IN THE CIRCUIT COURT FOR THE FIRST JUDICIAL CIRCUIT
IN AND FOR SANTA ROSA COUNTY, FLORIDA

STATE OF FLORIDA

v. **Case No. 2014 CF 001124**

DERRICK RAY THOMPSON,
Defendant.
_____/

DEFENDANT'S MOTION IN LIMINE CONCERNING
EVIDENCE OF OTHER CRIMES OR ACTS

The Defendant, Derrick Ray Thompson, by and through his undersigned counsel, hereby moves this Court to enter in order in limine directing the State Attorney not to introduce any evidence at trial in this case concerning the Defendant's alleged killing of Alan Johnson in Panama City, Florida; any alleged theft of items from Mr. Johnson, his home, or his vehicle; or any alleged possession of items taken from Mr. Johnson, his home, or his vehicle. As grounds, the Defendant states the following:

1. This case is a capital trial, as defined by Fla. R. Crim. P. 3.112 (b). The Defendant has been indicted for first degree murder. The State has filed notice of its intent to seek the death penalty.

2. The Defendant was found to be indigent. Pursuant to that finding, and because this case is a capital trial as defined by Fla. R. Crim. P. 3.112(b), the undersigned was appointed to represent the Defendant. The undersigned is currently on the First Circuit's appointment list only for appointment as lead counsel or co-counsel in capital trials. The undersigned meets all the qualifications for lead counsel in a capital trial set forth in Fla. R. Crim. P. 3.112(f).

3. The Defendant is charged with the killings of Steve and Debra Zachowski in Santa Rosa County, Florida on July 19, 2014.

4. The Defendant has also been charged in Bay County, Florida with the killing of Alan Johnson on July 21, 2014. He has not yet been tried for that offense.

5. The State has filed a "Notice of Intent to Rely Upon Other Crimes or Acts," setting forth its intention to seek to introduce evidence of the killing of Alan Johnson and theft of Mr. Johnson's property at the Defendant's trial in this case. The State's Notice specifies that it seeks to introduce this evidence "for the purpose of proving identity, motive, opportunity, or absence of mistake or accident."

6. As set forth more fully in the Memorandum of Points and Authorities below, which is hereby incorporated by reference, the Defendant submits that such evidence constitutes only inadmissible evidence of bad character or criminal propensity, and is not relevant to any disputed issue in this case. Moreover, even if such evidence were somehow considered relevant in this case, any probative value of such evidence is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury. Such evidence would also become an improper "feature of the trial." Admission of this evidence would therefore constitute reversible error, and would deprive the Defendant of his rights under the 5th, 6th, 8th, and 14th Amendments to the United States Constitution and Article 1, §§ 2, 9, 16, and 17 of the Florida Constitution.

7. Further grounds will be set forth *ore tenus* or in an amended or supplemental motion as necessary.

WHEREFORE, for the grounds set forth in this Motion and the below Memorandum of Points and Authorities, the Defendant prays that this Court will grant his motion.

MEMORANDUM OF POINTS AND AUTHORITIES

The Defendant has moved this Court to enter an order in limine directing the State Attorney not to introduce any evidence at trial in this case concerning the Defendant's alleged killing of Alan Johnson in Panama City, Florida; any alleged theft of items from Mr. Johnson, his home, or his vehicle; or any alleged possession of items taken from Mr. Johnson, his home, or his vehicle. While Florida law does permit the introduction of evidence of other crimes or acts in certain limited circumstances, none of those circumstances apply to this case. A review of Florida case law and analysis of the facts demonstrates (1) the evidence concerning Mr. Johnson that the State seeks to offer is not relevant to disputed issues in this case; (2) the evidence the State seeks to introduce relates only to the Defendant's character or propensity to commit the offenses in this case; (3) any probative value of the evidence the State seeks to introduce is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury; and (4) admission of the evidence would constitute reversible error. The Defendant therefore requests the Court to grant the requested motion in limine.

