

STATE OF SOUTH DAKOTA )  
 ) ss.  
COUNTY OF CHARLES MIX )

IN CIRCUIT COURT  
FIRST JUDICIAL CIRCUIT

**STATE OF SOUTH DAKOTA,**

Plaintiff,

vs.

**STACY PHELPS,**

Defendant.

11 CRI. 16-102

**NOTICE OF INTENT TO INTRODUCE  
404(b) AND RES GESTAE EVIDENCE**

The State of South Dakota, through its attorneys, Marty J. Jackley, Attorney General, and Brent K. Kempema, Assistant Attorney General, hereby serves notice of its intent to introduce evidence in this matter pertaining to other acts of the defendant relevant to SDRC 19-19-404(b) and *res gestae* in respect to the crimes alleged in the above-captioned matter.

Specifically, the state seeks to introduce, in its case-in-chief, testimony and evidence regarding conduct relating to:

1. Misuse of non-profit AIII funds earmarked for enhancing education opportunities for Native American youth by Stacy Phelps on meals, consumer goods, electronics, car fuel, personal vehicle maintenance and other personal expenses itemized on the attached spreadsheets including, but not limited to:
  - a. Dakotah Steakhouse 11OCT13 \$190.25  
Dakotah Steakhouse 30OCT13 \$181.52  
Dakotah Steakhouse 4NOV13 \$203.99  
Dakotah Steakhouse 24JAN14 \$195.47  
Dakotah Steakhouse 17JUN14 \$188.62
  - b. El Gaucho ("swanky" Seattle steakhouse) 4NOV11 \$163.00
  - c. Famous Dave's 15OCT13 \$299.83  
Famous Dave's 29JAN14 \$218.76  
Famous Dave's 5JUN15 \$534.47  
Famous Dave's 13JUL15 \$645.13
  - d. Fogo De Chao (Brazilian steakhouse/New York) 15NOV13 \$263.41  
Fogo De Chao 10NOV14 \$187.07

- e. Foley's Fish Chop & Steak 21FEB14 \$91.89
- f. Fuji Japanese Steakhouse 4JUN12 \$132.90  
Fuji Japanese Steakhouse 4NOV13 \$121.46  
Fuji Japanese Steakhouse 10JUN14 \$165.77  
Fuji Japanese Steakhouse 23JUN14 \$194.32
- g. Minerva's 30NOV11 \$188.76  
Minerva's 31MAY12 \$207.51  
Minerva's 8OCT13 \$151.61  
Minerva's 10OCT13 \$148.87  
Minerva's 23DEC13 \$623.56  
Minerva's 23DEC13 \$133.98  
Minerva's 6AUG14 \$258.45  
Minerva's 20JUL15 \$160.83  
Minerva's 27OCT11-28SEP14 TOTAL = \$7,643.00
- h. Montana Rib & Chop House \$120.10
- i. Olive Garden 25OCT11 \$248.62  
Olive Garden 30SEP13 \$222.08  
Olive Garden 18DEC13 \$285.65  
Olive Garden 9MAY14 \$307.78
- j. Rodizio Grill (Brazilian steakhouse) 2DEC14 \$140.66  
Rodizio Grill 14JUL15 \$193.72
- k. Ruth's Cris Steakhouse 1NOV11 \$186.00  
Ruth's Cris Steakhouse 7NOV11 \$107.77  
Ruth's Cris Steakhouse 2OCT14 \$154.80
- l. Sky City Restaurant (Seattle Space Needle) 29SEP14 \$241.41
- m. Texas Roadhouse 1JUL14 \$110.71  
Texas Roadhouse 14JAN15 \$186.56  
Texas Roadhouse 2MAR15 \$136.23  
Texas Roadhouse 17JUN15 \$145.59  
Texas Roadhouse 1JUL15 \$113.32
- n. The Crown Room/The Downs of Albuquerque 26APR14 \$154.40
- o. Wyoming Rib & Chop House 21APR14 \$141.66  
Wyoming Rib & Chop House 11MAY14 \$140.45  
Wyoming Rib & Chop House 30MAY14 \$150.67  
Wyoming Rib & Chop House 30AUG14 \$234.21
- p. Apple Store 19AUG13 \$850.46
- q. Arizona Grand Resort 21APR14 \$647.81
- r. Bargain Barn Tire Pros 23FEB10 \$628.05  
Bargain Barn Tire Pros 8JUL10 \$436.72  
Bargain Barn Tire Pros 31MAR11 \$448.52  
Bargain Barn Tire Pros 18JAN14 \$206.70  
Bargain Barn Tire Pros 26AUG14 \$966.72  
Bargain Barn Tire Pros 2FEB15 \$213.06  
Bargain Barn Tire Pros 23APR15 \$1,122.29

