STATE OF WISCONSIN, CIRCUIT COURT, KENOSHA COUNTY

State of Wisconsin, Plaintiff,

-vs-

Kyle H. Rittenhouse, Defendant.

MOTION TO ADMIT EVIDENCE

Case No. 2020CF983

The defendant, Kyle H. Rittenhouse, appearing specially by his attorney, Mark D. Richards, respectfully moves the court for entry of an order scheduling a hearing to determine whether the following evidence can be introduced at trial: specific act evidence establishing Joseph Rosenbaum was a convicted child sex-offender and unable to legally possess a firearm at the time he attempted to commit strong armed robbery against Kyle Rittenhouse on August 25, 2020. As grounds, Mr. Rittenhouse asserts that this evidence supporting his theory of defense that Rosenbaum was the initial aggressor in his confrontation with Rittenhouse that ultimately resulted in his death. This motion is made pursuant to Wis. Stat. §§ 904.02, 904.04(2)(a); FRE 402, 404, ***State v. Ingram***, 204 Wis. 2d 177, 554 N.W.2d 833 (Wis. Ct. App. 1996), ***State v. Kourtidias***, 206 Wis. 2d 574. 557 N.W.2d 858 (Ct. App. 1996), ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998), ***State v. Speer***, 176 Wis. 2d 1101, 501 N.W.2d 429 (1993), ***State v. Payno***, 2009 WI 86, ¶70, 320 Wis.2d 348, 768 N.W.2d 832; ***Chambers v. Mississippi***, 410 U.S. 284, 294 (1973); Wis. Const., Art. I § 7; U.S. Const. Amends. V, XIV; the attached Affidavit of Counsel, and the attached Memorandum of Law.

Electronically Signed on: 7/1/2021

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STATE OF WISCONSIN, CIRCUIT COURT, KENOSHA COUNTY	
State of Wisconsin, Plaintiff, -vs- Kyle H. Rittenhouse, Defendant.	**AFFIDAVIT IN SUPPORT OF MOTION TO ADMIT EVIDENCE** Case Nos. 2020CF983

STATE OF WISCONSIN)
)ss
RACINE COUNTY)

I, Mark D. Richards, being first duly sworn on oath, depose and state the following:

1. I am an attorney licensed to practice law in the state of Wisconsin. I have represented the defendant in the above captioned-case since before the November 2, 2020, Initial appearance.

2. I have reviewed all discovery provided by the state so far in this matter, including the August 26, 2020 police interview of Richie McGinnis.

3. In Count 1 of the criminal Information, Mr. Rittenhouse is charged with First Degree Reckless Homicide in violation of Wis. Stat. sec. 940.02(1) for the August 25, 2020, shooting of Joseph Rosenbaum.

4. Upon information and belief, I am aware that Joseph Rosenbaum was previously convicted in the state of Arizona for sexual conduct with a minor in Pima County case 20021139. On or about December 16, 2002, he was sentenced to 10 years, 0 months, 0 days prison and was paroled to the community on April 15, 2012. Rosenbaum's supervision was revoked and on June 10, 2013, he was sentenced to another 2 years and 6 months in prison before being paroled once again on August 29, 2014 in Pima County case 20021139001. Rosenbaum was charged once again in Pima County case 20143306001 for Interference with a Monitoring Device. On August 5, 2016, he was sentenced to 2 years and 6 months in prison and was released to the community on October 19, 2016. While these convictions may initially appear dated, they are less so when subtracting Rosenbaum's actual incarceration time.

5. It is the Defense's position that Rosenbaum sought to arm himself by stealing Mr. Rittenhouse's weapon because he could not legally purchase a firearm due to his status as a convicted sex-offender. This position is additionally supported by the information contained in McGinnis' police interview.

6. In his August 26, 2020 interview, McGinnis provided information regarding his personal,

first-hand observations of the actual shooting of Joseph Rosenbaum. McGinnis also described his observations of the events immediately prior to the shooting.

7. McGinnis stated that immediately before Rosenbaum was shot, he observed Rosenbaum running after Rittenhouse in a predatory manner. McGinnis described that in his "best estimation" he believed that "[Rosenbaum] and possibly other individuals decided that they were going to get [Rittenhouse's] gun from him." McGinnis provided that while watching the pursuit "it was pretty clear to me that [Rittenhouse] was trying to evade [Rosenbaum]." McGinnis stated that Rosenbaum proceeded to chase and corner Rittenhouse before he saw Rosenbaum lunge towards Rittenhouse and "certainly [try] to grab the barrel" of Rittenhouse's gun.

8. As to Count 1, Mr. Rittenhouse has entered a not guilty plea to the offense charged. His defense to this charge will rely on self-defense and his rights as the subject of an attempted strong-armed robbery.

