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

Attorneys for Defendant

IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. MARTIN J. MACNEILL, Defendant.	**MEMORANDUM IN SUPPORT OF MOTION TO EXCLUDE TESTIMONY OF MICHELLE SAVAGE AND BRANDI SMITH** CASE NO. 121402323 JUDGE SAMUEL D. MCVEY

Defendant, MARTIN J. MACNEILL, by and through his counsel, RANDALL K. SPENCER and SUSANNE GUSTIN, submits the following MEMORANDUM IN SUPPORT OF MOTION TO EXCLUDE TESTIMONY FROM MICHELE SAVAGE AND BRANDI SMITH ABOUT ALLEGED PRIOR ACTS OF GYPSY WILLIS.

TESTIMONY THE DEFENSE IS SEEKING TO EXCLUDE

The Defense seeks to exclude the testimony of Michele Savage (hereinafter "Savage") and Brandi Smith (hereinafter "Brandi"). Testimony from Savage and Brandi regarding alleged prior bad acts of Gypsy during 2004 is not relevant, is inadmissible character evidence, and to the extent that the Court finds any relevancy, such evidence is substantially more prejudicial than probative. Savage and Brandi were roommates with Gypsy from about January to the end of July in 2004.

STATEMENT OF FACTS

1. Savage met Gypsy at a Society for Creative Anachronism ("SCA") event and later introduced Gypsy to Brandi, also at a SCA event, in 2002 or 2003. See Preliminary Hearing Transcript (hereinafter "PHT") at 1712.

2. In January of 2004, Savage and Brandi moved into Gypsy's white house in Bountiful, Utah. See PHT at 1691.

3. In July of 2004, Savage and Brandi moved out of Gypsy's house. Id.

4. Brandi testified that they did not keep in contact with Gypsy after moving out. See PHT at 1718.

5. Savage and Brandi claim that during the time in which they lived with Gypsy, Gypsy told them about people she was dating, thoughts she was having, and things she wanted to do. See PHT at 1691-1719.

6. In an email posted January 20, 2009, on Rachel MacNeill's blog, after reading the numerous press reports of Martin MacNeill (hereinafter "MacNeill") and Gypsy being arrested,

Savage stated, "I have heard [Gypsy] plot to cut brake lines of her lover's wife, saying that the woman's children would be in car seats and should survive, as if the children were just an inconsequential annoyance to her as long as her objective was reached."

7. In the same email, Savage stated, "[Gypsy] tried to pressure me into telling her about a common ER injectable I had heard about on CNN that would kill people without a trace unless someone specifically looked for it in a [sic] autopsy, it made it look like a plain old heart attack..."

8. In the Preliminary Hearing, Michele testified that Gypsy never gave a lot of details about the men she was dating because they were all married. See PHT at 1704. Both Savage and Brandi testified that they did not remember the names of the other guys that Gypsy dated. See PHT at 1703 & 1717.

9. Brandi, in the Preliminary Hearing, testified that Gypsy dated a guy that was a doctor and a lawyer, whom she called "Neil". See PHT at 1713. Brandi later testified that she only knew that he was a doctor and lawyer after the fact, after she had been approached and asked information about him. See PHT at 1718.

10. Savage testified that she never reported anything that Gypsy said because it seemed like just talk. See PHT at 1704. But years after, Savage called one of the MacNeill daughters and told her to not give up. See PHT at 1705-06.

11. Savage testified that Doug Whitney told her that she would not have to testify. See PHT at 1710.

12. The Utah County Attorney's Office (hereinafter "UCAO") has not filed charges against

Gypsy for conspiring or having anything to do with the death of Michele MacNeill.

13. In response to MacNeill's motion to disqualify the UCAO, the UCAO used the fact that it had not filed charges against Gypsy in an effort to explain its sworn statements that it did not have sufficient evidence to proceed with charges, and therefore, its investigative efforts had failed.

ARGUMENT

MacNeill seeks to exclude testimony from Savage and Brandi as it is not relevant, it will create unfair prejudice, and any proper purpose the UCAO might suggest is really a ruse and is outweighed by the true improper purpose.

