CAUSE NO. CR14024

THE STATE OF TEXAS	§	**IN THE DISTRICT COURT**
VS.	§	**266TH JUDICIAL DISTRICT**
EDDIE RAY ROUTH	§	**ERATH COUNTY, TEXAS**

STATE'S BRIEF FOR THE COURT REGARDING THE ADMISSIBILITY OF EXTRANEOUS OFFENSES AND "BAD ACTS"

To the Honorable District Court:

Pursuant to the Court's request, the State hereby outlines the extraneous offenses and bad acts which will arise during the trial and the theories of admissibility. The State believes that these incidents are admissible under Texas Rules of Evidence 401 (relevance), 107 (Rule of Optional Completeness), 404(b), and are not precluded by Rule 403.

I.

There are several extraneous acts which are relevant to the case. This list outlines some of the major incidents or categories, but does not include every single extraneous offense or bad act listed on the State's 404(b), 609, and 37.07 notice.

1) The defendant has a long history of drug and alcohol use. From high school, while in the Marines, and after his discharge from the Marines, the defendant has smoked marijuana, drank alcohol excessively, smoked "K2" or "spice" (synthetic marijuana), and potentially marijuana laced with PCP or formaldehyde ("wet").

2) July 2011 ("the tapeworm incident") – The defendant was working construction in Houston along with his cousin, when he claimed he was suffering from dehydration and heatstroke. He stayed home from work, yet walked down the highway, bought food, and grilled it on an outdoor barbeque grill. He then went to a Houston hospital, claiming he had tapeworms. His sister picked him up in Houston and brought him home. He was briefly hospitalized at the VA Hospital, still claiming to have tapeworms.

3) January 2, 2012 ("DWI arrest") – the defendant was arrested for DWI in Lancaster, Texas. He was convicted and served a short jail sentence. During the detention, the

defendant told officers, "I'm a Marine" and "I have PTSD." The defendant's driver's license was suspended and his truck impounded after this incident.

4) September 2, 2012 ("the fish fry incident") – The defendant was present at a family gathering, which was either a fish fry or some kind of family dinner. He had been drinking alcohol, and smoking marijuana. He became intoxicated and got into an argument with his father, reportedly, about his father's wish to sell his firearms. A physical altercation ensued, the defendant may have thrown his dog while in its crate, and defendant made threats to shoot/kill the family members and shoot/kill himself. Defendant left the house, shirtless, crying, and intoxicated, and was apprehended by Lancaster Police. Lancaster Police took him to Green Oaks Hospital, which had him transferred to the VA Hospital.

5) January 19, 2013 ("the knife incident") – the defendant held his girlfriend, Jennifer Weed, and her roommate, Gabriella Lucero, hostage in their apartment, threatened them with a large kitchen knife and a sword, threatened to kill them, take them to another location, "use them as human tampons," and otherwise harm them. Miss Lucero was able to secretly contact the Dallas Police Department. When police arrived, Miss Weed told police the defendant was a veteran who needed help and had PTSD and told police she did not wish to press charges. Miss Lucero was scared to press charges if Miss Weed would not. Police transported the defendant to Green Oaks Hospital. After a brief stay at Green Oaks Hospital, the defendant was transferred to the VA Hospital where he remained until approximately January 25, 2013.

6) On several occasions between his release from the VA Hospital and February 2, 2013, the defendant smoked marijuana and drank alcohol.

7) February 2, 2013 (day of offense) --The defendant threatened Jennifer Weed with a knife in hand and told her to "get the fuck out of my house." He also made statements to her such as, "Go eat a peanut and die," insulted and argued with Miss Weed. The defendant was smoking marijuana and drinking alcohol that morning.

8) February 2, 2013 through present – The defendant made threats against officers who transported him from Lancaster Police Department to the Erath County Jail. After his incarceration in the Erath County Jail, he committed acts of vandalism on his jail cell or jail property, and made insulting or inappropriate comments to jail staff.

9) The defendant reportedly engaged in homosexual experimentation with a cousin as a preteen or young teenager. This "experimentation" has been described as "sexual abuse

by a cousin" in various medical records. This cousin may be the one working with the defendant at the time of "the tapeworm incident."