A. Florida Law Concerning Introduction of "Other Crimes or Acts" Evidence

Before any evidence can be admitted at a trial in Florida, that evidence must first be relevant to an issue in dispute. Under Fla. Stat. § 90.401, "[r]elevant evidence is evidence tending to prove or disprove a material fact." To be relevant, an offered item of evidence must make that material fact more or less likely to be true.

As a general rule, "all relevant evidence is admissible, except as provided by law." Fla. Stat. § 90.402 (emphasis added). Thus, even if evidence meets the technical definition of relevance, the Florida Evidence Code provides a number of exceptions under which the evidence is nonetheless inadmissible. Some exceptions have to do with questions about the reliability of

certain types of evidence, such as the hearsay rules codified in Chapter 90 of the Florida Statutes. Other exceptions are based in public policy decisions protecting certain types of relevant evidence from disclosure, such as communications falling under the rules in Chapter 90 concerning spousal privilege, lawyer-client privilege, accountant-client privilege, psychotherapist-patient privilege, sexual assault counselor-victim privilege, and domestic violence advocate-victim privilege. Thus, Florida law seeks to balance the rights of litigants with societal interests in the quality of evidence, the integrity of the judicial process, and the need to allow certain types of communications to proceed without concern for later disclosure.

As part of this higher principle of protection for the integrity of the judicial process, Florida law requires exclusion of certain types of relevant evidence which threaten that integrity. Florida Statute § 90.403 states that "[r]elevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." In a similar vein, Fla. Stat. § 90.404 places tight restrictions on the introduction of character evidence, preventing the introduction of "[e]vidence of a person's character or a trait of character … to prove action in conformity with it on a particular occasion" except under very limited circumstances. The reasons for these restrictions are evident – to insure that decisions in legal cases are made on the facts of those cases alone, not in reliance on extraneous facts likely to cause a judge or jury to rely on inherent prejudices or preconceived notions about a litigant's character or to decide cases by analogy to a litigant's actions at other times rather than his or her actions on the occasion in question.

Florida Statute § 90.404(2) does contain a very limited exception for introduction of evidence about other crimes, wrongs, or acts committed by the Defendant. However, recognizing the inherent problems with allowing such types of evidence and abundant

possibilities for misuse or error, the Legislature crafted tight restrictions on the purposes for which such evidence could be offered. Florida Statute § 90.404(2)(a) states that

> (2) OTHER CRIMES, WRONGS, OR ACTS.—
>
> (a) Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

Moreover, even if evidence of such other crimes, wrongs, or acts meets the initial threshold of relevance to a material fact at issue in the case, it would still be excluded under Fla. Stat. § 90.403 if its probative value was substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.

Florida appellate courts, charged with review of trial court decision on evidentiary issues and safeguarding the integrity of the judicial process, have long recognized the danger of allowing trials to focus on "other crimes" evidence. In Vice v. State, 39 So.3d 352, 359 (Fla. 1st DCA 2010), the First District Court of Appeal reversed this Court (Swanson, J.) for improperly allowing "other crimes" evidence. The defendant in Vice was charged with aggravated child abuse and child neglect for injuring an infant by shaking, and the trial court allowed evidence of two other incidents where the defendant had allegedly shaken another infant. In reversing the conviction, the First District quoted extensively from the Florida Supreme Court's decision in Robertson v. State, 829 So.2d 901, 907-08 (Fla. 2002), stating the following:

> "Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity." § 90.404(2)(a), Fla. Stat. (2006). *See Williams* [v. State], 110 So.2d [654] at 659-60 [Fla. 1959] ("Our view of the proper rule simply is that *relevant* evidence will not be excluded *merely* because it relates to

similar facts which point to the commission of a separate crime. The test of admissibility is relevancy. The test of inadmissibility is a lack of relevancy." (emphasis in original)). *See also* Charles W. Ehrhardt, *Florida Evidence* § 404.9 at 221 (2009 ed.). The evidence in the present case was "relevant solely to prove bad character or propensity." § 90.404(2)(a), Fla. Stat. (2006).

Evidence that does not logically tend to prove a fact in issue (other than propensity) is irrelevant and inadmissible. *See Williams,* 110 So.2d at 662 ("[W]e emphasize that the question of the relevancy of this type of evidence should be cautiously scrutinized before it is determined to be admissible.").

