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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, )  
 )  
Plaintiff, ) NO. CR 2006-131923-001 DT  
 )  
vs. ) MEMORANDUM ON SENTENCING  
 )  
DAVID DRAKE, )  
 ) (The Honorable Cathy Holt)  
Defendant. )  
 )  
 )

The State respectfully requests that the court find evidence that the defendant committed the crime out of malice toward the victim because of the victim's Mexican ancestry (ARS §13-702(C)(15)).

Submitted this \_\_\_\_\_ day of February, 2007

ANDREW P. THOMAS  
MARICOPA COUNTY ATTORNEY

BY/s/ \_\_\_\_\_  
JON ELIASON  
Deputy County Attorney

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. FACTS

#### A. The defendant is a member of the National Socialist Movement (NSM) .

It is undisputed that the defendant is a member of the National Socialist Movement (NSM). The defendant claims membership to NSM during his initial 911 call. He also admitted membership in the NSM to Julie Sutton, Chase Alvidrez, Ricky Botti, and Detective Armendariz. He even tried to recruit Chase Alvidrez to join NSM.

#### B. NSM is a neo-nazi group with racist ideology.

NSM is one of the largest Neo-Nazi organizations in the United States. Neo-Nazi means "new Nazi", but they still align themselves with Hitler's policies and beliefs. Like Hitler, NSM has extremely racist ideology. NSM hates any person who is not of the white race including those who are what they consider non-pure lineage, such as the victim David Scarano. They support the separation of the races, they oppose any immigration of non-whites to the United States. Inter-racial marriage and mixing of races is forbidden and NSM opposes any person or group who advocates the lifestyles mentioned above.

Under the banner of the First Amendment, NSM marches, pickets, rallies, holds meetings supporting the above stated views. These 'meetings' often end in violence.

**C. The defendant wore his NSM uniform to the 6/6/06 party.**

The defendant wore his NSM uniform to the 6/6/06 party at Ricky Botti's house. He now claims that Ricky Botti asked him to wear the uniform. Ricky Botti denies asking the defendant to wear his Nazi uniform, but admits that he and the victim did tease the defendant about wearing the uniform. The uniform has a Nazi armband and a NSM patch that does on the front. On 6/6/06 the armband was not on, but the defendant taped the NSM patch to his uniform.

**D. THE DEFENDANT TOLD THE POLICE THE PHYSICAL FIGHT STARTED AFTER THE VICTIM STEPPED ON HIS SWAZTIKA**

The defendant related in his own self-serving statements to Detective Armendariz that the victim stepped on his Swastika armband prior to the fight beginning (see transcript page 18 and 39). According to the defendant, the victim and the defendant 'talked' for a period of time, the talking ended after the victim stepped on the Nazi armband.

**E. THE DEFENDANT IS HEARD CALLING THE VICTIM A SPIC MOMENTS BEFORE THE DEFENDANT KILLS THE VICTIM**

It is undisputed that the victim called the defendant a "fucking half spic mother fucker" seconds before he killed the victim. The victim is of Mexican, Native American, and Italian ancestry. The Mexican and Indian ancestry come from his mother's side of the family. Merriam Webster dictionary defines spic as an offensive term for one of Spanish-American ancestry.

**F. WHEN LOCKED UP THE DEFENDANT IMMEDIATELY MENTIONS CONTACTING OTHER 'WHITES'**

Three days after being incarcerated the defendant asks the person on the other line to go to a website and contact Mark Martin. Mark Martin is the "SS commander" of the Western Ohio unit NSM, the largest neo-Nazi organization in the U.S. The defendant indicates that he wants the person on the other line to have Mark Martin see if he can contact a Commander to see if he knows anyone in the local prisons.

On June 23, 2006, the defendant said that he wanted to order a new NSM uniform.

**G. THE DEFENDANT REQUESTS WHITE SUPREMACIST AND VIOLENT LYRICS BE SENT TO HIM.**

Around August 27, 2006 the defendant begins requesting racial and violent lyrics be sent to him. One particular Johnny Rebel song is particularly indicative of one with extremist viewpoints like the defendant:

Well lately n..... are runnin' their mouths  
Sayin' they're gonna take over the South

Jigaboo-here's to you  
If you can, try it man

'Cause Dixieland will never be free  
To a n..... and the NAACP  
Stay away, stay away  
Stay away, from Dixieland

'Cause we're proud of our Dixie  
Hooray, hooray  
We'll fight again this time we'll win  
We've lived, we'll die in Dixie

Stay away, stay away  
You don't belong in Dixie  
Stay away, stay away  
You don't belong in Dixie

In the Civil War a lot of men died  
That's not enough, they ain't satisfied  
They integrate, demonstarate  
Shout and sing, for Mr. King