II. Texas Rule of Evidence 401 – Relevance

All of the above incidents, acts, or words of the defendant are relevant to the inquiry into the defendant's state of mind at or near the time of the offense committed. His hospitalizations, long-term drug and alcohol use, his personality, his common reactions or coping mechanisms are relevant to the issue of motive in committing the offense, voluntary intoxication, his diagnoses for any mental condition, and to differentiate between his "normal" state and his state of mind on the date of the offense. His emotions and reactions to various situations, and how he displays his emotions are relevant to the inquiry as to whether the defendant was sane or not at the time of the incident. *See* Texas Rule of Evidence 401. These are all factors expert witnesses will have relied upon in forming their opinions of the defendant and will be highly relevant and necessary to properly explain their conclusions to the jury.

III. Texas Rule of Evidence 107 -- Rule of Optional Completeness

The defense may seek to get evidence of the defendant's mental history and various hospitalizations in front of the jury. To inform the jury of the defendant's various hospitalizations without including the events which precipitated the hospitalization, would leave the jury with an incomplete and inaccurate impression of the events as well as an incomplete and inaccurate impression of his mental status. The jury should be allowed to put each hospitalization in the context of how the defendant came to be hospitalized. It will also be necessary for any testifying psychiatrist or psychologist to delve into these incidents in order to explain their opinions and conclusions about the defendant's mental history and his sanity at the time of the offense.

Evidence of the defendant's long-term drug and alcohol use is necessary to show how intoxication often played a role in the defendant's hospitalizations, played into doctors' diagnoses, and to show voluntary intoxication's role in the present case. Again, it will be necessary for any testifying psychiatrist or psychologist to delve into the extent and frequency of his drug and alcohol use in order to explain their opinions and conclusions about the defendant's mental history and his sanity at the time of the offense.

The defendant's arrest for DWI and his assertion of being a veteran with PTSD during the arrest is similar to his statements during his arrest for the present case. The fact that the defendant has previously asserted "I'm a veteran with PTSD" upon prior arrests, is probative of possible malingering when he makes similar statements upon his arrest in the present case. The fact that his license was suspended is relevant to his claim to a forensic psychologist that he was feeling paranoid near the time of the offense, and gave an example of his paranoia as "driving and being followed by a police officer and feeling like I would be pulled over." Furthermore, the fact that the defendant lost his truck to impound subsequent to his DWI, and he stole Chris Kyle's truck after the murders, made comments such as "I sold my soul for this truck," could be indicative of one of the defendant's motives in the crime.

Texas Rule of Evidence Rule 107, known as "The Rule of Optional Completeness" states that when part of an act, declaration, conversation, writing or recorded statement is given in evidence by one party, the whole on the same subject may be inquired into by the other, and any other act, declaration, writing or recorded statement which is necessary to make it fully understood or to explain the same may also be given in evidence, as when a letter is read, all letters on the same subject between the same parties may be given.

Rule 107 is a rule of admissibility. "This rule is one of admissibility and permits the introduction of otherwise inadmissible evidence when that evidence is necessary to fully and fairly explain a matter 'opened up' by the adverse party." *Walters v. State*, 247 S.W. 3d 204, 217– 18 (Tex. Crim. App. 2007); *Arebalo v. State*, 143 S.W.3d 402, 408 (Tex. App.—Austin 2004, pet. ref'd); *Washington v. State*, 822 S.W.2d 110, 115 (Tex. App.—Waco 1991) ("Rule 107 ... is grounded in the notion that evidence used to fully explain a matter opened up by the other party need not be ordinarily admissible."), rev'd on other grounds, 856 S.W.2d 184 (Tex. Crim. App. 1993). In *West v. State*, 121 S.W.3d 95, 103-104 (Tex. App.—Fort Worth 2003, no pet.), the court held that "Once an evidentiary door has been opened by one side, this rule serves to allow the other side to complete the picture."

Here are some examples in which the courts held evidence admissible through the "open door" of optional completeness:

1. Extraneous offenses: *Burns v. State*, 556 S.W.2d 270, 284 (Tex. Crim. App. 1977). (as

a result of the defendant referring to extraneous offenses in the course of cross examination, the State was entitled to inquire into "the whole on the same subject inquired into" and present evidence of the extraneous offense.)

