an admissible non-character purpose such as motive, etc. and an inadmissible propensity purpose) is subject to weighing under Rule 403 to determine the primary purpose of the proposed evidence, and exclude it if the primary purpose is improper or if it would confuse the jury. *Id.* at ¶18.

The UCAO has not articulated a specific non-character purpose for Osborne's proposed testimony from two years prior to Michele's death other than broad, undeveloped assertions, and even if the Court were to accept the general references to proper purposes for admission, it would

be outweighed by UCAO's true improper propensity and bad act purpose illustrated by the example of the alleged offer to kill Anna's husband cited above. After the preliminary hearing, Judge McVey made the observation that Osborne was not credible. Her interactions with the UCAO demonstrate her unreliability. Admission of Anna's testimony at trial could likely extend the trial by a day or more while all of the evidence of her lack of credibility is presented, but more importantly, it would further confuse the jury in an already convoluted circumstantial case.

ARGUMENT

I. ANNA OSBORNE WALTHALL'S TESTIMONY IS NOT ADMISSIBLE SIMPLY BECAUSE IT IS NON-HEARSAY

Rule 801(d)(2) of the Utah Rules of Evidence deems statements by a party opponent as non-hearsay; the rule does not declare that all non-hearsay is admissible. The UCAO cites *State v. Vargas*, 2001 UT 5, 20 P.2d 271 in support of its position. In *Vargas*, the statements that were at issue were made by the defendant about killing his wife if she were to ever leave him; she subsequently planned to leave and was killed. In the present case, the statements at issue have no relation to Michele MacNeill. MacNeill never told Osborne's that he would leave his wife, let alone kill her. MacNeill refused to leave his wife to Osborne's discontent. *Vargas's* statements were not admitted just because they were non-hearsay, but were admitted after the Court deemed them admissible pursuant to Rule 403. *Id.* at ¶¶ 37 – 41. There is no indication that *Vargas* contested admissibility pursuant to Rule 404(b). *Vargas* does not support the UCAO's argument that a statement is admissible at trial based solely on the fact that it is non-hearsay.

II. MACNEILL'S ALLEGED STATEMENTS ARE INADMISSIBLE PURSUANT TO RULE 404(B) OF THE UTAH RULES OF EVIDENCE

1. Rule 404(b) Does Apply to MacNeill's Statements

Hearsay statements are generally inadmissible, but words with legal significance are considered "verbal acts" and are not hearsay. *McKelvey v. Hamilton*, 2009 UT App 126, 211 P.3d 390 at ¶25. The Utah Supreme Court has treated statements of a defendant as verbal acts and determined the admissibility of such statements pursuant to Rules 402, 403 & 404(b) of the Utah Rules of Evidence. *See State v. Mead*, 2001 UT 58, 27 p.3d 1115 at ¶¶'s 61 to 64. Interestingly, the UCAO asserts "the prosecution does not accept these statements as representing real acts and has no interest in trying to prove the acts….It offers them only as statements that he made to [Osborne] that show he had thought through the process of killing someone." *See* Response at p. 9. Not only does Rule 404(b) apply, the UCAO admits in its pleading that it is offering the statements to show that he acted in conformity with the general statements. The UCAO further acknowledges that the proffered statements do not relate to any sort of plan to kill Michele, but are statements about the process of "killing someone."

Rule 404(b) of the Utah Rules of Evidence is applicable to the proffered statements, and requires exclusion of the statements from MacNeill's trial.

2. The UCAO's Alternative Argument that Rule 404(b) Allows Admission of Osborne's Statements is Erroneous

The UCAO asserts that it is not attempting to introduce evidence that MacNeill "actually"

committed prior murders because that would be evidence of his bad character and would be inadmissible. *See* Response at p. 10. Rather, the UCAO asserts that MacNeill's statements are admissible "as proof of…motive, opportunity, intent, preparation,…knowledge,…or absence of mistake or accident." The UCAO fails to articulate a basis for a specific admissible non-character purpose, but generally refers to all of the Rule 404(b) exceptions. The UCAO attempts to justify the admission of MacNeill's alleged statements pursuant to factors set forth in *State v. Shickles*, 760 P.2d 291, 295 (Utah 1988). The UCAO asserts that MacNeill's reliance on *State v. Verde*, 2012 UT 60 was wrong because it asserts that *Verde* held simply that the "not guilty rule" does not prohibit all evidence from which dual inferences may be drawn. *See* Response at p. 13.