> Before admitting *Williams* rule evidence, it is incumbent upon the trial court to make multiple determinations, including whether the defendant committed the prior crime, whether the prior crime meets the similarity requirements necessary to be relevant as set forth in our prior case law, whether the prior crime is too remote so as to diminish its relevance, and finally, whether the prejudicial effect of the prior crime substantially outweighs its probative value.

Robertson v. State, 829 So.2d 901, 907-08 (Fla.2002) (footnotes omitted).

Vice, 39 So.3d at 355.

The Vice court specifically warned against improper use of "other crimes" evidence to show identity, reminding lower courts that using other crimes evidence for such purpose is only arguably relevant where (1) the method by which the crime was committed was so unique or unusual as to make it highly likely that the same person committed both offenses; (2) the identity of the defendant is in fact an issue at the trial; and (3) the defendant is shown conclusively to have committed the other offense. As the Vice court stated, again quoting extensively from Ehrhardt:

> [T]o be admissible to show identity, similar fact evidence must prove a prior act or crime that shares a distinctive modus operandi with the offense charged:
>
> > The probative value comes from the fact that the collateral crimes were committed with a unique modus operandi which was the same as that used in the crime in question; therefore, it may be inferred that the same person committed both crimes. When that evidence is coupled with an

> identification of the defendant as the person who committed the prior crime, the evidence is relevant. Evidence that the defendant has committed prior crimes, without evidence of a similar unique modus operandi, does not raise the same inference. Only when the court can find that modus operandi is so unusual so that it is reasonable to conclude that the same person committed both crimes is the evidence of the prior crime admissible to prove identity.

Ehrhardt, supra, § 404.10, at 242-43 (footnotes omitted).

Vice, 39 So.2d 3d at 356 (footnote omitted).[1]

Florida appellate courts are also appropriately wary of the introduction of "other crimes" evidence on the question of intent. In Jackson v. State, 140 So.3d 1067, 1070-73 (Fla. 1st DCA 2014), a case involving an alleged burglary with battery, the First District Court of Appeal reversed a conviction and held it erroneous to admit "other crimes" evidence of previous violent assaults on the victim. The Jackson court supported its decision with two separate conclusions, each sufficient in and of itself to justify its ruling. First, the Jackson court noted that because the defendant's defense was not one of a difference of intent, but instead that he was in fact not the person who committed the crime for which he was on trial, proof of the defendant's intent on a prior occasion was irrelevant. Second, the Jackson court noted that the defendant's motivation for attacking the victim in a separate incident was simply not probative of his intent at the time he allegedly committed the burglary at issue. As Jackson succinctly summarized, admitting other crimes evidence on the question of "intent" in such cases, regardless of the stated reason, was tantamount to admission of forbidden bad character or propensity evidence. Id.

A review of Florida appellate decisions concerning "other crimes" evidence illuminates the "multiple determinations" a trial court must make before such evidence can be admitted:

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[1] It is clear from the appellate decisions that the First District Court of Appeal regards Ehrhardt's *Florida Evidence* treatise as an authoritative source – perhaps THE authoritative source – on the issue of admission of "other crimes" evidence.

1. Materiality: Are identity, motive, opportunity, or absence of mistake or accident actually at issue in the case being tried? A defendant's mere entry of a "not guilty" plea and insistence that the State prove the allegations against him at trial does not, in and of itself, make all issues of identity, motive, opportunity, or absence of mistake or accident material. As the First District Court of Appeal has noted, the less material an issue is in a particular case, the higher the probability that the probative value of "other crimes" evidence will be substantially outweighed by its prejudicial effect. See Jackson v. State, 140 So.3d 1067, 1071-72 (Fla. 1st DCA 2014) (citing extensively to Ehrhardt). Allowing "other crimes" evidence to "establish" a point which is not, in fact, material to the current prosecution converts such evidence into impermissible "bad character" or "propensity" evidence. Jackson, 140 So.3d at 1070-72. In such circumstances, reversal is highly likely. See Bolden v. State, 543 So.2d 423 (Fla. 5th DCA 1989) (reversal where trial court improperly admitted "other crimes" evidence on issues of establishing identity and absence of mistake or accident, neither of which were material issues at trial).