2. Hearsay: *Ware v. State*, 475 S.W.2d 282, 285 (Tex. Crim. App. 1971); *Ibenyenwa v. State*, 367 S.W.3d 420, 424–25 (Tex. App.—Fort Worth 2012, pet. ref'd) (trial court properly admitted entire audio recording of forensic interviewer's interview with child sex abuse victim where defense's cross-examination had suggested interviewer had manipulated the interview); *Walters v. State*, 206 S.W.3d 780, 785–86 (Tex. App.—Texarkana 2006), vacated on other grounds, 247 S.W. 3d 204 (Tex. Crim. App. 2007).
3. Statutorily incompetent spouse testimony: *Jones v. State*, 501 S.W.2d 308, 311 (Tex. Crim. App. 1973).

There are three limitations, however, to the scope of the completeness opening. One: only parts or items germane to the part or item offered ("on the same subject") become admissible. *Sauceda v. State*, 129 S.W.3d 116, 123 (Tex. Crim. App. 2004) ("The plain language of Rule 107 indicates that in order to be admitted under the rule, the omitted portion of the statement must be 'on the same subject' and must be 'necessary to make it fully understood.' "); *Estrada v. State*, 352 S.W.3d 762, 768-69 (Tex. App.—San Antonio 2011, no pet.); *Crosby v. Minyard Food Stores, Inc.*, 122 S.W.3d 899, 903 (Tex. App.—Dallas 2003, no writ) (the party offering the remainder must show that it is on the same subject and is necessary to explain or fully understand the matter). Two: the matter offered on the justification of completeness may be excluded under Rule 403 if its prejudicial effect substantially outweighs its probative value. *Kinnamon v. State*, 791 S.W.2d 84, 101–02 (Tex. Crim. App. 1990); *Arebalo v. State*, 143 S.W.3d 402, 408 (Tex. App.—Austin 2004, pet. ref'd). Three: when an application of Rule 107 would conflict with a constitutional right of an accused, the constitutional right must prevail. Accordingly, in a joint trial in which defendant A did not testify, it was proper to introduce A's written statement from which references to defendant B had been redacted, over A's Rule 107 objection, because to have introduced the redacted portions would have violated B's constitutional right of confrontation. *Finley v. State*, 917 S.W.2d 122, 126–27 (Tex. App.—Austin 1996, pet. ref'd).

Rule 107 was given a novel narrow construction in *Stewart v. State*, 221 S.W.3d 306, 311–12

(Tex. App.—Fort Worth 2007, no pet.): "During the direct examination of Sergeant DeLuna by the State, testimony was elicited that Officer Cook pulled out his COP during the scuffle with Stewart, but Sergeant DeLuna did not see him spray Stewart and could not tell whether Stewart was sprayed or not. Later, during cross-examination, defense counsel showed a portion of State's Exhibit 3, which had been highlighted, to Sergeant DeLuna wherein he had stated that Officer Cook had sprayed Stewart in the face. Defense counsel also elicited testimony from Sergeant DeLuna that the statement was made about two hours after the confrontation when the events were fresh in his mind. Thereafter, the State offered the exhibit itself into evidence under [Rule] 107. The State's reason for seeking such introduction was to show that also in that report Sergeant DeLuna stated he was unsure whether Officer Cook had sprayed the COP spray. Defense counsel objected that he had never offered the written document itself into evidence. A close examination of Rule 107 indicates that if a portion of a document is read into evidence, then other portions or other writings may *only* be read into evidence. In other words, if one party simply reads from a document, the party does not open the door for the opposing party to *admit* the document into evidence."

In *Walters v. State*, 247 S.W.3d 204, 220 (Tex. Crim. App. 2007), the trial court erroneously excluded evidence offered by defendant under Rule 107; "the State, through the questioning of its witnesses, opened the door to the admission of the second 911 call to correct a false impression that it had created. The record shows that the State's questioning of Officer English and Beth Hankins left the jury with the impression, later emphasized during closing arguments, that appellant had not given any explanation of the shooting immediately after the event. Officer English testified that he asked appellant if he wanted to talk about what had happened. That question hovered in the air, but the State cut the witness off and redirected him to other matters. The jury did not hear that, from the very beginning, appellant told officers that he shot his brother in self-defense. Appellant's words to Officer English were: 'My brother come over here threatening me, one of several times,' and 'He told me one time he was gonna kill me out there at the barn.' The State played the initial 911 call three times for the jury. During closing argument, it harped on appellant's preternatural 'calmness' and inaccurately asserted that appellant never told the 911 operator that he shot his brother.

