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4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

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**IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR  
UTAH COUNTY, STATE OF UTAH**

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STATE OF UTAH,  Plaintiff,  vs.  MARTIN J. MACNEILL,  Defendant.	STATE'S RESPONSE AND MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO EXCLUDE TESTIMONY OF MICHELLE SAVAGE AND BRANDI SMITH  Case No. 121402323  Judge: SAMUEL D. MCVEY
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The State, by and through Deputy Utah County Attorney Sam Pead, hereby responds to Defendant's motion to exclude testimony of Michelle Savage and Brandi Smith with this memorandum in opposition, and prays the Court to Deny Defendant's motion.

**I. ARGUMENT**

The substance of Defendant's argument relates to exclusion of evidence relating to other acts (including statements) of Gypsy Willis.<sup>1</sup> The State believes this evidence is relevant and

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<sup>1</sup> The State has conferred with counsel for Defendant (Randall Spencer), and has clarified that the purpose

admissible because it demonstrates motive and infers preparation, plan, and absence of mistake or accident under Rule 404(b). The State's primary purpose for offering this evidence through Michelle Savage and Brandi Smith is to impeach any inconsistent, minimized, or denied statements made by Gypsy Willis during her testimony at trial.

For evidence to be admissible under Rule 404(b) the evidence must be relevant, admitted for a proper, non-character purpose, and not subject to preclusion under Rule 403. State v. Mead, 2001 UT 58, ¶ 61, 27 P.3d 1115. The other act evidence related to Gypsy Willis is relevant, is offered for a proper, non-character purpose, and is not subject to exclusion under Rule 403.

***A. Use of Inconsistent Statements (non-hearsay)***

A prior statement made by a testifying declarant who is subject to cross-examination is admissible to refresh recollection or to impeach an inconsistent statement. UT. R. EVID. 801(d)(1) (2012). These statements are considered non-hearsay. Gypsy Willis testified at the preliminary hearing held in this matter and denied making a number of statements, including statements allegedly made to Michelle Savage and Brandi Smith. Those statements are admissible through these witnesses as non-hearsay under Rule 801.

***B. Gypsy Willis's Prior Words and Actions Are Relevant***

The standard to admit evidence is relatively low. Rule 401 of the Utah Rules of Evidence states that "evidence is relevant if it has any tendency to make a fact more or less probable than it

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of Defendant's Motion is to completely exclude the other act evidence of Gypsy Willis complained of in his motion whether that evidence is to be introduced by Michelle Savage, Brandi Smith, Gypsy Willis, or any other witness.

would be without the evidence; and the fact is of consequence in determining the action.” Under this standard, “even evidence that is only slightly probative in value is relevant.” State v. Martin, 2002 UT 34, ¶ 31, 44 P.3d 805. Rule 402 of the Utah Rules of Evidence states that “[r]elevant evidence is admissible.” In this case, the other act evidence of Gypsy Willis is relevant to Defendant’s motive, and also to show preparation, plan, and absence of mistake or accident. Therefore, the evidence can not be properly excluded under Rules 401 and 402.

The Defendant claims that the evidence is not relevant because Defendant was not a party to the other acts identified in Brandi Smith’s and Michele Savage’s testimonies. However, his analysis is erroneous. In this case, the evidence goes directly to Defendant’s motive. Defendant had a long-term romantic relationship with Gypsy Willis. Defendant had one of the quintessential motives for murder: to replace his current wife with his girlfriend. Gypsy Willis testified at the preliminary hearing that marrying Defendant was not possible because Defendant was already married, but that changed abruptly after Michele MacNeill died. Preliminary Hearing transcript, 1627. The pressure to openly be with Gypsy Willis is a powerful motive, especially considering that Gypsy Willis was making statements to Michelle Smith and Brandi Savage about getting Defendant all to herself by any means including homicide. Defendant was in bed both literally and figuratively with Gypsy Willis, and it seems extremely unlikely that Gypsy Willis would share her homicidal thoughts with her roommates and not Defendant, which would exacerbate the pressure he felt to be with her.

