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5 *Attorney for Defendant WILLES*

6 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

7 **IN AND FOR THE COUNTY OF MARICOPA**

8 STATE OF ARIZONA,

9 Plaintiff,

10 vs.

11 ARLENA WILLES,

12 Defendant.

No: CR2019-005397-001

**DEFENDANT'S RESPONSE TO
STATE'S NOTICE OF INTENT TO
USE DEFENDANT'S OTHER
CRIMES, WRONGS OR ACTS
PURSUANT TO RULE 404(b),
ARIZONA RULES OF EVIDENCE**

13 (Assigned to the Honorable Jeffrey
14 Fish)

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19 COMES NOW the Defendant, ARLENA WILLES, by and through counsel
20 undersigned, and pursuant to Arizona Rules of Evidence, Rules 401, 402, 403 and 404,
21 hereby moves this Honorable Court to deny the State's Motion.

22
23 This Motion is more fully supported by the Memorandum of Points and
24 Authorities incorporated herein, by any attached documentation, and by the evidence and
25 testimony to be introduced at the evidentiary hearing on this Motion.

26 **MEMORANDUM OF POINTS AND AUTHORITIES**

1 I. Statement of Facts/Procedural History:

2 The State has charged the Defendant with two counts of Child Abuse. Count 1
3 alleges that the listed victim “failed to thrive” under Defendant’s care and/or custody to
4 the point where he was placed in a situation where his person or health was endangered
5 under circumstances likely to produce death or serious physical injury. Count 2 alleges
6 that the Defendant obstructed the listed victim’s medical care while under Defendant’s
7 care and/or custody to the point where he was placed in a situation where his person or
8 health was endangered under circumstances likely to produce death or serious physical
9 injury.
10 injury.

11
12 The State seeks in its 404(b) Motion to introduce “other acts” evidence relating to
13 the Defendant to prove motive, intent to isolate the victim, and absence of mistake or
14 accident. Specifically, the State intends to introduce evidence that the defendant
15 completed isolated the victim, including that he was receiving no services at the time he
16 was hospitalized, from DDD or any other medical or other type of provider. Such
17 information would include:
18 information would include:

- 19 1. Alleged Victim had not seen a primary care provider in a few years and had
20 stopped all services in 2012; and,
- 21 2. Alleged Victim was home schooled and was barely literate; and,
- 22 3. Alleged Victim was isolated from all providers, school personnel, and anyone
23 else who could see his physical condition deteriorating.
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25 II. Law and Argument:
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1 Arizona Rules of Evidence, Rule 404(b), provides in pertinent part that:
2 "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a
3 person in order to show action in conformity therewith. It may, however, be admissible
4 for other purposes, such as proof of *motive*, opportunity, *intent*, preparation, plan,
5 knowledge, identity, or *absence of mistake or accident*." Ariz. R. Evid. § 404(b).
6

7 Before admitting prior bad act evidence, a trial court should determine that: (1)
8 the evidence is proffered to show something other than conduct in conformity with the
9 prior acts, pursuant to rule 404(b); (2) the evidence is legally and logically relevant
10 under rules 401 and 402; (3) the probative value of the evidence substantially outweighs
11 the risk of unfair prejudice under rule 403; and (4) defendant has not been denied an
12 appropriate limiting instruction under rule 105. *State v. Hyde*, 186 Ariz. 252, 276
13 (1996).
14

15 Evidence is relevant "if it has any tendency to make a fact more or less probable
16 than it would be without the evidence; and... the fact is of consequence in determining
17 the action." Ariz. R. Evid. 401. However, relevant evidence must nonetheless be
18 excluded if "its probative value is substantially outweighed by a danger of . . . unfair
19 prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or
20 needlessly presenting cumulative evidence." Ariz. R. Evid. 403.
21

22 Normally the probative force and prejudicial effect of evidence is viewed
23 favorably toward the proponent of the evidence. *State v. Castro*, 163 Ariz. 465, 473, 788
24 P.2d 1216, 1224 (App. 1989). When the evidence concerns prior bad acts, however, the
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1 rules have a different thrust, and the suppositional balance no longer tilts towards
2 admission. *State v. Salazar*, 181 Ariz. 87, 91, 887 P.2d 617, 621 (App.1994).

3 An appellate court will review a trial court's admission of evidence pursuant to
4 Rule 404(b) for an abuse of discretion. *State v. Lehr*, 227 Ariz. 140, 147, ¶ 19 (2011).

5 An abuse of discretion occurs when the court misapplies the law or makes an arbitrary
6 decision unsupported by the facts. *See State v. Linares*, 241 Ariz. 416, 418, ¶ 6 (App.
7 2017) (citing *Gorman v. City of Phx.*, 152 Ariz. 179, 182 (1987)).

8
9 In its Motion, the State seeks the admission of certain evidence to attack the
10 defendant's parenting skills/choices. The State wants to attack the Defendant for her
11 choice to home-school her disabled child. The State wants to attack the Defendant for
12 her choice to have one-on-one daily interaction with her son, instead of someone else.
13 The State wants to attack the Defendant for her choice to care for her child as she saw
14 fit. It is expected that the witnesses would testify that it was readily apparent that the
15 Defendant deeply cared for her son and was a stern advocate for him. Candidly, this is a
16 veiled attempt to circumvent the Rule 404(b) prohibition against introduction/use of
17 character evidence. The State essentially wants to admit other "bad act"/ parenting
18 choices to prejudice the Defendant's right to a fair trial by attacking the Defendant's
19 character/parenting skills.
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23 Further, even if this court determines that the sought evidence is offered for a
24 proper purpose under Rule 404(b) and is relevant and admissible under Rules 401 and
25 402, the sought evidence should nonetheless be precluded under Rule 403
26

1 considerations. Introduction of such prior bad acts/choices evidence would be highly
2 prejudicial. Clearly, the probative value of such prior bad acts evidence is substantially
3 outweighed by the potential for unfair prejudice in this case. As such, this court must
4 properly preclude the sought evidence under Ariz. R. Evid. § 403.

5
6 **III. Conclusion:**

7 As stated above, the State fails to demonstrate in its Motion that the sought prior
8 bad acts evidence is relevant under rules 401 and 402, its assertion that that proffered
9 evidence is sought for a proper purpose under 404(b) is disingenuous, and, its probative
10 value is substantially outweighed by the potential for unfair prejudice under Rule 403.
11 As such, Defendant requests this Honorable Court deny the State's motion and preclude
12 the sought prior bad acts evidence.
13

14 **RESPECTFULLY SUBMITTED** this 11th day of April, 2021.

15
16 **RICK G. TOSTO, P.C.**

17 /s/ Rick G. Tosto

18 Rick G. Tosto

19 P.O. Box 24397

20 Phoenix, Arizona 85074

21 **ORIGINAL** of the foregoing filed
22 with:

23 The Clerk of the Court

24 **COPY** of the foregoing sent
25 this 11th day of April, 2021 to:

26 **HONORABLE JEFFREY FISH**

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7
8 By /s/ Rick G. Tosto

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