9. The fact that Rosenbaum is a convicted child sex-offender is relevant to Mr. Rittenhouse's defense in this matter, as Rosenbaum could not lawfully possess the firearm he was attempting to steal from my client at the time of the conduct underlying Count 1.

10. This evidence, while prejudicial to Rosenbaum, is true and highly probative in establishing Rosenbaum's motive to steal Mr. Rittenhouse's firearm on August 25, 2020 and Rosenbaum's status as the initial aggressor in his confrontation with Mr. Rittenhouse.

Dated this 1st day of July, 2021.

Mark D. Richards, #1006324

NOTARY PUBLIC
NATALIE L. WISCO
STATE OF WISCONSIN

Subscribed and sworn to before me
This 1st day of July, 2021.

Natalie L. Wisco
Notary Public State of Wisconsin
My commission expires: perm.

STATE OF WISCONSIN, CIRCUIT COURT, KENOSHA COUNTY	
State of Wisconsin, Plaintiff -vs- Kyle H. Rittenhouse., Defendant	**MEMORANDUM IN SUPPORT OF MOTION TO ADMIT EVIDENCE** Case Nos. 2020CF983

I. GOVERNING LEGAL PRINCIPLES

An accused's Constitutional right to due process in criminal trials is "in essence, the right to a fair opportunity to defend against the State's accusations." ***Chambers v. Mississippi***, 410 U.S. 284, 294 (1973). The Sixth Amendment Compulsory Process Clause guarantees defendants not only the right to subpoena favorable witnesses, but also to present their testimony. ***Taylor v. Illinois***, 484 U.S. 400 (1987). The right to compulsory process is itself "designed to vindicate the principle that the 'ends of criminal justice would be defeated if judgments were to be founded on partial or speculative presentation of the facts.'" ***Id.*** at 411, quoting ***United States v. Nixon***, 418 U.S. 683, 709 (1974). In circumstances where constitutional rights "directly affecting the ascertainment of guilt are implicated," evidentiary rules "may not be applied mechanistically to defeat the ends of justice." ***Chambers***, 410 U.S. at 302.

Wis. Stat. sec. 904.02, modeled after Federal Rule of Evidence (FRE) 402, imparts that "all relevant evidence is admissible," except as otherwise provided by law. Wis. Stat. § 904.02. Wis. Stat. sec 904.04(2)(a), modeled after FRE 404(b), provides that while evidence of other crimes is generally "not admissible to prove the character of a person in order to show that the person acted in conformity therewith," other act evidence may be admissible when offered for alternative purposes such as "proof of motive, opportunity, intent, preparation, plan, knowledge,

identity, or absence of mistake or accident." Wis. Stat. § 904.04(2)(a). Other act evidence may also be introduced to furnish the context of the crime if necessary for the full presentation of a case. ***State v. Chambers***, 173 Wis. 2d 237, 496 N.W.2d 191 (Ct. App. 1992). When a defendant seeks to introduce evidence of another actor's conduct which is relevant to his defense, "his right to present a vigorous defense" requires the admission of the evidence at issue. ***United States v. McClure***, 546 F. 2d 670 (5th Cir. 1977) (Where the court of appeals held that a jury could not properly convict the defendant absent the opportunity to hear excluded evidence "bearing upon [the defendant's] theory of defense and weigh its credibility along with the other evidence in the case."); *see also* ***Davis v. Alaska,*** 415 U.S. 308 (1974), (Where the Supreme Court held that a defendant's right to present evidence supporting his theory of defense was "paramount" to state laws restricting cross-examination of juvenile offenders.); ***State v. Herndon,*** 145 Wis.2d 91, 426 N.W.2d 347 (Ct. App. 1988) (Where the court held that when evidence is introduced to prove a person's motive, it overcomes any presumption against introduction) *overruled on other grounds,* ***State v. Pulizzano,*** 155 Wis. 2d 633, 456 N.W.2d 325 (1990).

Under ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998), other act evidence is admissible: 1) if it is offered for a permissible purpose; 2) if it is relevant; and 3) if the probative value of the evidence is not substantially outweighed by the risk of unfair prejudice. ***Id.*** When determining relevance of other acts evidence a trial court is to consider: 1) whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action; and 2) whether the other acts evidence "has a tendency to make the consequential fact or proposition more or less probable than it would be without the evidence." ***Id.*** at 772. This is a "common sense determination based less on legal precedent than life experiences." ***State v. Payno***,

2009 WI 86, ¶70, 320 Wis.2d 348, 768 N.W.2d 832, (*citing* Daniel D. Blinka, Wisconsin Practice Series: Wisconsin Evidence § 404.6 at 181 (3d ed. 2011). "Although some…cases focus on the other incident's nearness in time, place, and circumstances to the…proposition sought to be proved, similarity and nearness are not talismans. Sometimes dissimilar events will be relevant to one another." *See* ***Payno***, ¶70 (*citing* Blinka, *supra*, § 404.6 at 181-82) (quotation marks and internal citations omitted).