Defendant also claims that the proffered testimony is not relevant because the State has not charged Gypsy Willis in relation to Michele MacNeill's death, and because the State made a deal with Gypsy Willis in a separate fraud case to testify in this matter, wherein she got (roughly) the same kind of plea agreement that Defendant was given by the State in his fraud case. Candidly, this argument is not related to the relevance issue at all, and it is clearly outside of Defendant's power and discretion to decide what charges should be brought against whom, or what plea deals the State should offer. Moreover, such second-guessing is certainly not grounds for exclusion of this evidence.<sup>2</sup>

Defendant also asserts that the date on which Defendant and Gypsy Willis met is not relevant to the case. Again this goes to motive. It stands to reason that the longer Defendant had a relationship with his paramour the more pressure he would feel to make that relationship permanent and primary in his life, especially when the evidence from Michelle Savage and Brandi Smith evinces a fixated eagerness on the part of Gypsy Willis to have Defendant all to herself, and even by means of homicide. This likelihood is bolstered by the facts that soon before Michele MacNeill's death Gypsy Willis moved near Defendant, was financially sponsored by Defendant, and Michelle MacNeill was becoming apprized of Defendant's infidelity. And in the end, her wish to have Defendant as her open partner was granted very soon after Michele

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<sup>2</sup> Defendant makes other irrelevant claims regarding what are solely prosecutorial decisions in this case. The State never stated that it did or did not have probable cause to arrest Gypsy Willis – only that the State did not have sufficient evidence to feel comfortable charging her. While it is true that the State must have at least probable cause to charge a case that does not mean that the State charges every case that satisfies the amorphous probable cause standard, especially when the prospects for conviction are small.

MacNeill died

***C. Proper Purpose - Gypsy Willis's "Other" Conduct is Admissible Under Rule 404(b)***

Rule 404(b) states:

“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 lack of accident.”

The evidence at issue in Defendant's motion is being offered for a proper non-character purpose. Gypsy Willis's other acts are well within the non-character exceptions provided in this rule, and the fact that Gypsy Willis has not been charged in this case does not change the analysis. Gypsy Willis's other acts relate most directly to motive and intent, but also relate to Defendant's preparation, plan, and absence of mistake or accident. Defendant had a strong motive to replace his wife with his eager and determined paramour. The evidence at Defendant's preliminary hearing demonstrated the length of Defendant's relationship with Gypsy Willis. As time went on it is likely that Defendant felt more and more pressure from Gypsy Willis, based on the clear and unrelenting feelings Gypsy Willis expressed to Michelle Savage and Brandi Smith, to do something about his wife prior to her death.

The evidence supports the inference that homicide was already contemplated at early stages of the relationship, and that these thoughts advanced over time as the extra-marital relationship became stronger, closer in proximity, and more discoverable by Michelle, who

became apprised of Defendant's unfaithfulness shortly before her death. The testimony will show that different methods of homicide were considered by Defendant's paramour. If Gypsy Willis was willing to talk about different methods of homicide with her roommates, she certainly shared her thoughts with her lover (Defendant). As Defendant felt the pressure and desire to replace his wife with his paramour it is extremely likely that Gypsy Willis's expressions influenced Defendant. The evidence offered through Michelle Savage and Brandi Smith demonstrates motive, in addition to strong inferences of preparation, plan, knowledge, and absence of mistake or accident.

The testimony is also relevant to demonstrate the timeline and length of Defendant's relationship with Gypsy Willis, which is a fact that was contended by Defendant during and since his preliminary hearing (i.e. a fact in dispute).

***D. The Evidence Should not be Precluded Under Rule 403***

Utah Rule of Evidence 403 states: "[t]he court may exclude relevant evidence 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." The other act evidence of Gypsy Willis is essential to prove material fact, and is not substantially outweighed by unfair prejudice. Therefore, the evidence can not be properly excluded under rule 403.