I. GYPSY'S ALLEGED PRIOR BAD ACTS ARE IRRELEVANT PURSUANT TO RULE 402

This Court should exclude the UCAO from questioning Gypsy and from introducing the testimonies of Savage and Brandi because the alleged prior bad acts of Gypsy are not relevant to the charges against MacNeill. Rule 402 of the Utah Rules of Evidence prohibits the introduction of irrelevant evidence. "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Utah R. Evid. 401 (2011).

The prior bad act of associates without any evidence that defendant was party to the bad acts are inadmissible. U.S. v. Cardall, 885 F.2d 656, 671 (10th Cir. 1989). In U.S. v Cardall, the Tenth Circuit excluded the prior bad acts of associates to the defendant as irrelevant. Id. The court held that for similar bad acts of others to be introduced, "there must be reasonable

indication in the record that the defendant was in fact a party to the bad acts..." Id. In the present case, there is not a scintilla of evidence indicating that MacNeill was a party to Gypsy's alleged bad acts identified by Savage and Brandi. Furthermore, Gypsy's alleged bad acts would have occurred three years prior to Michele MacNeill's death. And as discussed below, the prior acts of Gypsy are not similar to the charged crime against MacNeill.

Additionally, the UCAO has admitted that it does not have sufficient evidence to charge Gypsy with conspiracy, obstruction of justice, or any charge in relation to Michele's death. As the UCAO has pointed out in this case, the standard for charging is only probable cause. The UCAO justified its conduct in relation to the wiretap affidavit by arguing that its assertion that it did not have sufficient evidence to prosecute (which it pointed out was a probable cause standard) the case was correct because it did not prosecute Gypsy although it did prosecute MacNeill. Further, the UCAO has made a deal with Gypsy wherein it granted her leniency and other favors in exchange for her testimony against MacNeill.

Gypsy has maintained that she did not even meet MacNeill until November of 2005—after the time when Savage and Brandi claim Gypsy to have threatened the life of her lover's wife. Admitting the testimony of Savage and Brandi will create a mini-trial within the trial about when MacNeill and Gypsy met which will be confusing to the jury and distract them from the real issues at trial.

Evidence of prior misconduct is more likely to be admissible when it is the only evidence available to prove a material fact. State v. Hildreth, 238 P.3d 444, 456 (UT App. 2010). Hildreth provides an example of when evidence of prior acts might be needed. See Id. In

Hildreth, the court reasoned that since a need for the evidence arose to determine which testimony was more credible and there was "no alternative evidence," the admissibility of the evidence was more likely. Id. In contrast, State v. Northcutt provides an example of when evidence from an ex-wife was not needed. See 195 P.3d 499, 504 (UT App. 2008). The court, in Northcutt, found that since the fact that the "State had ample proof" even without the ex-wife's testimony weighed heavily against the admissibility of her testimony as it was unnecessary. Id.

In the instant case, evidence of Gypsy's alleged prior acts in 2004 is not necessary to make any material fact more or less probable in relation to the charge that MacNeill killed his wife or obstructed justice in April of 2007. Unlike Hildreth where such evidence was needed to determine credibility between two opposing accounts in order to determine culpability, evidence of Gypsy's prior acts does not help determine any material element in the charge against MacNeill.

Additionally, unlike Hildreth where there was no alternative evidence, the UCAO has indicated that it has 5-weeks-worth of witnesses to testify in its case in chief. This case is more like Northcutt where the court found a former wife's testimony to be unnecessary due to alternate evidence. Testimony of Gypsy's acts is unnecessary and irrelevant to the days of other evidence the UCAO intends to submit in this case. Inherently, the UCAO believes that it has more efficacious evidence than two ladies who can only testify about their interaction with Gypsy three years before Michele's death.