There is no presumption of admissibility or exclusion for other crimes evidence. ***State v. Speer***, 176 Wis. 2d 1101, 501 N.W.2d 429 (1993). If relevancy for an admissible purpose is established, "the evidence *will* be admitted unless the opponent of the evidence can show that the probative value of the other crimes evidence is substantially outweighed by the danger of undue prejudice." ***Id.*** at 1114. (Emphasis added).

II. EVIDENCE OF ROSENBAUM STATUS AS A PROHIBITED PERSON IS ADMISSIBLE UNDER WIS. STAT. § 904.02.

This court should order that evidence of Rosenbaum's status as a prohibited person is admissible as evidence under ***State v. Ingram***, 204 Wis. 2d 177, 554 N.W.2d 833 (Wis. Ct. App. 1996) and ***State v. Kourtidias***, 206 Wis. 2d 574. 557 N.W.2d 858 (Ct. App. 1996). In ***State v. Ingram***, the trial court allowed the State to introduce evidence of the defendant's status as a parolee under the relevancy standard of Wis. Stat. § 904.02 to show that Ingram had a motive and intent to elude the police when tried for fleeing a traffic officer. 204 Wis. 2d at 182. In response to the defendant's objection that such evidence was "immaterial and prejudicial," the trial court reasoned that the evidence in question "would show the jury why Ingram wanted to flee." ***Id.*** It further explained that most jurors would ordinarily wonder why someone in Ingram's position would flee from an officer, and that the probative value of the evidence outweighed its prejudicial impact. ***Id.***

On review, the Court of Appeals affirmed admission of the evidence, holding that motive for Ingram's actions was relevant and "crucial" to the proponent's case. ***Id.*** at 183. In doing so it held that the probative value of evidence of potential motive "had greater than equal probative value" to any prejudice "inferentially suggested to the jury" against Ingram. ***Id.*** at 184.

Shortly after its ruling in ***State v. Ingram***, the court of appeals reaffirmed in ***State v. Kourtidas***, that when an individual's "status" is based upon a criminal conviction, evidence proving that status is admissible if the status itself demonstrates motive for, or otherwise explains, the conduct of the actor. 206 Wis. 2d 574, 557 N.W.2d 858 (Ct. App. 1996). The court further proscribed that an individual's actions taken in direct violation of said "status" may not be admitted to demonstrate an "irresistible impulse to commit that specific action;" but *should* be admitted when the status itself is used to prove motive for his or her conduct. ***Id.*** at 585. (Emphasis added). This holding, in addition to the court's decision in ***Ingram,*** requires admission of Rosenbaum's status as a convicted felon and prohibited person as evidence.

As articulated further below, Mr. Rittenhouse's theory of defense to Count 1 is based upon his statutory privilege to self-defense. To present this theory, he must be allowed to introduce evidence supporting his argument that Rosenbaum was the initial aggressor in their August 25, 2020, interaction which ultimately resulted in Rosenbaum's death. Similar to ***Ingram***, a jury considering this theory of defense would surely wonder *why* Rosenbaum would want to attack Mr. Rittenhouse when determining the credibility of such a claim. Mr. Rittenhouse contends that Rosenbaum initiated his attack against him to commit strong-armed robbery and take possession of his firearm, as Rosenbaum was unable to legally purchase or otherwise obtain a firearm on his own. This theory of defense is directly supported by Richie McGinnis' statements and his personal

observations of the actual shooting, as well as the preceding events. Additional existing evidence further supports this argument, including: video evidence depicting Rosenbaum attempting to conceal his identity by hiding his face prior to and during the interaction; video evidence showing Rittenhouse fleeing from Rosenbaum immediately prior to the shooting; testimonial evidence establishing that Rosenbaum made threats against Mr. Rittenhouse and Ryan Balch prior to the shooting; video evidence displaying Rosenbaum threatening additional armed individuals; and Rosenbaum repeatedly stating that he was not afraid to return to jail.

Accordingly, to show a jury *why* Rosenbaum would wish to attack Mr. Rittenhouse, he has the right to introduce evidence of Rosenbaum's status as a convicted felon, which prohibited Rosenbaum from legally purchasing or obtaining a firearm, short of committing robbery of Mr. Rittenhouse. As in ***Ingram***, this evidence of Rosenbaum's potential motive has greater than equal probative value to any prejudice inferentially suggested to the jury against the State as it tends to prove Rittenhouse's claim of self-defense and is not "being used to generally tarnish the [decedent's] character." ***Ingram***, 204 Wis. 2d at 189. Accordingly, this court should allow introduction of such evidence as it is critical to Mr. Rittenhouse's theory of defense and is admissible under sec. 904.02.

