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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, )  
 )  
 ) NO. CR2006-131923-001 DT  
 )  
 ) Plaintiff, )  
 )  
 ) STATE'S MOTION IN LIMINE TO  
 ) vs. ) ADMIT DEFENDANT'S PANTS, SHIRT,  
 ) ARMBAND, NSM PATCH, AND BOOTS  
 ) IN THE STATE'S CASE IN CHIEF  
 )  
 ) DAVID DRAKE, )  
 )  
 ) Defendant. )  
 )  
 )  
 ) (Assigned to the Honorable  
 ) Cathy Holt)  
 )  
 )  
 )

The State of Arizona, by and through undersigned counsel, respectfully requests that this court admit the above mentioned relevant items into the State's case in chief. Each article is relevant and is extremely probative as to motive and to the self defense claim.

Submitted this October 31, 2006

ANDREW P. THOMAS  
MARICOPA COUNTY ATTORNEY

BY \_\_\_\_\_

Jon Eliason  
Deputy County Attorney

F. ADITYA

A. Before coming up to the killing of David Scarano.

On the night of the murder, the defendant got into a taxi cab with the driver's name, Dave Mack. The defendant was wearing a uniform of the National Movement (NMN), a Neo-Nazi group, which the victim, David Scarano, with a striped shirt (which is a part of his uniform). The victim has a dark complexion and was Mexican ancestry.

At the time of the fight the defendant was wearing his own uniform. The uniform consisted of a khaki long sleeve shirt, a dark-colored pair of pants, a tie and belt, a six inch wide unadorned kilt, and steel-toed Samsonite boots. At the time the fight began, the NMN shirt had a NMN patch taped onto the center area of his arm. The defendant also had a swastika armband. The following events led up to the defendant stabbing the victim in anger, not self defense.

1. The victim made the defendant angry by making fun of the NMN uniform the defendant was wearing.

The defendant's best friend, Dave Aldred, said that during the evening, the victim was making fun of the defendant's NMN uniform. Other witnesses to the victim's cruelty of the defendant also said that the victim spoke in a way that the defendant was annoyed. The defendant's best friend Aldred said that he would speak at any time to the NMN.

MEMORANDUM OF POINTS AND AUTHORITIES

**I. FACTS**

**A. Events leading up to the killing of David Scarano.**

On June 6, 2006, the defendant and the victim got into a fight outside of 3700 E. Sierra Way, Cave Creek. The defendant, a member of the National Socialist Movement (NSM), a Neo-Nazi group, stabbed the victim, David Scarano, with a six-inch blade sheath knife (part of his uniform). The victim has a dark complexion and has Mexican ancestry.

At the time of the fight the defendant was wearing his new NSM 'uniform'. The uniform consisted of a khaki long sleeve shirt, a dark-colored pair of pants, a tie and belt, a six inch blade sheathed knife, and steel-toed Demonia boots. At the time the fight began, the NSM shirt had a NSM patch taped onto the shoulder area of his arm. The defendant also had a swastika armband. The following events led up to the defendant stabbing the victim in anger, not self defense.

- 1. The victim made the defendant angry by making fun of the NSM uniform the defendant was wearing.**

The defendant's best friend, Chase Alvidrez, said that before the stabbing, the victim was making fun of the defendant's NSM uniform. Other witnesses to the victim's teasing of the defendant also said that the victim made fun of way the defendant was dressed. The defendant's jail calls indicate that he easily gets upset at anyone who puts down NSM.



**2. The victim made the defendant angry by stepping on the defendant's swastika armband.**

The defendant told the police that before he stabbed the victim, he saw the victim stepping on his Nazi Armband, part of his NSM uniform. Detective Matt Browning, a witness in this case, and an expert on white supremacists, will testify that stepping on the Swastika is a serious sign of disrespect by the victim to the defendant. This angered the defendant, who shortly after this called the victim a "mother fucking half spic mother fucker!"

**3. The victim ripped the defendant's NSM patch off of his uniform.**

During the fight the defendant's arm patch was ripped off of his uniform. It was attached to the defendant's uniform by tape (the defendant hadn't had time to sew it on). This constituted another insult to the defendant, provoking him to escalate from a fist fight to using a knife.

**4. The victim punched the defendant in the face.**

The victim punched the defendant in the face, causing the victim's nose and lip to bleed. The defendant told the 911 operator that the victim called him a 'punk'. A witness described the defendant's face as being full of blood. Others said that blood was dripping off of the defendant's face. All of these actions (of both the defendant and victim) made the defendant mad at the victim.

**5. The defendant tried to kick the victim with his steel-toed boots.**

Part of the defendant's NSM uniform included his steel-toed boots. The defendant was wearing them at the time he committed this crime. The boots make the defendant taller and were used by the defendant as a deadly weapon. The defendant told the police that when he and the unarmed victim fought, he tried to kick the defendant with the boots.