2. Factuality: Did the defendant actually commit the other crime, wrong, or act? Without a finding that the defendant actually committed the other crime, wrong, or act, it is error to introduce evidence about it, as such evidence would have no relevance. See Robertson v. State, 829 So.2d 901, 907-08 (Fla. 2002); Smith v. State, 700 So.2d 446, 447 (Fla. 1st DCA 1997); Beckett v. State, 730 So.2d 809, 812 (Fla. 4th DCA 1999). In a situation where the defendant's commission of the other crime, wrong, or act has not yet been established, the defendant is afforded full rights of confrontation and cross-examination about the alleged other crime, wrong, or act as if at an initial trial of the offense. See Gutierrez v. State, 705 So.2d 660, 661 (Fla. 2d DCA 1998). The standard of proof required in this context for the "other crime"

evidence to be admitted is clear and convincing evidence that the defendant in fact committed the other crime. See McLean v. State, 934 So.2d 1248, 1256 (Fla. 2006) and other cases cited in Ehrhardt § 404.9 n.26. Moreover, if evidence of a collateral crime is admitted at a trial, and the defendant is later acquitted of the collateral crime, the conviction based on the collateral crime evidence will be reversed. See Hines v. State, 983 So.2d 721 (Fla. 1st DCA 2008); Perez v. State, 801 So.2d 276, 277 (Fla. 4th DCA 2001).

3. Relevance: Does the evidence of the other crime, wrong, or act make the existence of a material fact in the case at trial more or less likely? If not, the evidence is irrelevant, and therefore inadmissible.

4. Purpose: Is the purpose of the evidence of the defendant's commission of the other crime, wrong, or act merely to show the defendant's bad character or his propensity to commit the crime for which he is on trial in the instant case? If so, the evidence is inadmissible. See Jackson, 140 So.3d at 1070-72.

5. Prejudicial Effect: Is any probative value of the evidence substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence? If so, the evidence is inadmissible, even if it is relevant. The Florida Supreme Court, the First District Court of Appeal, and other Florida appellate courts have reversed convictions on multiple occasions where trial judges allowed evidence whose probative value was substantially outweighed by its prejudicial effect. See, e.g., McLean v. State, 934 So.2d 1248 (Fla. 2006); LaMarca v. State, 785 So.2d 1209, 1212 (Fla. 2001); State v. Hubbard, 751 So.2d 552, 565 (Fla. 1999) (prior suspension of driving privileges in DUI manslaughter case); Henry v. State, 574 So.2d 73, 575 (Fla. 1991) (prior murder in current murder case); Denmark v. State, 927 So.2d 1079, 1081-82 (Fla. 2nd DCA 2006) (prior

juvenile offenses in a battery on law enforcement officer case); Carr v. State, 578 So.2d 398, 400 (Fla. 1st DCA 1991) (prior cocaine possession in current cocaine possession case); Bell v. State, 650 So.2d 1032, 1035 (Fla. 5th DCA 1995) (prior fire in current arson case); Herbert v. State, 526 So.2d 709 (Fla. 4th DCA 1988) (prior physical child abuse). Even when such evidence is properly admitted, Florida appellate courts have held that the details of the other crimes, wrongs, or acts must be carefully limited. See, e.g., Long v. State, 610 So.2d 1276, 1281 (Fla. 1992) (limiting details of prior crime); Steverson v. State, 695 So.2d 687, 688-89 (Fla. 1997) (reversed where extensive details of prior crime admitted and prejudice therefore outweighed probative value); Harrison v. State, 61 So.3d 413 (Fla 2d DCA 2010); Farrell v. State, 682 So.2d 204, 206 (Fla. 5th DCA 1996).