In sum, however the facts are analyzed, this Court should conclude that Gypsy's alleged bad acts from 2004, are irrelevant to the UCAO's charge that MacNeill killed his wife in 2007

when there is no evidence that MacNeill had any connection to Gypsy's alleged bad acts, and when the UCAO has concluded that there is not even sufficient probable cause to charge Gypsy with any offense in relation to Michele's death, and when there is no need for the evidence. Therefore, the Court should not allow Gypsy to be questioned regarding those alleged bad acts, and should not allow Michele and Brandi Savage to testify regarding the alleged bad acts of Gypsy.

II. GYPSY'S ALLEGED CONDUCT IS INADMISSIBLE AS PRIOR BAD ACTS PURSUANT TO RULE 404(b)

Moreover, this Court should exclude the questioning of Gypsy and the introduction of the testimony of Michele and Brandi as it is inadmissible evidence of Gypsy's character. Character evidence of prior bad acts is inadmissible pursuant to Rule 404(b). "Evidence of a crime, wrong, or other act is not admissible to prove a person's character..." Utah R. Evid. 404(b)(1). Permitted uses of evidence of prior misconduct for a non-character purpose include "proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Utah R. Evid. 404(b)(2). Gypsy's alleged bad acts do not fit any of the exceptions to the general inadmissibility of character evidence. If Gypsy were the one charged, then perhaps the analysis would be different. However, the State has not charged Gypsy as even being a conspirator, has admitted that they do not have sufficient evidence that she was somehow a conspirator with MacNeill, and MacNeill has not asserted that Gypsy's conduct is related to any claim or defense that he is making. There is simply no proper purpose to allow examination of Gypsy's alleged bad acts in the prosecution of MacNeill.

Recently, the Utah Supreme Court lamented the difficulty of application of Rule 404(b). State v. Verde, 296 P.3d 673, 678 (Utah 2012). "[E]vidence of prior bad acts often will yield dual inferences—and thus betray both a permissible purpose and an improper one." Id. Prior acts evidence "may plausibly be aimed at establishing" a proper purpose but may truthfully show an inference that the defendant previously acted improperly and is likely to act improperly again. Id. Evidence must be "plausibly aimed at a proper purpose" and not "outweighed by an illegitimate effect." Id. at 681.The Court further indicated that evidence of prior acts "gives rise to a strong—and impermissible—propensity inference." Id. at 682-83.

If the Court were to do a similarity analysis between Gypsy's acts and the UCAO's allegations of MacNeill's conduct, the alleged bad acts of Gypsy are not similar to the UCAO's allegations against MacNeill. For example, Martin is not accused of cutting Michele's brake lines nor of administering some unknown fatal drug that causes a heart attack that was apparently discussed on a television news story. Rather, the purpose of the UCAO attempting to admit Gypsy's prior acts is to encourage the jury to conclude that Gypsy's character is bad because she had homicidal thoughts; MacNeill associated with Gypsy; therefore, MacNeill must have had homicidal thoughts, and therefore, MacNeill must have killed Michele in a similar fashion as Gypsy discussed with Michelle Savage and Brandi Smith. Gypsy's alleged bad acts are purely character evidence and are inadmissible in MacNeill's murder trial.

III. THE TESTIMONY OF SAVAGE AND BRANDI IS INADMISSIBLE UNDER RULE 403 OF THE UTAH RULES OF EVIDENCE

Relevant evidence may be excluded "if its probative value is substantially outweighed by

a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Utah R. Evid. 403 (2011). Additionally, Rule 404(b) requires a "determination of whether proffered evidence of prior misconduct is aimed at proper or improper purposes." Verde, 296 P.3d at 678. Courts should exclude evidence if its real purpose is a ruse, showing the "defendant's propensity to commit crime," even if some permissible purpose exists. Id. Courts should "weigh the proper and improper uses of 404(b) evidence and exclude it under rule 403" as required. Id. at 680.

The Utah Supreme Court suggests the following four requirements to consider in application of the balancing test of Rule 403: (1) materiality—the purpose introducing the uncharged, prior conduct must actually be in dispute; (2) similarity—each act needs to be similar to the crime at issue; (3) independence—the accusations of prior acts must be independent from the current charge; and (4) frequency—the alleged acts or crime must happen more often to the defendant than would be typical to the average person. Id. at 686-87.