**6. The defendant threatened the victim and used a racial slur against the victim on his 911 call.**

Prior to the stabbing the defendant threatened to stab the victim. His voice (its tone) is recorded on the 911 call. The defendant clearly is angry and warns the victim that he will stab him. He curses at the victim and calls the victim the racial slur mentioned earlier in this motion. When discussing the 911 call during one of the defendant's jail calls, the defendant says that he curses like that when he is angry.

A witness to the racial slur told the police it was after the racial slur that the victim began fighting with the defendant. Prior to the racial slur, the two were separated and not fighting at that moment. This demonstrates that the reason for the fight was because of racial slurs or putdowns by the defendant.



**B. Change in self-defense law requires the State to prove beyond a reasonable doubt that the killing was not done in self defense.**

On April 24, 2006, the Governor Napolitano signed into law Senate Bill 1145, amending Arizona's justification statutes. The law signed by the Governor contains an emergency provision. The emergency provision results in the law going into effect on the date of signing, April 24, 2006. *Clark v. Boyce*, 20 Ariz. 544, 547, 185 P. 136, 137 (1919) ("Emergency laws when passed according to the forms prescribed by the Constitution, become effective at once and prevent a referendum."). With the new amendment, a defendant no longer has to present any evidence of self defense and the State must show beyond a reasonable doubt that the killing was not in self defense.

The change in the law regarding self defense makes any fact that tends to disprove self defense exceptionally probative --- more so than it would have been before the change in the law. The defendant has listed justification in his list of defenses.

## **II. LAW AND ARGUMENT**

### **A. The defendant's NSM uniform is relevant.**

Rule 401, Ariz. R. Evid., defines relevant evidence: "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Rule 402, Ariz. R. Evid., generally provides that all relevant evidence is admissible, and irrelevant evidence is not. All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of Arizona or by applicable statutes or rules.

The complete NSM uniform, patch, armband, belt, tie, boot, shirt, and pants are all relevant as to motive. The defendant was upset at the victim for making fun of his uniform and stepping on his armband, tearing off his NSM patch, among other things.

The defendant used his steel toed boots as a deadly weapon against the victim, making it relevant when a jury considers the defendant's claim of self defense. The sheath and knife that killed the victim were part of the uniform and are also extremely probative.

**B. The NSM uniform is intrinsic evidence.**

Rule 404(b) governs the admission of evidence of other crimes, wrongs, or acts. Because this rule refers to "other" crimes, wrongs, or acts, the Arizona courts have held that it governs only other act evidence that is "extrinsic," and thus does not apply to other act evidence that is "intrinsic." *State v. Dickens*, 187 Ariz. 1, 926 P.2d 468, 485 n. 7 (1996), *State v. Baldenegro*, 188 Ariz. 10, 15-16, 932 P.2d 275 (App. 1996). *Crane McClennen, Arizona Courtroom Evidence Manual* (third edition, 1997), page 404-3.

"Intrinsic" evidence is defined as follows:



"Other act" evidence is "intrinsic" when the evidence of the other act and the evidence of the crime charged are "inextricably intertwined" or both acts are part of a "single criminal episode" or the other acts were "necessary preliminaries" to the crime charged.

McClennen, p 402-2, citing *United States v. Coleman*, 78 F.3d 154, 156 (5th Cir. 1996); *United States v. Swinton*, 75 F.3d 374, 377-78 (8<sup>th</sup> Cir. 1996) and *United States v. Tutiven*, 40 F.3d 1, 5 (1<sup>st</sup> Cir.1994).

In the Comments to Rule 404, the *Arizona Courtroom Evidence Manual*, Judge McClennen explains intrinsic evidence as follows:

The reasoning is that, if the other crime, wrong or act is inextricably intertwined, part of a single criminal episode, or a necessary preliminary to the crime charged, it then by definition has some relevance to the crime charged, and thus is not offered merely to prove the character of the defendant. This reasoning is consistent with another recent case wherein the Arizona Supreme Court analyzed the term "common scheme or plan" under Rule 13.3(a)(3), Ariz. R. Crim. P., and concluded that another act is part of a common scheme or plan only if the other act is part of a particular plan of which the charged crime is a part. Based on these new cases, it appears the other acts that were formerly considered admissible because they either were part of a common scheme or plan or completed the story would now be considered intrinsic evidence because they would be either inextricably intertwined, part of a single criminal episode, or necessary preliminaries to the crime charged.

McClennen, page 404-3 to 404-4, omitting footnotes.

McClennen discusses Arizona case law on intrinsic evidence and comes to the following conclusion:

"If evidence of the other crime, wrong, or act is inextricably intertwined with evidence of the crime charged, or the other act was a necessary preliminary to the crime charged or an



inevitable result of the crime charged, evidence of the other act will **complete the story** and will be intrinsic evidence, and thus admissible without a Rule 404(b) analysis." McClennen, section 404.b.cr.050.

