YAVAPAI COUNTY ATTORNEY'S OFFICE
Sheila Polk, SBN 007514
County Attorney
ycao@co.yavapai.az.us

Attorneys for STATE OF ARIZONA

SUPERIOR COURT
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BY: BOBBI JO BALL

IN THE SUPERIOR COURT

STATE OF ARIZONA, COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. JAMES ARTHUR RAY, Defendant.	V1300CR201080049 **STATE'S BENCH MEMORANDUM Re: 404(B) ACTS** **(The Honorable Warren Darrow)**

The State of Arizona, through undersigned counsel, hereby submits this Bench Memorandum regarding Rule 404(b) acts. As explained below, the State has presented clear an convincing evidence to support the introduction at trial of Defendant's prior sweat lodge ceremonies from 2003 through 2008 to prove his requisite mental state of "recklessly" (intent), his knowledge of the consequences of his acts, and absence of mistake or accident with respect to the three counts of manslaughter.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Rule 404b Acts Admissible at Trial to Prove Defendant's *Mens Rea:* Intent, Knowledge of Consequences of Acts, and Absence of Mistake or Accident

State v. Terrazas, 189 Ariz. 580, 944 P.2d 1194 (1997), provides that other act evidence is admissible if: admitted for a proper purpose; it is relevant to the case; its probative value outweighs any unfair prejudice pursuant to Rule 403; and an appropriate limiting instruction is given if requested. Rule 404(b) of the Arizona Rules of Evidence allows the introduction of other acts to

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

prove a defendant's mental state if it is similar to the act for which the defendant is on trial. *State v. Woody,* 173 Ariz. 561, 563, 845 P. 2d 487, 489 (App 1993). "The prior act need not be factually identical to the crime at issue, however. It is sufficient for purposes of Rule 404(b) if it can permit the juror to infer either that the defendant intended the act in question or had knowledge of its consequences." *Id.*

Case law makes it clear that "intent" as used in Rule 404(b) is synonymous with "*mens rea*" or the requisite "mental state" to prove a crime, i.e. intentionally, knowingly, with extreme indifference to human life, recklessly or with criminal negligence. As discussed below, a review of relevant Arizona case law reveals cases where prior acts were introduced to prove the requisite mental states of "intentionally" and "knowingly," [*State v. Villalobos,* 225 Ariz. 74, 225 P. 3d 227 (2010)]; "extreme indifference to human life" [*State v. Woody, supra,* 173 Ariz. 561, 845 P. 2d 487]; and "recklessly" [*State v. Smith*, 130 Ariz. 74, 634 P. 2d 1 (1981)].

A. Introduction of other acts to prove "intentionally" or "knowingly," and to rebut claim of accident

In *State v. Villalobos, supra,* 225 Ariz. 74, 225 P. 3d 227, the defendant was convicted of 1st degree murder and child abuse for the abuse and murder of his girlfriend's daughter, five year old Ashley, and sentenced to death. The murder occurred on January 3, 2004, and the medical examiner testified Ashley had 150 to 200 bruises on her body, and that the cause of death was blunt force trauma to her abdomen. At trial, the court admitted evidence of three other episodes of abuse by the defendant toward the victim: (1) testimony that the defendant had violently shaken Ashley in October 2003, (2) the defendant's admission that he had bruised Ashley's face and buttocks in November 2003, and (3) the defendant's admission that he had bruised Ashley's arms in the weeks before her death. The Arizona Supreme Court held that the introduction of the evidence was appropriate and that the probative value of the other acts was not substantially

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

outweighed by the danger of unfair prejudice. "The child abuse charge required proof that Villablobos "intentionally or knowingly" injured Ashley. *See* A.R.S. 13-3623(A)(2) (2001). The prior abuse evidence was relevant to establish Villalobos's mental state. . . . This evidence also rebutted Villalobos's claim that he did not intend to hurt Ashley and hit her as a 'reflex,' as well as his contention that Verdugo could have caused the injuries." *Id.* 225 Ariz. at 80, 225 P. 3d at 233.