A. The purpose for introducing the prior acts of Gypsy is not actually in dispute.

Any purpose the UCAO might indicate for introducing the uncharged, prior acts of Gypsy is a ruse and not actually in dispute. MacNeill is not disputing that he and Gypsy Willis were having an affair prior to Michele's death. The Utah Supreme Court, in Verde, indicated that courts should consider "[f]irst, materiality: The issue for which the uncharged misconduct evidence is offered 'must be in bona fide dispute.'" Id. at 686. Further, the Court rejected the "not-guilty rule" reasoning that such a rule "technically puts every element of a crime at issue." Id. at 679.

Even if the UCAO argues that the testimony of Savage and Brandi should be admissible pursuant to 404(b) or 608(b) or 608(c), the credibility of Gypsy or whether or not she was having an affair with MacNeill are not disputed issues in the case. Additionally, MacNeill is not calling Gypsy as a witness. It is the UCAO who has made a deal with her to testify against MacNeill. Gypsy's alleged bad acts of wanting to cut brake lines or learn the name of a drug undetectable on autopsy is not evidence of bias in favor of MacNeill; prejudice against the UCAO, or motive to misrepresent. Gypsy's alleged bad acts are evidence of potential bad acts of hers with no evidence that MacNeill even had knowledge of the alleged conversations on or before April 11, 2007. To the extent that there is any dispute regarding Gypsy's testimony, it is a dispute of the UCAO's own making.

Further, "[w]here intent [or another proper purpose] is uncontested and readily inferable from other evidence, 404(b) evidence is largely tangential and duplicative. It is accordingly difficult to characterize its purpose as properly aimed at establishing intent [or another proper purpose]." Id. at 680. Evidence must be "plausibly linked" to the charged crime or else it "has no legitimate narrative value". Id. at 681. Prior acts tend to have no narrative value but are likely to create "an alternative, illegitimate narrative." Id. Evidence of Gypsy's prior acts are perfect examples of illegitimate testimonial narratives when sought to be introduced in MacNeill's murder trial.

B. The prior acts of Gypsy do not have any striking similarities and are separated by several years to the charged crime against MacNeill.

Each of Gypsy's alleged prior acts needs to be similar to the charged crime to be

admissible. Evidence of prior misconduct is more likely to be admissible when there are "striking similarities" between the crime charged and the prior misconduct. Hildreth, 238 P.3d at 452.

In the instant case, there are not any striking similarities between Gypsy's alleged acts and the instant charge against MacNeill. The testimonies of Savage and Brandi are of things Gypsy allegedly did or said and are not tied to MacNeill's alleged conduct three years later; nothing in their testimony indicates any similarity. For example, one of the alleged acts includes Gypsy expressing frustration and wanting to cut the brake lines to her lover's wife's car. However, Michele did not die because of cut brake lines; she was not even in a car. The UCAO alleges that Michele was drugged and drowned, but Savage and Brandi did not testify that Gypsy killed anyone, tried to drown anyone, or attempted to drug anyone. Further, none of the prior acts of Gypsy were ever charged. The UCAO even admits that they do not have enough evidence to charge Gypsy.

While Savage did testify that Gypsy wanted to know the name of some drug believed to be undetectable on autopsy, the medical experts of the UCAO have testified, and the response to the Bill of Particulars referencing the probable cause statement confirms, that the UCAO's theory is that MacNeill either drown Michele or gave her Percocet and Phenergan which caused a fatal arrhythmia. Gypsy's alleged acts do not rise to the "striking similarities" standard in Hildreth.

Evidence of prior misconduct is less likely to be admissible when "the interval of time that has elapsed between the prior bad acts and the [current charge] is fairly lengthy." Id.

Michele MacNeill died in April of 2007, about three years after Savage and Brandi moved away from and severed contact with Gypsy. Any acts of which Savage and Brandi could testify happened long before the charge brought against MacNeill. Further, the prior acts, of which Savage and Brandi can testify, are of Gypsy, an associate of MacNeill, and not of MacNeill. Lapses in time between prior acts of associates and the charged crime must be even more limited in time.