Defendant also argues that the purpose for introducing the testimony is not actually in

dispute. However, the duration of the relationship between Defendant and Gypsy Willis is in dispute. Gypsy Willis's testimony as to when the relationship between her and Defendant started differs from Michelle Savage's and Brandi Smith's. Also in dispute, is the seriousness of Defendant's relationship with Gypsy Willis prior to Michelle MacNeill's death, and the evidence at issue demonstrates it was much more serious than Defendant or Gypsy Willis are willing to concede. Additionally, the desire on the part of Gypsy Willis and, by implication, Defendant, to get rid of Michelle MacNeill so they could be together openly is also contested. Considering all of this, the evidence is necessary to establish material fact.

The evidence is also necessary to counter Gypsy Willis's denials and minimizations, and reveal a clearer picture of truth regarding Gypsy Willis; a witness who is unquestionably biased in favor of Defendant. Brandi Smith and Michele Savage can help determine the true duration of Gypsy Willis's relationship with Defendant. It is obvious that the relationship between Gypsy Willis and Defendant was much more long-term and meaningful than Gypsy Willis was willing to testify to. Gypsy Willis's testimony at Defendant's preliminary hearing clearly demonstrated that she will deceive and minimize in an effort to protect her former lover (Defendant). The testimony of Michelle Savage and Brandi Smith will help reveal and negate that bias and offer the trier of fact a larger view of the facts. Like in the case of Hildreth, cited by Defendant, this testimony is needed to help determine the credibility of Gypsy Willis who will only admit to facts that she cannot deny based on her prior statements.

Defendant, who carries no burden of proof in this matter, also argues that the proffered testimony is cumulative and unnecessary. Similarly, Defendant argues that the State has “weeks worth of witnesses” to testify in the State’s case in chief, and that therefore the State has more efficacious evidence than the proffered testimony. The fact that Defendant believes the State has other witnesses that are more efficient does not render Michele Savage’s and Brandi Smith’s testimonies unnecessary, and the State who bears the burden of proof, believes this evidence is important to establish motive and preparation type inferences.

Defendant goes on to argue that Gypsy Willis’s prior acts are dissimilar and distant in time from the crimes charged against Defendant. This assertion fails for a number of reasons. First, the three years between the statements that Gypsy Willis made to Michele Savage and Brandi Smith is not a very large gap of time, especially considering the 10 year rule that is often associated with 404(b) evidence. It is also not enough time to erase the expressions offered by Gypsy Willis, and create concern over unreliability based on a temporal analysis.

More importantly, Gypsy Willis’s relationship with Defendant did not end when Michelle Savage and Brandi Smith no longer lived with her, and continued throughout this time period, only to expand and flourish just before and after the death of the Michele MacNeill. This constitutes long, continuing pressure and motive for Defendant to make Gypsy Willis his primary relationship. Again, this is powerful motive. Additionally, there are striking similarities to the methods of homicide contemplated by Gypsy Willis and the method the State asserts was



eventually used on Michele MacNeill. Gypsy Willis, in a hysterical rant, commanded Michelle Savage to tell her the name of an undetectable drug used to commit homicide on a television show, and spoke of creating an “accident” by cutting Michele MacNeill’s brake lines. These approaches are not dissimilar to using Percocet or Phenergan in an attempt to cause a fatal arrhythmia, or to package a drug cocktail along with other CNS depressants including ambien to lead to an “accidental” drowning. Michele MacNeill had just undergone elective surgery at the relentless insistence of Defendant; surgery that might, arguably, make it unsurprising to find multiple CNS depressants in Michele MacNeill’s system and offer an innocent and accidental explanation for her death. This insistence came at a time when Gypsy Willis had been moved close to Defendant, and at a time that Michelle MacNeill was increasingly suspicious of Defendant’s infidelity.

Defendant cites to State v. Verde, 2012 UT 60, 296 P.3d 673, claiming that in order for prior bad act evidence to be admitted, the accusations must be independent from the current charge. However, a closer look at the language in Verde shows that Defendant’s extrapolated explanation of that holding is wrong. The Verde Court actually held that:

Where the prior uncharged conduct is an accusation of *sexual assault*, each accusation must be independent of the others. This is because ‘the probative value of similar accusations evidence rests on the improbability of chance repetition of the same event.’ And the existence of collusion among various accusers would render ineffective the comparison with chance repetition.