B. Introduction of other acts to prove "extreme indifference to human life" and knowledge of consequences of acts

In *State v. Woody, supra,* 173 Ariz. 561, 845 P. 2d 487, the defendant was charged with 2nd degree murder and two counts of felony DUI. On December 23, 1989, the defendant was driving on the wrong side of road in Tucson, in excess of 60 mph, and hit the victim's pickup truck head on, killing him. A subsequent test revealed a BAC of .2039. At trial, the court allowed the State to introduce evidence of the defendant's prior arrest on Dec. 3, 1985 for DUI pursuant to Rule 404(b) to show the requisite *mens rea* for 2nd degree murder, "extreme indifference of human life." On appeal, the defendant raised three objections: (1) that the prior DUI was not sufficiently similar to the facts of charged case to show "extreme indifference," (2) that the prior DUI did not show defendant was especially aware of the commonly known dangers of drunk driving; and (3) that the evidence was unduly prejudicial and violated Rule 403. The appellate court upheld the introduction of the prior DUI, noting that the prior act need not be factually identical to the crime at issue, and that it is sufficient for purposes of Rule 404(b) if it can permit the jury to infer either that the defendant intended the act in question or had knowledge of its consequences. "In this case, the facts of appellant's prior conviction were sufficiently similar for the jurors reasonably to conclude that as a result of it, appellant was made aware of the risks he posed to others in driving while under the influence. **Thus, the evidence was relevant to the**

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

issue of whether appellant's mental state reflected a reckless indifference to human life." *Id.* 173 Ariz. at 563, 845 P. 2d at 489. (emphasis added)

C. Introduction of other acts to prove "recklessly" and knowledge of consequences of acts

In *State v. Smith, supra,* 130 Ariz. 74, 634 P. 2d 1, the defendant was convicted by a jury of child abuse in violation of A.R.S. 13-3623(C)(2) [since renumbered as 13-3623(B)(2)], that provides:

> Under circumstances other than those likely to produce death or serious injury to a child, any person who causes a child to suffer physical injury or abuse as defined in s 8-546, subsection A, paragraph 2, or, having the care or custody of such child, causes or permits the person or health of such child to be injured or causes or permits such child to be placed in a situation where its person or health is endangered is guilty of an offense as follows:
>
> 2. If done recklessly, the offense is a class 5 felony.

The charges in this case arose when the State alleged that the defendants, husband and wife, maintained a home environment on September 21, 1979 which posed a health hazard to their five children, ranging in age from one to twelve years. The trial court admitted into evidence photographs and testimony concerning a 1978 investigation of the home when the children had to be removed due to similar unsanitary conditions. The appellate court upheld the introduction of the evidence to prove the mental state of "recklessly," noting that the evidence was admissible under Rule 404(b) to prove intent, knowledge, and absence of mistake or accident.

> The state had to prove that appellants acted recklessly. A.R.S. 13-105(5)(c) provides, in part, the following definition of the term "recklessly":
>
> " 'Recklessly' means, with respect to a result or to a circumstance described by a statute defining an offense, that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur and that the circumstances exist."
>
> Rule 404(b) of the Arizona Rules of Evidence provides that evidence of other crimes, wrongs or acts is admissible to show, inter alia, intent, knowledge, and absence of mistake or accident. **The evidence, therefore, was admissible under**

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

> **the foregoing rule to show knowledge, intent and absence of mistake or accident.**

Id. 130 Ariz. at 76, 634 P.2d at 3. (emphasis added)

D. The consequences of the prior acts need not be identical to the injury in the charged case

Case law makes it clear that the consequences of the prior acts, such as injury to third parties, need not be identical to the consequences in the charged act. For example, in *State v. Woody*, *supra,* no one died as a result of the defendant's prior DUI, yet it was admissible to prove the *mens rea* in the 2nd degree murder case. Similarly, in *State v. Villalobos, supra,* the defendant abused his girlfriend's daughter on three prior occasions but she did not die, yet those other acts were admissible to prove his *mens rea* in the charged case involving her death.