C. The allegations of Gypsy's prior acts came only in connection with the charged offense against MacNeill and are not any more frequent than might be expected.

The prior acts of Gypsy were only reported by Savage and Brandi after being influenced by media reports and in direct connection with MacNeill being charged in federal court and the homicide investigation being reported in the news. In other words, the testimony of the prior acts did not arise independently.

The fact that the alleged bad acts relate to Gypsy, an uncharged person against whom the UCAO has admitted it does not have sufficient evidence to charge, makes the frequency analysis irrelevant. MacNeill is the one on trial for his life, not Gypsy. Even if the Court were to look at the frequency prong, the evidence of Gypsy's prior unrelated bad acts is that they were isolated statements made three years before Michele's passing, and were only disclosed 5 years after they were allegedly made when Savage and Brandi learned of a lot of media that incriminated MacNeill and Gypsy.

D. Evidence of Gypsy's prior acts will create an unfair prejudice, confuse the issues, and waste time.

Evidence of Gypsy's prior acts will unfairly prejudice the jury against MacNeill.

"Evidence is unfairly prejudicial if it has a tendency to influence the outcome of the trial by improper means, or if it appeals to the jury's sympathies, or arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions of the case." State v. Burk, 839 P.2d 880, 883 (Utah App. 1992).

In the instant case, testimony that a former lover of MacNeill, Gypsy, may have thought about doing bad things accomplishes nothing except telling the jury that MacNeill associated with a bad person and is guilty simply by his association to Gypsy. This would likely provoke the jury's instinct to punish, allowing the jury to feel good about punishing MacNeill for alleged prior acts of his associates, even if the evidence does not indicate that MacNeill was even a party to these alleged acts or that he is guilty of the instant charge beyond a reasonable doubt.

Additionally, the Utah Supreme Court, in State v. Vargas, held that introducing two witnesses in order to impeach another witness would "confuse the issues at trial". 20 P.3d 271, 279 (Utah 2001). The Court reasoned that allowing these two witnesses to impeach another witness would "create a trial within a trial." Id. Focusing so much time on what a witness may have done will "distract from the issues that are at trial." Id. Such testimony concerning Gypsy's acts and not MacNeill's acts will cause confusion among the jury as to how that testimony relates to the charges against MacNeill. Like Vargas where the testimony of two witnesses' was found to be inadmissible, the introduction of testimony of Savage and Brandi to impeach Gypsy should be inadmissible.

Lastly, since the testimonies of Savage and Brandi are improper and unnecessary, inquiry into such testimonies will waste the time of this Court. The Utah Supreme Court, citing the Sixth

Circuit, stated: "If…[the] knowledge…does not affect a result the trier of fact would have reached even without the knowledge, the [evidence] serves no purpose and their discussion is simply a waste of time." Knapstad v. Smith's Management Corp., 774 P.2d 1, 2 (UT App. 1989) (citing Minichello v. U.S. Indus., Inc., 756 F.2d 26, 29 (6th Cir. 1985)). The testimony of Savage and Brandi, as shown above, will not affect a material fact that the jury will have to decide and thus is a waste of time.

CONCLUSION

The UCAO cannot question Gypsy about such prior acts as they are irrelevant, impermissible character evidence, and substantially more prejudicial than probative. If the UCAO cannot question Gypsy on these acts, then they cannot impeach Gypsy using the testimony of Savage and Brandi. For the forgoing reasons, this Court should exclude the questioning of Gypsy and the testimonies of Michele Savage and Brandi Smith concerning Gypsy's alleged prior acts.

Submitted this 3 day of July, 2013.

Randall K. Spencer
Fillmore Spencer LLC

CERTIFICATE OF DELIVERY

I hereby certify that I caused to be delivered by Email and Mail, the forgoing document(s) to:

CHAD GRUNANDER
SAM PEAD
JARED PERKINS
Deputy Utah County Attorney
100 East Center, Suite 2100
Provo, Utah 84606
Email: ucadm.Dcourt@state.ut.us

Dated this 3rd day of June, 2013.