The UCAO seemingly has not read *Verde* carefully. *Verde* requires the court to ascertain the true purpose of proffered misconduct evidence, and if it is proferred to suggest action in conformity with a person's alleged bad character, it is inadmissible. *Verde*, 2012 UT 60, ¶15. If the Court determines that there are dual purposes to the proffered evidence, it must balance the dual purposes against each other and exclude the bad act evidence if the "tendency to sustain a proper inference is outweighed by its propensity for an improper inference or for jury confusion about its real purpose." *Id.* at ¶18.

The proffered testimony from Osborne should not even make it to the balancing stage because the UCAO simply cites the laundry list from the statute without developing a theory for proper admissibility of bad act evidence. Even if the Court were to engage in the balancing analysis, assuming a dual inference exists, the UCAO admits in its memo that it wants to admit

the alleged statements of MacNeill to assert he acted in conformity with the statements. *See* Response at p. 9 (statements show MacNeill had thought through process of killing someone and Michele's death is allegedly in conformity with those statements) and Response at p. 12 (alleging that MacNeill killed Michele in conformity with assertion that he offered to kill Osborne's husband to help her get out of her marriage).

In *Verde*, the State of Utah encouraged the Utah Supreme Court to adopt a more liberal interpretation of rule 404(b) allowing more generalized assertions of commonality between alleged bad acts and the subject crime. The Utah Supreme Court declined to do so because "[e]vidence of a 'general plan' to commit crimes with common features is perilously close to evidence of a general disposition to commit crime. Any difference between the two concepts "is extremely subtle and quite likely to be lost on a jury.'" *Id.* at ¶39 (internal citations omitted).

The UCAO also misapplies the "doctrine of chances" to the facts of this case. The UCAO asserts that the *Verde* court "favors admission of prior acts when the prosecution must overcome a fabrication defense." *See* Response at 14. In the present case, there is no claim of "fabrication" in relation to the *actus reas* as discussed in *Verde*. *See Verde*, 2012 UT 60 at ¶¶44-53. Rather, the claims of fabrication relate to witness testimony about alleged bad acts that are not part of the elements of the charged offenses.

The doctrine of chances would not be applicable to Osborne's testimony under any circumstance. Osborne first made her allegations in November of 2009 after seeing media reports about the MacNeill case which almost certainly included the September 26, 2009 article in the

Deseret News. *See* Exhibit 44 to June 26, 2013 hearing on MacNeill's Motion to Disqualify the UCAO and related memoranda. In the September 26, 2009 article, the UCAO through Jeff Robinson with authorization of Mariane O'Bryant, who was then assigned to the MacNeill cases, made numerous inflammatory statements in violation of Rule 3.6 of the Utah Rules of Professional Conduct. The prosecution's past assertion that Rule 3.6(b)(5) allows release of information in violation of Rule 3.6 is inconsistent with the plain language of the rule which allows a prosecutor to request assistance from the media, but not to give most of its file to the media including evidence that would likely be inadmissible at trial or that attacks the character of the accused.

The UCAO's generation of a media firestorm "to get leads" culminated with a 20 page *ex pose* in the Deseret News on December 4, 2010, an episode of Nancy Grace on December 7, 2010, a 20/20 episode in February of 2011, and countless other media reports based on information the UCAO gave to the press. Every inmate that claims MacNeill made some sort of incriminatory statement reported the alleged statements after numerous media reports about the case including reports on the preliminary hearing in October of 2012. The doctrine of chances is based on the objective improbability that independent witnesses would concoct similar accusations. *See Verde* 2012 UT at ¶47. The most allegedly incriminating statement from inmate, Michael Buchanan, was reported on May 29, 2013, more than two years after MacNeill was alleged to have made the statements. Buchanan also told the investigator that media reports he had reviewed were "pretty close" to what he claims MacNeill had told him. *See* Exhibit G of Response, Michael Buchanan,

Jr. report, page 2.