II. The State has proven the others acts by clear and convincing evidence

For other acts to be admissible in a criminal case, "the profferer must prove by clear and convincing evidence that the prior bad acts were committed and that the defendant committed the acts." *State v. Terrazas*, *supra,* 189 Ariz. 580, 582, 944 P.2d 1194, 1196. Rule 104(a) of the Arizona Rules of Evidence provides that in determining the admissibility of evidence, the trial court is not bound by the rules of evidence, except those with respect to privileges.

A. Trial court can rely on *unsworn audio recordings and transcripts* in concluding that clear and convincing evidence exists to support a finding that the other acts occurred and that the Defendant committed the other acts

In *State v. LeBrun,* 222 Ariz. 183, 213 P.3d 332 (App. 2009), *review denied* (Dec. 1, 2009), the defendant, a priest who worked with underprivileged children first in Indiana and later in Arizona, was charged in separate cases with eight counts of sexual misconduct and child molestation of six victims between 1986 and 1991. The cases were joined for trial after the court found that evidence of the charged offenses would be cross-admissible if tried separately, pursuant to Arizona Evidence Rule 404(c). At trial, the court also admitted other act evidence

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

pursuant to Rule 404(c) that the defendant had engaged in similar conduct with four boys between 1979 and 1986 while working in Indiana.

The trial court relied on audio and video recordings of **unsworn statements** made by victims of the charged offenses to prove the cross-admissibility. The trial court also relied on audio and video recordings of **unsworn statements** made by the Indiana victims of prior acts for admissibility under Rule 404(c). ("Defendant maintains that the trial court's consideration of **unsworn statements** for determining admissibility under Rule 404(c) failed to comply with the dictates of *Aguilar* that the trial court hear testimony to determine the victims' credibility. In addition, defendant claims that admission of other act propensity evidence in the absence of an evidentiary hearing violates his rights to due process." *Id.* 222 Ariz. at 185-86, 213 P.3d at 334-35.) (emphasis added)

On appeal, the defendant cited *State v. Aguilar*, 209 Ariz. 40, 97 P.3d 865 (2004), claiming that the trial court was required to conduct an evidentiary hearing regarding the credibility of the Indiana victims before the evidence could be admitted under Rule 404(c) or the cases joined as cross-admissible. Defendant also claimed an evidentiary hearing was needed on the issue of cross-admissibility.

> In ruling on the state's motion to admit the evidence under Rule 404(c), the trial court again relied on taped statements by the Indiana victims. As with defendant's other claim, we hold that the materials reviewed by the trial court were sufficient to permit a finding that there was clear and convincing evidence establishing that defendant committed the other acts of sexual misconduct without an evidentiary hearing to evaluate credibility. Accordingly, there was no abuse of discretion in the admission of evidence regarding the Indiana incidents.

State v. LeBrun, supra, 222 Ariz. at 188, 213 P.3d at 337.

In upholding the convictions, Arizona Court of Appeals held that the trial court's consideration of **unsworn statements** by victims who resided in other states to conclude that

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

clear and convincing evidence existed to support a finding that the defendant committed the offenses was proper. The Court noted that "[o]ur review of *Aguilar* and the Rules of Evidence, including Rule 404(c), reveals nothing that categorically restricts the types of evidence the trial court may consider in determining the admissibility of evidence under Rule 404(c)." *Id.* at 187, 213 P. 2d at 336. In so holding, the appellate court expressly rejected the defendant's claim that the trial court was required to conduct an evidentiary hearing regarding the credibility of the out-of-state victims of prior acts.

B. *State v. Aguilar* does not require live witness testimony for a Rule 404 hearing

The *LeBrun* court distinguished the facts of *State v. Aguilar*, *supra,* 209 Ariz. 40, 97 P.3d 865, a case where the Arizona Supreme Court ruled the trial court's findings on whether there was clear and convincing evidence that the defendant actually committed sexual assaults were insufficient to support the determination of cross-admissibility. In *Aguilar,* the defendant was charged with sexually assaulting four women between 1999 and 2001. The defendant admitted to the conduct, but claimed it was consensual, and asked for a severance. The trial court denied the severance, finding that the offenses were cross-admissible under rule 404(c) because Aguilar admitted that he had sexual contact with the three victims.