To allow the defense to put in evidence of the defendant's hospitalizations without the events which resulted on those hospitalizations would leave the jury with an incomplete picture of the defendant's mental status. Other incidents also complete the picture for the jury on the issues of motive, voluntary intoxication, and the defendant's mental status.

IV. Texas Rule of Evidence 404(b)

The rule for the admissibility of extraneous offenses has been codified in Texas Rule of Evidence 404(b).[1] Generally, extraneous offenses are not admissible at the guilt/innocence phase of trial to prove that a defendant acted in conformity with his character by committing the charged offense. *Montgomery v. State*, 810 S.W.2d 372, 387 (Tex. Crim. App. 1990). The admission of an extraneous offense is permitted under Rule 404(b), however, if it has relevance for a purpose other than character conformity, such as proving motive, opportunity, intent, preparation, plan, knowledge, or absence of mistake or accident. Evidence of extraneous offenses may be admissible to rebut the defendant's assertion that he was insane at the time of the offense. *Sanders v. State*, 449 S.W.2d 262, 263 (Tex. Crim. App. 1969); *Sanders v. State*, 450 S.W.2d 871, 872 (Tex. Crim. App. 1970).

V. Texas Rule of Evidence 403

Although the State has more than adequately demonstrated that the evidence of the extraneous offenses or bad acts are relevant to the issue of motive, opportunity, intent, preparation, plan, knowledge, or absence of mistake or accident, the inquiry regarding its admissibility does not end there. This Court must also determine whether the probative value of the extraneous offenses or bad acts are not substantially outweighed by their prejudicial effect under Texas Rule of Evidence 403. See *Lane v. State*, 933 S.W.2d 504 at 520 (Tex. Crim. App. 1996). Since the enactment of Rule 403, there has existed a presumption that relevant evidence is more probative than prejudicial. *Montgomery*, 810 S.W.2d at 389. Thus, evidence should be

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[1] 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 that he acted 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 accident, provided, upon timely request by the accused, reasonable notice is given in advance of trial of intent to introduce in the State's case in chief such evidence other than that arising in the same transaction.

admitted unless the opponent of the evidence can successfully demonstrate that the danger of unfair prejudice substantially outweighs the probative value. *Sosa v. State*, 230 S.W.3d 192, 195 (Tex. App.– Houston [14th Dist.] 2005, pet. ref'd); *Crank v. State*, 761 S.W.2d 328, 342 (Tex. Crim. App. 1988). As with the relevance determination, a trial court's decision regarding Rule 403's balancing test is also reviewed under an abuse of discretion standard. *Mozon v. State*, 991 S.W.2d 841, 847 (Tex. Crim. App. 1999) (citing *Montgomery*, 810 S.W.2d at 389).

A. The Four Factors for Admissibility in a Rule 403 Analysis

In making a determination of probativeness, this Court must determine whether the admission of the extraneous offense properly assisted the jury in resolving the contested issue of identity. Thus, a Rule 403 balancing test includes the following factors: (1) how compellingly evidence of the extraneous offense(s) served to make a fact of consequence more or less probable; (2) the extraneous offense's potential to impress the jury in some irrational but indelible way; (3) the trial time that the proponent took to develop evidence of the extraneous misconduct; and (4) the proponent's need for the extraneous transaction evidence. *Lane*, 933 S.W.2d at 520. An analysis of each of the four factors in the instant case reveals that the court would be well within its discretion in holding that the extraneous offense was admissible pursuant to Rule 403.

1. The probative value of the evidence (Factor 1).

As to the first factor, the defendant's actions and state of mind before his various hospitalizations and leading up to the murders makes his sanity at the time of the offense far more probable. The defendant's frequent use of drugs and alcohol makes voluntary intoxication far more probable. His actions near in time to the date of the offense makes it more probable that he had some other motive or other factors were involved in committing the offense other than his claimed insanity. Relevant evidence is defined as "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." Tex. R. Evid. 401. In the instant case, the main questions in dispute are: Was the defendant sane at the time of the offense? Did he know his actions were wrong? What is the nature and severity of any mental illness? And was he voluntarily intoxicated at the time of the offense?