III. OTHER ACT EVIDENCE OF JOSEPH ROSENBAUM'S PRIOR CHILD SEX-OFFENSE CONVICTIONS IS ADMISSIBLE UNDER WIS. STAT. § 904.04(2)(b).

Here, the State has obtained statements from various citizen "witnesses" present in the city of Kenosha on August 25, 2020 who claim to have observed or negatively interacted with the Mr. Rittenhouse prior to the shootings at issue in this case. We anticipate that the State will use these statements to establish that Mr. Rittenhouse was present in the city of Kenosha that evening with

the intent to commit bodily harm against individuals engaged in rioting. Here, Rittenhouse seeks to introduce evidence of Rosenbaum's prior felony child sex-offense convictions as part of a specific chain of inferences establishing that it is equally—if not more probable—that Rosenbaum was the initial aggressor and enacted his attack against the defendant in order to steal, possess, and control Mr. Rittenhouse's firearm.

Specific act evidence used to prove that a decedent was the initial aggressor in his encounter with an accused is specifically relevant when the accused claims he acted in self-defense.[1] *See* ***Chandler v. State,*** 405 S.E.2d 669 (Ga. 1991) (A decedent's violent acts against a third-party unknown to the accused can be as relevant as his violent acts against a defendant in weighing the truth of a defendant's claim of justification.) The Federal Rules were designed to protect an accused from prejudice resulting from the prosecution's introduction of specific prior bad acts of an accused, not to prevent a defendant from presenting relevant evidence that may raise a reasonable doubt as to his guilt.

While such evidence *may* be prejudicial to the State, the risk of unfair prejudice is low for several reasons. First, the evidence at issue can easily be proven with a certified Judgment of Conviction. Second, Rosenbaum is not on trial in this matter and therefore has no liberty interest at stake. Third, typical concerns regarding the prejudicial impact of other act evidence are not applicable here. While courts often display reservation because of the impact other acts evidence may have on a witness's credibility, Rosenbaum will not be testifying in this matter and his credibility will not be an issue. Fourth, because Rosenbaum is unable to testify, there will be no

1 The Advisory Committee's Note to FRE 404 states: "The criminal rule [with respect to character evidence] is so deeply imbedded in our jurisprudence as to assume almost constitutional proportions and to override doubts of the basic relevancy of the evidence." Fed. R. Evid. 404, Advisory Committee's Note.

opportunity to cross-examine him and establish his actual intentions when he attacked Rittenhouse. Accordingly, greater latitude should be applied when considering the admissibility of evidence bearing upon Rosenbaum's intent. Fifth, the State wins when justice is done. A full presentation of all necessary and relevant facts would allow a jury to consider a complete picture before rendering its verdict. Finally, evidence of Rosenbaum's prior convictions is already part of the larger context and fullness of the situation at issue in this matter due to Rosenbaum's own statements and actions prior to the shootings. Consequently, to any extent the evidence at issue in this case inculpates Rosenbaum or imparts prejudice upon the state, it does so to the same extent that the evidence exculpates Rittenhouse, and therefore must be admitted. *See* ***Chambers v. Mississippi***, 410 U.S. at 297.

Here, the inferential chain behind Mr. Rittenhouse's theory of defense is dependent upon specific knowledge of Rosenbaum as a convicted child sex-offender and his inability to purchase or otherwise lawfully obtain a firearm without committing strong-armed robbery. As stated previously, this position is further supported by statements made by Richie McGinnis; video and photographic evidence exhibiting the fact that Rosenbaum attempted to conceal his identity by hiding his face prior to and during the interaction; video evidence showing Mr. Rittenhouse fleeing from Rosenbaum immediately prior to the shooting; evidence of Rosenbaum making threats against Mr. Rittenhouse and Ryan Balch prior to the shooting; video evidence displaying Rosenbaum threatening additional armed individuals; and Rosenbaum repeatedly stating that he was not afraid to return to jail for any of his actions that evening. Accordingly, as the other act evidence at issue is offered for a permissible purpose; is critical to Rittenhouse's theory of defense; and is relevant and not unfairly prejudicial, it should be admitted under ***Sullivan***. 216 Wis.2d 633.

IV. CONCLUSION

Based on the foregoing, Mr. Rittenhouse requests an evidentiary hearing be scheduled and an order be entered allowing introduction of evidence establishing Joseph Rosenbaum's status as a prohibited person and convicted child sex-offender.

Electronically Signed on: 7/1/2021

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