> As for defendant's specific contention, the *Aguilar* court made no mention of the need for an evidentiary hearing involving live testimony in order to admit sexual propensity evidence under Rule 404(c). If the supreme court meant to require that such a hearing be held in all cases, it could have easily indicated that in its decision and reversed on that basis. The error found to have occurred in *Aguilar* was the trial court's failure to make a finding that the defendant's sexual conduct with the victims was non-consensual, a factually necessary predicate for admissibility under the circumstances of that case, and a finding that the written materials submitted could not sustain. 209 Ariz. at 50, ¶ 35, 97 P.3d at 875. Absent some clear indication that Rule 404(c) requires that the trial court hear live testimony to determine admissibility of sexual propensity evidence, it is not this court's place to read such a requirement into the rule.

State v. LeBrun, supra, 222 Ariz. at 187, 213 P.3d at 336.

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255 E. Gurley Street
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In the present case, while credibility of the witnesses will be an issue for the jury at the trial, the admissibility of the events at Defendant's prior sweat lodges does not turn solely on the credibility of the non-testifying witnesses at the 404(b) hearing. In *Aguilar*, a finding that defendant's sexual conduct with his victims was nonconsensual was a factually necessary predicate for admissibility. If nonconsensual, the evidence was 404(c) evidence; if consensual, the conduct would not come in at all. The error in *Aguilar* was the insufficient evidence to support specific findings that the defendant's sexual conduct with his victims was non-consensual, not the absence of live testimony at an evidentiary hearing.

C. State has presented clear and convincing evidence to prove other acts committed by Defendant

In contrast to the limited evidence presented to the court in *Aguilar*, the State presented live testimony from witnesses, who were cross-examined at great length by Defendant, to establish by clear and convincing evidence that Defendant conducted sweat lodge ceremonies between 2003 and 2009, all of which were similar in many striking and irrefutable ways to the sweat lodge ceremony in 2009. Through the live witnesses, the State established the following:

- 2005
  - That in 2005, the participants did not partake of food or water for the 36 hour duration of the Vision Quest.
  - That the Defendant knew and was aware that Daniel Pfankuch was in medical distress at the end of the sweat lodge ceremony in 2005; that the Defendant knew Daniel was transported to the hospital; that Defendant was angry that Amayra Hamilton called 911; and that Defendant failed to follow up on the medical care received by Daniel to learn why he suffered medical distress and the role Defendant's sweat lodge ceremony played in that distress.
- 2006
  - That in 2006, after the Daniel Pfankuch incident, the Defendant toned down the intensity of his sweat lodge ceremony.
- 2007

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

- That in 2007, the Defendant again conducted the Vision Quest, without food or water to his participants, prior to the sweat lodge ceremony.
- That in 2007, the Defendant moved the sweat lodge ceremony to the middle of the day.
- That many participants were in physical or medical distress during or after the 2007 sweat lodge ceremony, including a woman who crawled out and passed out, eyes rolled to the back of her head; two ladies who were spaced out and incoherent; and an older gentleman who suffered from a heart condition and ran down to the creek to cool down.

- 2008
  - That in 2008, the Defendant again conducted the Vision Quest, without food or water to his participants, prior to the sweat lodge ceremony.
  - That many participants were in physical or medical distress during or after the 2008 sweat lodge ceremony, convulsing or vomiting, including Vicki Rock whose head was pounding and heart beating furiously; a lady who was curled up in the fetal position with muscles contracted; a man named Irwin Bosma who was convulsing, shaking violently and in distress; and a man who was in an "altered state" who was held back by the Dream Team as he tried to get back in the sweat lodge.
- 2009
  - That in 2009, at round 5 of the sweat lodge ceremony, participant Dennis Mehaver exhibited symptoms very similar to Daniel Pfankuch from 2005, screaming he was having heart attack; that Defendant called out, according to Ted Mercer, "You'll be fine. You're where you need to be on your journey;" and that, according to Debra Mercer, Defendant said, "It is fine. It is a good day to die."
  - That also in 2009, 8-10 people were pulled out of the sweat lodge ceremony before it was over.
  - That Debra Mercer heard someone inside say that someone was unconscious, to which Defendant replied "That's ok, she's been down this road before, she knows what she is doing."
  - That near the last round, Debra Mercer heard someone say that a participant was not breathing, and heard Defendant respond "They'll be fine. That's where they need to be."
  - That victim Kirby Brown was seated inside the sweat lodge to the right of Mark Rock and victim James Shore was seated to Mark Rock's left; that Mark Rock heard Kirby Brown gurgling and heard someone call out "she needs to get out," and that Mark Rock heard Defendant respond "The gate is closed. We'll deal with it when the round is over."