2. The potential for unfair prejudice (Factor 2).

As to the factor concerning the danger of unfair prejudice, it is true that a similar extraneous offense always carries the potential to impress the jury of a defendant's character conformity, an impression the law seeks to avoid. However, that impermissible inference of character conformity can be minimized by the trial court through the use of a proper limiting instruction. *Jabari v. State,* 273 S.W.3d 745 at 751 (Tex. App. – Houston [1st Dist.] 2008), citing *Lane*, 933 S.W.2d at 520.

In weighing this factor, the Court must further consider the "emotional weight" of the extraneous offense evidence and whether that evidence is "graphic." Here, the capital murder of Chris Kyle and Chad Littlefield was extremely brutal and the photographs of the crime scene and their bodies may be extremely graphic. Descriptions of how the defendant committed the crime will, undoubtedly, be disturbing. While, for example, the "knife incident" in which the defendant threatened his girlfriend and roommate and wouldn't let them leave their apartment may be unsettling, there are no photos of the offense, no one received any physical injuries, and that incident (arguably, the most serious of his extraneous offenses) pales in comparison to the murders of Kyle and Littlefield.

Moreover, the trial court can appropriately instruct the jury in an effort to minimize the prejudicial effect of the extraneous murder. The court's charge should, and will, undoubtedly, include a proper limiting instruction.

Finally, the question is not merely whether the extraneous offense prejudices the defendant, since all evidence, by its very nature, is designed to prejudice its opponent, but whether that prejudice distracts the jury from making a reasoned response to relevant evidence. In *Taylor v. State*, 920 S.W.2d 319, 323 (Tex. Crim. App. 1996), the Court of Criminal Appeals held that since the prior capital murder that the State introduced as an extraneous offense was no more heinous than the charged capital murder, its introduction was unlikely to have caused unfair prejudice. Moreover, both *Segundo v. State*, 270 S.W.3d 79, 88 (Tex. Crim. App. 2008) and *McGregor v. State,* 394 S.W.3d 90 (Tex. App.—Houston[1st Dist.] 2012, pet. ref'd) involved the proper introduction of extraneous capital murders in a capital murder prosecution. None of

the extraneous offenses or bad acts are not even remotely more heinous or shocking than the offense for which the defendant is on trial.

3. The time factor (Factor 3).

As to the third factor, it will admittedly take the State some amount of time to develop the extraneous offenses or bad acts, but it will not take nearly as long as the testimony to establish the defendant's guilt in the case on trial, or the forensic psychiatric testimony from both the defense and the State's rebuttal.

4. The State's need for the evidence (Factor 4).

As to the final factor, the State's need for the evidence of the extraneous offenses in this case is great. The question of the defendant's sanity is the very crux of the case. As previously argued, to put forth certain evidence without the context of the evidence would give the jury an incomplete and inaccurate picture of the defendant and his mental state.

B. Conclusion: The danger of unfair prejudice will not substantially outweigh the probative value of the evidence.

When one considers all of the factors together, all four factors weigh in favor of admissibility. As such, the court would well within the zone of reasonable disagreement in finding that the probative value of the extraneous offenses and bad acts are not substantially outweighed by their prejudicial effect. See *Hammer v. State*, 296 S.W.3d 555, 568 (Tex. Crim. App. 2009) ("[Rule 403] envisions exclusion of evidence only when there is a 'clear disparity between the degree of prejudice of the offered evidence and its probative value.").

VI.

In summary, the enumerated extraneous offenses or bad acts are relevant and admissible in this trial. They are necessary to give the jury a complete and accurate picture of the defendant, his mental state at the time of the offense, his mental health history, other motives or driving forces for the murders other than legal insanity, to show voluntary intoxication as a factor in the commission of the offense, and to show instances of malingering or manipulation of the legal system.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing brief has been delivered to counsel for the defendant, Warren St. John and Tim Moore, on this the 4th day of February, 2015.

FILED FOR RECORD
AT_____O'CLOCK___M
FEB 10 2015
Wanda Pringle
CLERK DISTRICT COURT ERATH COUNTY, TEX