6. "Feature of the Trial": Will the evidence of other crimes, wrongs, or acts become a "feature" of the current trial, rather than the offense actually before the court for resolution? If so, the evidence is inadmissible, even if otherwise relevant. As stated by the First District Court of Appeal in Bush v. State, 690 So.2d 670, 673 (Fla. 1st DCA 1997):

> Unfair prejudice results where the state makes a collateral offense a feature, instead of an incident, of a trial. State v. Richardson, 621 So.2d 752 (Fla. 5th DCA 1993). The state's presentation of evidence of collateral offenses must not transcend the bounds of relevancy to the offense being tried. Id. A similar offense becomes a feature instead of an incident of the trial on the charged offense where it can be said that the similar fact evidence has so overwhelmed the evidence of the charged crime as to be considered an impermissible attack on the defendant's character or propensity to commit crimes. Snowden v. State, 537 So.2d 1383 (Fla. 3d DCA), rev. denied, 547 So.2d 1210 (Fla.1989). The admission of excessive evidence of other crimes to the extent that it becomes a feature of the trial has been recognized as fundamental error. See Travers v. State, 578 So.2d 793 (Fla. 1st DCA), rev. denied, 584 So.2d 1000 (Fla.1991). As we stated in Travers, the danger is that evidence that the defendant committed a similar crime will frequently prompt a more ready belief by the jury that the defendant might have committed the charged offense, thereby predisposing the

mind of the juror to believe the defendant guilty. Travers at 797, citing Nickels v. State, 90 Fla. 659, 685, 106 So. 479, 488 (1925).

While it is true that a collateral offense can become a "feature of the trial" where the proof of the collateral offense "consume[s] more trial time and space than the evidence of the actual crime charged." Sutherland v. State, 849 So.2d 1107, 1108 (Fla. 4th DCA 2003), the real issue is that of the emphasis placed on the collateral offense rather than the quantum of proof. A collateral offense can become a "feature of the trial" by its emphasis in opening statement and closing argument, even if the amount of actual trial time devoted to the collateral offense is brief. Seavey v. State, 8 So.3d 1175 (Fla. 2d DCA 2009); see also Ballard v. State, 899 So.2d 1186 (Fla. 1st DCA 2005). It is this shift of emphasis from the crime being tried to the collateral offense, creating in effect a trial by analogy, which renders the collateral crime evidence inadmissible.

7. Strength of Other Evidence: How strong is the evidence on the relevant point without the evidence of the other crime, act, or wrong? In balancing the question of probative value versus undue prejudice, the probative value of collateral crime evidence falls and the likelihood of undue prejudice increases where there is other strong evidence on the point in question. See Huddleston v. United States, 485 U.S. 681, 689 n.6 (1988). The trial court must conduct this balancing independent of the opinion of the party offering the evidence. See Ruffin v. State, 397 So.2d 277, 279-80 (Fla. 1981) (State is not entitled to admit collateral crime evidence based only on its opinion that the evidence is "necessary" to its case). Thus, for example, in a case where the proof of identity, motive, opportunity, or absence of mistake or accident are strong (for example, where the State's evidence will include forensic evidence, video evidence placing the Defendant at the scene, and a confession), the need for the admission of collateral crime evidence is proportionally diminished. Admitting collateral crime evidence in

a circumstance where it is not necessary creates a high likelihood that an appellate court will find that the collateral crimes evidence constituted impermissible bad character or propensity evidence and reverse the conviction.

B. Application of Florida Law Concerning Introduction of "Other Crimes or Acts" Evidence to the Facts of this Case

The State has filed a Notice of Intent to Rely Upon Other Crimes or Acts, stating that it intends to introduce collateral crime evidence at trial concerning the Defendant's alleged commission of the murder of Alan Johnson in Panama City, Florida; the alleged theft of Mr. Johnson's vehicle; and the Defendant's possession of items allegedly stolen recently from Mr. Johnson. Specifically, the State's notice states its intent to introduce this evidence "for the purpose of proving identity, motive, opportunity, or absence of mistake or accident."