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

In order to bolster the live witness testimony, the State also introduced: (1) the grand jury testimony to establish the events of 2009 that resulted in the deaths of three victims, and the similarities between the Defendant's past sweat lodge ceremonies to the ceremony in 2009; (2) the autopsy reports of Kirby Brown, who died of heat stroke, James Shore, who died of heat stroke, and Liz Neuman, who died of multi-system organ failure due to hyperthermia due to prolonged sweat lodge exposure; (3) the medical records of Daniel Pfankuch, who suffered from syncope due to heat exposure; (4) made an offer of proof as to the testimony of seventeen additional witnesses to the Defendant's sweat lodge ceremonies between 2003 and 2008, and (5) introduced the unsworn audio statements and transcripts of those witnesses as well as the statements of other participants to the Defendant's prior sweat lodge ceremonies.

III. Prior sweat lodge ceremonies are clearly relevant under Rule 404(b)

The State is not offering the other act evidence to prove Defendant is a callous man, as Defendant suggested in court. These are not sweat lodge ceremonies with Defendant merely present. It is Defendant who is in charge of every detail of his "Spiritual Warrior Seminar" and the sweat lodge ceremonies year after year. It is Defendant who is responsible for the health and well-being of his participants. It is Defendant who determines how many rocks come in, how much water is poured on the rocks, the length of a round, how hot the inside of the sweat lodge will be, and when the door will open or close. It is Defendant who pushes the limits with his events, first with the Vision Quest, then the sweat lodge ceremony, year after year, in spite of the distress of his participants. It is Defendant who ignores the physical and medical distress of his participants year after year, who fails to seek medical or other expert advice about the safety of his sweat lodge ceremony, and who repeatedly assures participants they will be fine ("No one has died in my sweat lodge yet"). It is Defendant who tells his participants to ignore their body and

their mind as they react to the intense heat, telling them "you will think you're going to die but you won't die" and that "you are more than your body." Finally, in spite of his knowledge of the consequences of the prior sweat lodge ceremonies, it is Defendant who consciously disregards the substantial and unjustifiable risk that his sweat lodge ceremony will result in the death of his participants.

In determining the admissibility of the prior acts, the relevant question is: are the facts of the prior sweat lodge ceremonies sufficiently similar to allow the jurors to reasonably conclude that Defendant was made aware of the risks his manner of conducting sweat lodge ceremonies posed to others? The answer is yes. Without question, the sweat lodge ceremonies conducted by Defendant between 2003 and 2008 are relevant under Rule 404(b) to prove Defendant's requisite mental state under a manslaughter charge of "recklessly," to prove that Defendant has knowledge of the consequences of his sweat lodges, and to prove absence of mistake or accident.

RESPECTFULLY submitted this 3rd day of December, 2010.

By Sheila S Polk

SHEILA SULLIVAN POLK
YAVAPAI COUNTY ATTORNEY

COPIES of the foregoing emailed this 3rd day of December, 2010:

Hon. Warren Darrow
Dtroxell@courts.az.gov

Thomas Kelly
tkkelly@thomaskellypc.com

Truc Do
Tru.Do@mto.com

By: [signature]

COPIES of the foregoing delivered this 3rd day of December, 2010, to

Thomas Kelly
Via courthouse mailbox

Truc Do
Munger, Tolles & Olson LLP
355 S. Grand Avenue, 35th Floor
Los Angeles, CA 90071-1560

Via U.S. Mail

By: [signature]

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110