The facts as outlined above are all intrinsic in nature. The reasons for the fight; the mocking of the defendant's NSM uniform; the stepping on the Swastika; the tearing off of the NSM patch, all caused the defendant to become enraged and stab the victim in anger, and not in self defense.

**C. The lack of significant blood on the NSM uniform contradicts the defendant's claim of self defense.**

The lack of significant amount of blood goes to the core of proving the killing was not in self defense. The only way to demonstrate this is by allowing the jury to examine the defendant's shirt, tie, pants, belt and boots.

Several witnesses will likely testify that there was blood on the defendant's shirt, tie, pants, and boots, but the statements alone will not portray an accurate picture of the amount of blood on the clothing. The defendant only had a bloody nose and split lip. The amount of blood on the uniform is consistent with that and nothing more. The jury must be shown the uniform so that they will not be misled with only part of the picture.

**D. Unless the jury gets to examine the uniform, there is danger that the jury will be misled.**

The only way to accurately demonstrate the lack of significant

blood is by allowing the jury to examine the defendant's shirt, tie, pants, belt and boots.

Witness statements alone will not portray an accurate picture of the amount of blood on the clothing. The amount of blood from the defendant is consistent only with a nosebleed, which hardly justifies deadly force. The jury must be shown the uniform so that they will not be misled into thinking the victim seriously bloodied the defendant before the defendant killed the victim.

**E. The probative value of the NSM uniform is not substantially outweighed by any unfair prejudice to the defendant.**

As pointed out repeatedly by the defendant in prior motions, the burden is on the State to prove beyond a reasonable doubt the killing of David Scarano was not in self defense. There is no dispute that the defendant killed David Scarano, what is at dispute is why. Therefore, any evidence that shows why the defendant killed the victim, is evidence of the most probative nature.

Rule 403, Ariz. R. Evid., provides that even relevant evidence may be excluded if the danger of unfair prejudice substantially outweighs its probative value:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Evidence is only "unfairly prejudicial" when it tends to make



the trier of fact decide the issue on an improper basis. Unfair prejudice results if the evidence has an undue tendency to suggest decision on an improper basis, such as emotion, sympathy, or horror. *State v. Schurz*, 176 Ariz. 46, 52, 859 P.2d 156, 162, cert. denied, 510 U.S. 1026, 114 S.Ct. 640, 126 L.Ed.2d 598 (1993). Not all harmful evidence, however, is unfairly prejudicial. *State v. Mott*, 187 Ariz. 536, 931 P.2d 1046, 1055-56 (1997).

**F. The defendant cannot claim the NSM uniform and its significance to the case is unfairly prejudicial after he racially threatened the victim.**

It is important to remember that the mere fact that evidence is harmful to the defense does not make it "unfairly" prejudicial. Although a defendant has a constitutional right to a fair trial, "this right does not guarantee a trial unfettered by all harmful or prejudicial evidence." *State v. Brito*, 183 Ariz. 535, 546, 905 P.2d 544, 555 (App. 1995). Mere prejudice is not a basis for exclusion of evidence under Rule 403, Ariz. R. Evid., because evidence can be harmful and not unfairly prejudicial. "After all, evidence which is relevant and material will generally be adverse to the opponent. The use of the word 'prejudicial' for this class of evidence, while common, is inexact. 'Prejudice,' as used in this way, is not the basis for exclusion under Rule 403." *State v. Schurz*, 176 Ariz. 46, 52, 859 P.2d 156, 162, cert. denied, 510 U.S. 1026 (1993).

Although evidence of other acts is not admissible to show that

defendant has a criminal propensity, State v. Mulligan, 126 Ariz. 210, 215, 613 P.2d 1266, 1271 (1980), such evidence is admissible under Rule 404(b), "as proof of  **motive**, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Here, the defendant's own words inject racial issues into this trial when the defendant called the victim a "fucking half spic, mother fucker!" moments before killing the victim. The defendant made race an issue in this case, and cannot now sterilize the case by claiming unfair prejudice.

Any prejudice that the defendant fears, may be remedied through a possible limiting jury instruction.

### **III. CONCLUSION**

The State respectfully requests that this Court grant this motion to admit the previously mentioned relevant items during the State's case in chief. The requested evidence is necessary to prove the one contested issue: why the defendant stabbed the victim. There is nothing more probative. Any prejudice can easily be remedied by a limiting instruction.

Submitted this October 31, 2006

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BY \_\_\_\_\_

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Copy mailed/delivered  
October 31, 2006,  
to:

The Honorable Cathy Holt  
Judge of the Superior Court

Kristen Curry  
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