The UCAO claims that there is a "striking resemblance" between Osborne's statements and Michele's death. *Id.* at p. 9. The striking resemblance is because the UCAO has created its belief of what happened based on Osborne's statements rather than accept the conclusions of Dr. Frikke and Dr. Grey who believe Michele died as a result of an arrhythmia, and the conclusions of Dr. Frikke, Dr. Grey, & Dr. Perper who believe the measured amount of medication in Michele's heart blood was "low."1

There is no evidence that MacNeill administered any medications to Michele on April 11, 2007, or any other day except Alexis's testimony regarding the night of April 4, 2007.

The UCAO concludes its mistaken doctrine of chances argument by asserting that intent in relation to the *actus reas* is disputed. It asserts that due to the inconclusive autopsy results, it must prove Michele's death was not natural, accidental, suicide or "absence of mistake in Michele's having ingested the whole cocktail of drugs found in her body post-mortem…." *See* Response at p. 15. The UCAO confuses burden of proof with intent to commit a homicide and absence of mistake on Michele's part with absence of Mistake on MacNeill's part.

The fact that the state has the burden of proof does not make "intent" automatically in dispute. The UCAO's argument is essentially the same as the "not guilty" rule disavowed in

1 Within the next few days, MacNeill will file his motion to exclude Drs. Dawson and Rollins because their preliminary hearing testimony that the level of medication in Michele's blood during life could have cause her death or would have rendered her comatose and unresponsive is not believed to be reliable by prosecution experts, Drs. Grey & Perper and is even contradicted by Drs. Dawson and Rollins in their private communications with the UCAO. The UCAO's assertions that the evidence supports a claim that Michele was overdosed on April 11, 2007 leading to her death or drowning is not supported by reliable, generally accepted scientific evidence.

Verde 2012 UT 60 at ¶¶22-24. The dispute in the MacNeill's case is whether a homicide occurred or not. If a homicide occurred, the intent element would be proven by the act in this case; there is no evidence to imply that if there was a homicidal act that it was negligent or reckless as opposed to intentional.

That fact that the UCAO thinks it must disprove the absence of mistake on Michele's part in consuming medication does not translate to a claim of absence of mistake on MacNeill's part which could be demonstrated by an "other bad act." Further, the proposed testimony from Osborne regarding alleged other bad acts of MacNeill are general statements with absolutely no indication by Osborne that they relate to Michele in any way. In deeming the general allegations regarding "plan" evidence inadmissible in *Verde*, the court stated, "[t]here is no suggestion of prior, conscious resolve on Verde's part to formulate an overarching grand design encompassing both the charged and uncharged offenses." *Verde* 2012 UT 60 at ¶40. Similarly, none of the alleged bad acts claimed by Osborne suggest a prior, conscious resolve or "overarching grand design encompassing both the charged and uncharged offenses." *Id.* at ¶40.

In *Verde*, the other bad acts the prosecutors sought to introduce in Verde's trial for sexual abuse of a child were other acts of sexual abuse that were actually believed to have happened. The connection between the bad acts in *Verde* seems much more persuasive than in the present case in which the prosecution does not even think that the other bad acts occurred.

This Court should conclude that the untrue bad acts, which Osborne claims MacNeill talked about at least two years prior to Michele's passing and are unrelated to Michele, are

inadmissible pursuant to Rule 404(b) of the Utah Rules of Evidence.