The State's notice is the type of "laundry list" approach to collateral crime evidence disapproved by the First District Court of Appeal in Tollefson v. State, 525 So.2d 957, 960 (Fla. 1st DCA 1988) ("although the prosecution submits that proof of [the collateral crime] is relevant to show lack of mistake, modus operandi and course of conduct, these 'labels' are advanced without any connection to the facts of appellant's case.") An analysis of the points the State claims the collateral crime evidence will prove, viewed through the prism of the Florida law on collateral crimes evidence discussed above, shows that the proffered collateral crime evidence (1) pertains to issues not material to this case; (2) is not relevant to this case; (3) relates to issues on which the State's other available proof is strong; (4) is based on alleged offenses for which the Defendant has not yet been tried, thus requiring a full "mini-trial" within the context of this trial to even establish the alleged collateral facts, and (5) is merely bad character or propensity evidence, which is clearly forbidden. Under such circumstances, the collateral crime evidence is likely to become a "feature" of the current trial, and the probative value of the collateral crime

evidence will be far outweighed by the danger of unfair prejudice, confusion of issues, and misleading the jury. Thus, allowing the State to introduce the evidence concerning the Alan Johnson killing and thefts in Panama City will create a high likelihood of reversal, on the ground that such evidence constitutes merely proof of the Defendant's bad character or propensity to commit criminal acts.

1. Identity

The identity of the Defendant is not a material issue in this case. The Defendant expects the State to introduce his videotaped statement to law enforcement in which he admits his identity as the shooter of the Zachowskis; evidence of a report Steve Zachowski made to law enforcement shortly before his killing in which he identified the Defendant as a person who had come to his home that morning and stolen his vehicle; video surveillance footage purporting to show the Defendant in the area of the killings shortly after the time of the killings; and forensic evidence linking the Defendant to the offenses. As detailed above, admission of collateral crime evidence on a point not actually at issue in the trial is likely to be held reversible error, as the probative value is far outweighed by the prejudicial effect and the likelihood that such evidence will be held to be merely bad character or propensity evidence is high.

In addition, as the Defendant has not been convicted of the Panama City offenses, the State would have to present evidence and try those offenses in the context of this trial. In doing so, the Panama City case would quickly become a feature of the Santa Rosa trial, and any probative value of such evidence would be overwhelmed.

Finally, even if it were shown conclusively that the Defendant committed the Panama City offenses, such evidence would not be admissible to prove evidence in this case, as the two offenses bear merely a superficial similarity.[2] Vice v. State, 39 So.3d 352, 356 (Fla. 1st DCA

2010, cites Ehrhardt §404.10 for the proposition that using collateral crime evidence to prove identity requires a "unique modus operandi" which "is so unusual … that it is reasonable to conclude that the same person committed both crimes." See Edmond v. State, 521 So.2d 269, 270 (Fla. 2d DCA 1988) (requiring a "striking similarity" between the offenses). Moreover, where the State is trying to prove a fact such as a Defendant's identity through the collateral crime evidence, rather than simply offering such evidence to corroborate a witness' testimony the First District Court of Appeal indicates that the "rigidity with which the similarity requirement is applied" should be high. Calloway v. State, 520 So.2d 665, 668 (Fla. 1st DCA 1988). The evidence in this case clearly fails such a test. There is simply nothing unique about either case, nor are the similarities between them so striking, that a reasonable inference could be drawn that the same person must have committed both.

2. Motive

The Defendant's motive is not a material issue in the Santa Rosa case. The Defendant has been indicted for two counts of first-degree murder, either premeditated or during the course of a robbery or burglary. However, to obtain a conviction, the State is not required to prove any particular motive for the killing, or that any motive existed at all.

Moreover, proof that the Defendant committed the Panama City murder two days later is of no probative value towards establishing a motive for his previous actions in Santa Rosa. No link of any sort has been postulated between Mr. Jackson and the Zachowskis. No evidence exists that the Defendant committed the Santa Rosa offense for a motive common to the Panama City offense, such that proving a motive for the Panama City offense would be probative of his

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[2] Both Mr. and Mrs. Zachowski were killed by a single gunshot to the left rear of the head. Mr. Johnson was killed by two gunshots to the head, one of which was from the front, and the other of which was to the left rear of the head.

motive for the Santa Rosa offense. Even the fact that both offenses were apparently accompanied by the theft of property does not provide proof of a common "motive" as used in this context.