'Cause Mr. King is-a-gonna lose out  
When the northern states unite with the  
South  
Watch the fun, when it's done  
'Cause they'll run, from Dixieland

'Cause we're proud of our Dixie

Hooray, hooray  
We'll fight again this time we'll win  
We've lived, we'll die in Dixie

Stay away, stay away  
You don't belong in Dixie  
Stay away, stay away  
You don't belong in Dixie

They've yelled "black power" in Alabama  
Even demonstratin' in Louisiana  
What a shame, they're to blame  
'Cause they came, to Dixieland

Up in the North big trouble they've brewed  
In Chicago town and Cicero too  
Let's unite, Yankeeland  
Come on fight, with Dixieland

'Cause we're proud of our Dixie  
Hooray, hooray  
We'll fight again this time we'll win  
We've lived, we'll die in Dixie

Stay away, stay away  
You don't belong in Dixie  
Stay away, stay away  
You don't belong in Dixie

#### **H. THE DEFENDANT BEGINS STUDYING NORID RUNES**

During several phone calls the defendant tells others that he is studying Nordic Runes. White supremacists study Nordic Runes, and this shows the defendant is becoming more dedicated to extremists views.

#### **I. THE DEFENDANT HAS HIS BROTHER ERASE ALL VIOLENT AND RACIST INFORMATION FROM HIS MYSPACE ACCOUNT AND THE DEFENDANT'S PARENTS TAKE DOWN THE DEFENDANT'S CONFEDERATE FLAG FROM HIS CAR.**

On August 22, 2006, knowing that racism was a factor in his trial, the defendant asks his brother to erase everything from his Myspace account dealing with racism and violence. IN

a later jail call the defendant is told that his parents took his confederate flag out of his car.

When a defendant attempts to suppress adverse evidence, this indicates a consciousness of guilt. In State v. Allen, 140 Ariz. 412, 682 P.2d 417 (Ariz. 1984) the Arizona Supreme Court en banc affirmed the admission of such evidence and held that

Relevant evidence is defined as evidence which has a tendency to prove or disprove a material fact at issue. 17 A.R.S., Arizona Rules of Evidence, rule 401.... In State v. Adair, 106 Ariz. 4, 469 P.2d 823 (1970), we said evidence that a defendant has tried to procure false testimony is an admission. Cf. State v. Settle, 111 Ariz. 394, 531 P.2d 151 (1975) (attempt to suppress adverse evidence indicates a consciousness of guilt); see also State v. Bravo, 131 Ariz. 168, 169, 639 P.2d 358, 359 (App.1981) ("[e]vidence that a defendant attempted to influence the testimony of a witness against him tends to show a consciousness of guilt."); McCormick on Evidence, Sec. 273, at 660 (2d Ed.1972) ("By resorting to wrongful devices he is said to give ground for believing that he thinks his case is weak and not to be won by fair means.")

Allen, 140 Ariz. at 414.

In State v. Williams, 183 Ariz. 368, 904 P.2d 437 (Ariz. 1995) the Arizona Supreme Court en banc held that evidence that a criminal defendant sought to suppress evidence adversely affecting him is relevant to show a consciousness of guilt, citing State v. Settle, 111 Ariz. 394, 396, 531 P.2d 151, 153 (Ariz. 1975). and State v. Bible, 175 Ariz. 549, 592, 858 P.2d 1152, 1195 (1993) (cert den. 511 U.S. 1046)

("Evidence of flight from, or concealment of, a crime usually constitutes an admission by conduct.")

In a pre-trial ruling this Court excluded the racists motive mentioned above after doing a Rule 403 analysis. This ruling was for the jury and has no bearing on the court's ability to analyze this information and to also consider the defendant's attempts to destroy evidence of racism as consciousness of guilt.

## **II. Conclusion**

The State has reviewed all of the above relevant facts with Detective Matt Browning of the Mesa Police Department. Detective Browning has over a decade's experience working white supremacist extremists both undercover and as a detective. He trains other officers around the State and country on white supremacists and the crimes they commit. Detective Browning agrees that the facts do show that this killing was racially motivated. The uniform, the membership in NSM, the victim stepping on the Swastika, and the defendant calling the victim a spic moments before the killing all show that this was racially motivated. Combined with further illumination of the defendant's thoughts and mindset from the jail calls demonstrates beyond reasonable doubt that this killing was racially motivated.

Submitted this \_\_\_\_\_ day of February, 2007

ANDREW P. THOMAS  
MARICOPA COUNTY ATTORNEY

BY/s/  
\_\_\_\_\_  
JON ELIASON  
Deputy County Attorney

Copy mailed/delivered  
February \_\_\_\_\_, 2007,  
to:

The Honorable Cathy Holt  
Judge of the Superior Court

Kristen Curry  
Attorney for the Defendant  
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Phoenix, AZ 85007

BY/s/  
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