III. ANY BAD ACTS WHICH SURVIVE RULE 404(B) ANALYSIS ARE INADMISSIBLE PURSUANT TO RULE 403

If the Court finds that any of the permissible purposes under 404(b) allows any of Osborne's testimony to get through the Court's 404(b) gate keeping evaluation, Osborne's testimony is inadmissible pursuant to Rule 403. The true purpose of Osborne's testimony is to paint MacNeill as a man with bad character that is the type of person who would murder Michele. If there is a legitimate proper purpose to any of Osborne's testimony, it is outweighed by its propensity for improper influence or further confusion of the jury.

As discussed above, the UCAO has admitted that its true purpose in admitting Osborne's testimony of other bad acts of MacNeill is to claim that he acted in conformity with those bad acts on April 11, 2007. In the past, the Utah Supreme Court has employed a Rule 403 analysis that incorporates various factors. *See State v. Shickles*, 760 P.2d 291, 295 (Utah 1988). Numerous cases have cited the "*Shickles"* factors since. However, in *Verde* 2012 UT 60 ¶18, the Utah Supreme Court abandoned the confusing "*Shickles"* factors and stated that "…if evidence may sustain both proper and improper inferences under rule *rule 404(b)*, the court should balance the two against each other under *rule 403*, excluding the bad acts evidence if its tendency to sustain a proper inference is outweighed by its propensity for an improper inference or for jury confusion about its real purpose." *Id.* (emphasis in original).

The UCAO has charged MacNeill under alternative theories—stating that he either drown

Michele, or he somehow surreptitiously administered medication to her causing her to have a fatal arrhythmia. *See* Probable Cause Statement accompanying the Information. The UCAO has noticed up four primary experts; Dr. Grey currently opines that Michele had a terminal arrhythmia and that the medications she was taking aggravated her underlying myocarditis (discovered at autopsy) although he originally agreed with Dr. Frikke that Michele's death was due to natural causes of an arrhythmia; Dr. Perper opines that Michele drown and did not have myocarditis. Dr. Grey and Dr. Perper agree that the level of medication in Michele's postmortem heart blood was low. The non-forensically trained toxicologists, Dr. Dawson and Dr. Rollins assert that the medication detected in Michele's postmortem heart blood is such that they can extrapolate to living conditions and conclude that Michele either died from the medications or would have been comatose or severely sedated. Dr. Perper & Dr. Grey dispute that Dr. Rollins and Dr. Dawson can reliably make the type of extrapolative conclusions they try to make. *See* MacNeill's Motion in Limine to Exclude Testimony of Drs. Rollins and Dawson for a detailed discussion of the State's conflicting and confusing set of experts.

At the conclusion of the preliminary hearing, Judge McVey concluded that Osborne was not a credible witness. *See* Prelim Tr. at 1805. As documented in MacNeill's initial memoranda, Osborne admittedly suffers from multiple personality disorder, communicates telepathically, relayed many stories to the UCAO which were demonstrably not true, and is a jilted lover that wants to hurt MacNeill. An interesting example of Osborne's twisting of facts that have a morsel of truth is demonstrated in a draft article written by MacNeill while he was seeing Anna that was

seized by the federal authorities when they searched MacNeill's home in January of 2009. *See* Helping Them Go: A Thought on Active Euthanasia by Healthcare Professionals attached as Exhibit 1. In MacNeill's article, he cites the infamous article titled "It's Over Debbie" published in the Journal of the American Medical Association, and MacNeill espouses an opinion in opposite to the opinion of the true author of "Its Over Debbie;" MacNeill encourages other doctors to not try and play God by quickening the death of even those whose death appears imminent. Osborne knowledge in 2005 of MacNeill writing his article about the article "Its Over Debbie" morphed into MacNeill claiming to have written the article "Its Over Debbie."

If the Court finds that any of the permissible purposes under 404(b) allows any of Osborne's testimony to get through the Court's 404(b) gate keeping evaluation, it is inadmissible pursuant to Rule 403. The true purpose of Osborne's testimony is to paint him as a man with bad character that is the type of person who would murder Michele. If there is a legitimate proper purpose to any of Osborne's testimony, it is outweighed by its propensity for improper influence or further confusion of the jury.