From the wording of the State's Notice, it appears that the State's theory may be that the Defendant committed the Panama City offenses in order to obtain a vehicle and resources to flee the area, because he had discovered that he was wanted for questioning in the Santa Rosa offenses. While such a scenario might potentially make the Santa Rosa offenses relevant as providing a motive in the Panama City trial, the theory does not work in reverse.

3. Opportunity

The question of the Defendant's opportunity to commit the Santa Rosa offenses is not a material issue in this case. Other evidence from the State, including a report to law enforcement filed by Steve Zachowski shortly before his death, will establish that the victims lived alone, that the Defendant was familiar with their home, that the Defendant had been to the victims' home as recently as a few hours before the killing, and that the Defendant had transportation. Moreover, even if the Defendant were shown to have committed the Panama City offense, there is simply nothing about the commission of those offenses that is probative on the issue of the Defendant's opportunity to commit the Santa Rosa offenses. The offenses are separated by several days and a substantial geographic distance.

4. Absence of mistake or accident

In order to admit evidence of the Panama City offenses for the purpose of showing "absence of mistake or accident" in Santa Rosa, the State would have to meet several high thresholds. First, it would have to present evidence to demonstrate conclusively that the Defendant committed the Panama City shooting. Second, it would have to prove that the

Panama City shooting was not itself a mistake or accident. Third, it would have to somehow demonstrate that those facts were relevant and probative on the issue of whether the Santa Rosa shootings were a mistake or accident, which would require a showing of a similar unique modus operandi or striking similarity between the offenses to show that the lack of mistake or accident in Panama City translated somehow to a lack of mistake or accident in Santa Rosa. Finally, it would have to do all these things while avoiding making the Panama City offense a "feature of the trial" in Santa Rosa and preventing the prejudicial effect of such evidence (including confusion of issues, misleading the jury, or proof of bad character or propensity) from outweighing its scant probative value. These hurdles simply could not be overcome in a way that would allow collateral crimes evidence on this point without practically guaranteeing reversal.

C. Standard of Appellate Review

Because the dangers of improperly admitting collateral crime evidence are so profound and obvious, Florida appellate courts are rigorous in their review of this issue. The error is presumed to be harmful unless the State can demonstrate otherwise. The First District Court of Appeal in Vice cited Henrison v. State, 895 So.2d 1213, 1216 (Fla 2d DCA 2005), for the proposition that "[a] trial court's decision to admit collateral crime or Williams rule evidence is reviewed for an abuse of discretion. However, '[t]he admission of improper collateral crime evidence is presumed harmful error because of the danger that a jury will take the bad character or propensity to commit the crime as evidence of guilt of the crime charged.' For the harmless error rule to apply, the State must prove that there is ' "no reasonable possibility that the error contributed to the conviction." ' " (citations omitted). In this case, where the Defendant has not even been convicted of the collateral crime, and the probative value of that crime on the issues in

the case at bar is so tenuous, allowing the State to admit the Panama City evidence would practically guarantee a future reversal.

Conclusion

Under Florida case law, the guarantees of the United States Constitution, the requirements of the Florida Evidence Code, and the common and traditional understandings of the nature and purpose of the rules of evidence, it would constitute reversible error for this Court to allow the State to introduce collateral evidence of the Defendant's alleged criminal actions in the Alan Johnson case from Panama City into his trial in this case. Therefore, for the reasons stated above, as well as any that may become evident to the Court upon a hearing in this matter, the Defendant respectfully moves this Court to grant his motion in limine.

Respectfully submitted,
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By counsel:

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Certificate of Service

I HEREBY CERTIFY that I caused a true and correct copy of the foregoing Defendant's Motion in Limine Concerning Evidence of Other Crimes or Acts to be served on John A. Molchan, Assistant State Attorney, First Judicial Circuit of Florida, via e-service, this 18th day of May, 2016.

/s/ Martin W. Lester