*Id.* at ¶ 60 (emphasis added). This prong of the Verde test is clearly only in cases of sexual

assault, and is actually made in the context and contemplation of the doctrine of chances. In homicide cases, and especially in this case, requiring independence would only make sense if the State were trying to show a common method for committing multiple murders through the other act evidence of Gypsy Willis. Following Verde by analogy and in relation to Defendant's motion at issue would not make sense and, if generalized, would disqualify many viable witnesses from testifying in homicide cases. Gypsy Willis's statements are not unrelated to the case at issue, and the evidence at issue is relevant to show motive, preparation, plan, and absence of mistake or accident.

Finally, Defendant claims that Michele Savage's and Brandi Smith's testimonies will create unfair prejudice, confuse the issues, and waste time. Note, these concerns must not simply outweigh the probative value of the evidence, but must "substantially outweigh" it in order to be precluded under Rule 403. The evidence at issue in Defendant's motion will not create unfair prejudice because it demonstrates Defendant's motive, in addition to inferring preparation, plan, and absence of mistake or accident.

Moreover, this evidence will not provoke the jury to punish Defendant, especially considering all of the other possible reasons a jury might want to feel hostile toward Defendant that will be introduced at this trial – in all likelihood, the long-term affair will already be in evidence before this evidence is offered. Instead, this information gives the jury a fuller picture of Defendant's relationship with Gypsy Willis, a relationship that is a key component to

Defendant's motive to kill Michele. Any anxiety over the jury misusing the evidence can be assuaged by a jury instruction that tells the jury how to consider the evidence and how to properly deliberate and judge.

Admitting this evidence will not create a trial within a trial. Defendant cites State v. Vargas, 2001 UT 5, 20 P.3d 271, in support of this argument. In Vargas, the court excluded testimony because the proffered testimony would confuse the issues at trial. However, in Vargas the proffered testimony was proposed to merely impeach another witness and not to establish a material fact. In this case the duration of Defendant's relationship with Gypsy Willis is a material fact, as is her desire to have Defendant to herself and her expression to get him by whatever means necessary including homicide. As previously stated, the longer Defendant's relationship with his paramour, the more pressure he would feel (motive), based on her expressions, to replace his spouse with his paramour.

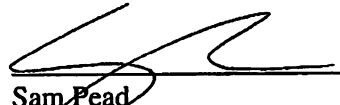
Defendant has previously expressed that he did not know Gypsy Willis during the time alleged by Michelle Savage and Brandi Smith. The evidence at issue appears to be accurate because during the time that Michelle Savage and Brandi Smith were living with Gypsy Willis, Brandi Smith had a child that Michelle Savage proclaimed was her world (as a grandmother). It is not likely that Michelle Savage and Brandi Smith are mistaken about when this child was born, and that is their mnemonic for remembering when they were living with Gypsy Willis. This is a simple way to determine the duration of the relationship between Defendant and Gypsy Willis. In

every trial there are witnesses that do not agree with each other. This does not necessarily lead to a confusing mini-trial for the jury. This is simply a question of fact properly left to the jury to decide. Additionally, of all of the witnesses at Defendant's preliminary hearing, the testimonies of these two witnesses were two of the shortest. Because the testimonies of Michele Savage and Brandi Smith are both necessary and proper, and are relatively short, they will not waste the Court's time.

## **II. CONCLUSION**

Because the other act evidence relating to Gypsy Willis is relevant, is admissible, is offered for a proper purpose, and is not unfairly prejudicial or time consuming it should not be excluded. The evidence helps to establish material fact, and demonstrates Defendant's motive, in addition to inferring plan, preparation, and absence of mistake or accident. Therefore, the Court should deny Defendant's motion to exclude the other act evidence of Gypsy Willis whether testified to by Michelle Savage, Brandi Smith, Gypsy Willis, or any other competent witness.

SIGNED this 22<sup>nd</sup> day of July, 2013.

  
Sam Peard  
Deputy Utah County Attorney

CERTIFICATE OF DELIVERY

I hereby certify that I caused to be delivered by Email and Fax, the foregoing document(s)

to:

Randall Spencer, Attorney for Defendant  
3301 North University Ave.  
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DATED this 22<sup>nd</sup> day of July, 2013.

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