The UCAO claims that the Court should ignore Osborne's judicially declared lack of credibility, and allow the jury to determine credibility. Such an approach would be improper. Article I, Section 7 of the Utah Constitution requires the exclusion of evidence which may be unduly impressive to jurors, particularly if the evidence is actually unreliable and likely to mislead them. *See State v. Ramirez*, 817 P.2d 774, 778-79 (Utah 1991) (addressing the admissibility of eyewitness identification testimony under the state constitution). It is the state

constitutional role of the courts to act as the gatekeepers to unreliable evidence. *Id.* If courts leave it to the jury to weigh such evidence without judicial screening, courts jeopardize the constitutional rights of defendants to a fair trial. *Id.*

The Fourteenth Amendment to the Federal Constitution similarly calls upon the courts to exclude evidence which is the product of suggestion and unreliable. *See, e.g.*, *Manson v. Braithwaite*, 432 U.S. 98 (1976). Testimony may be inadmissible as a matter of law because the means used to elicit it raise serious questions as to its reliability. For example, hypnotically induced or enhanced testimony is inadmissible for lack of reliability. *State v. Tuttle*, 780 P.2d 1203 (1989). Allegedly repressed memories evoked through questionable techniques are similarly subject to exclusion under Utah law. *Franklin v. Stevenson*, 1999 UT 61, 987 P.2d 22.

The United States Supreme Court has recognized that child testimony may be unreliable and prone to falsity particularly if coached by a "malevolent adult." *Coy v. Iowa*, 487 U.S. 1012, 1020 (1988). The Utah Supreme Court has recognized that application of Rule 403 of the Utah Rules of Evidence is the proper gate-keeping function of the trial court to exclude unreliable evidence. *See State v. Fulton*, 742 P.2d 1208, 1218 (Utah 1987 & *State v. Hall*, 946 P.2d 712, 719 (Utah App. 1997).

It is proper for this Court to consider the reliability of Osborne's testimony that may have been divined during sexual intercourse, telepathically revealed or otherwise imagined in her ethereal communication when balancing whether any proper purpose to alleged bad act evidence is outweighed by improper inferences and confusion of the jury. The UCAO's assertion pursuant

to the doctrine of chances that Osborne's testimony is corroborated by inmate witnesses is unpersuasive because they were exposed to the prosecution's theory of the case developed from Osborne's testimony prior to giving any statements to the UCAO. *Verde*, 2012 UT 60 at ¶60.

Even if the Court found Osborne to be credible, such a determination would not tip the balance to a conclusion that proper purposes outweigh improper inferences. Osborne's testimony is very inflammatory in painting MacNeill has having bad character, and it relates to statements at least two years prior to Michele's death that have no indicia of an over-arching grand plan or connection to Michele's death.

CONCLUSION

Osborne's claims that MacNeill made statements at least two years prior to Michele's death regarding various homicidal scenarios that do not relate to Michele are not admissible simply because the statements are non-hearsay under 801(d)(2); Osborne's testimony of MacNeill's alleged bad acts is offered by the UCAO for an improper purpose asserting that MacNeill acted in conformity with the prior bad acts on April 11, 2007; and the tendency of Osborne's testimony to support an improper purpose and create jury confusion outweighs any claimed legitimate purpose. MacNeill respectfully requests the Court to exclude Anna Osborne from testifying regarding any bad acts at MacNeill's trial.

Submitted this 28th day of August, 2013.

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Randall K. Spencer
Fillmore Spencer LLC

CERTIFICATE OF DELIVERY

I hereby certify that I caused to be delivered by Email and Mail, the forgoing Memorandum in Support of Motion to Exclude Anna Osborne to:

Chad Grunander
Sam Pead
Jared Perkins
Deputy Utah County Attorney
100 East Center, Suite 2100
Provo, Utah 84606
Email: chadgr@utahcounty.gov; samp@utahcounty.gov; jaredp@utahcounty.gov

Dated this 28th day of August, 2013.

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