- s. Best Buy 11JUN12 \$4,275.90  
Best Buy 15OCT12 \$1,003.76  
Best Buy 5DEC12 \$896.68  
Best Buy 3JUN13 \$1,500.00  
Best Buy 20JUN13 \$528.87  
Best Buy 10FEB14 \$741.99  
Best Buy 25FEB14 \$787.52  
Best Buy 21DEC14 \$1,695.98  
Best Buy 29FEB12-14SEP15 TOTAL = \$20,729.74
- t. Cabela's 20JUN13 \$381.56  
Cabela's 25JUN14 \$635.94
- u. Computer Village 20JUN12 \$1,042.88  
Computer Village 10SEP12 \$899.78  
Computer Village 1JUL13 \$4,714.78  
Computer Village 7APR14 \$3,608.08  
Computer Village 19DEC11-14SEP15 TOTAL = \$20,377.78
- v. Hilton Hotels 13FEB12 \$1,202.84  
Hilton Hotels 26JAN12 \$246.32
- w. Loaf & Jug (fuel) 25OCT11-29DEC14 TOTAL = \$44,913.49
- x. Mystic Lake Casino 20AUG13 \$171.00  
Mystic Lake Casino 18AUG14 \$368.73  
Mystic Lake Casino 18AUG14 \$368.73
- y. O'Reilly Auto 10JUL12 \$370.42
- z. Pilot (fuel) 28/NOV11-9DEC14 TOTAL = \$3,914.71
- aa. Sam's Club 24OCT11-18DEC14 TOTAL = \$61,242.32
- bb. Scheel's 30APR12-29MAY15 \$1,901.68
- cc. Shell Oil (fuel) 4NOV11-22OCT14 TOTAL = \$1,786.56
- dd. Sound Pro 8MAR14 \$781.21  
Sound Pro 17MAR14 \$561.79  
Sound Pro 3MAR15 \$217.30
- ee. Victorinox (Swiss Army knife store/Minneapolis) 20AUG13 \$251.01  
Victorinox 20AUG13 \$275.70  
Victorinox 14JUL15 \$674.72
- ff. WalMart 28NOV11-29DEC14 TOTAL = \$57,776.97

See Exhibits 1-4 attached.

2. On December 2, 2015, Phelps and Westerhuis engaged in an e-mail exchange in which they agreed they discussed running an AIII program through an affiliate so that AIII's board members would not question Phelps' and Westerhuis' activities:

**2015-02-12 20:25:24 phelpsstacy@gmail.com:** might be better if we run it thru mid central huh?

**2015-02-12 20:25:50 scottwesterhuis@gmail.com:** Or the new one?

**2015-02-12 20:26:00 phelpsstacy@gmail.com:** yeah. but I hear what carlos is saying

**2015-02-12 20:26:07 phelpsstacy@gmail.com:** he still think aiii is bare bones

**2015-02-12 20:26:11 phelpsstacy@gmail.com:** and I think that is good at this point

**2015-02-12 20:26:16 scottwesterhuis@gmail.com:** Ya

**2015-02-12 20:26:33 phelpsstacy@gmail.com:** because if he know we have 35 staff he will ask much more more questions.

**2015-02-12 20:26:41 scottwesterhuis@gmail.com:** Yes

See Exhibit 5 attached.

Per SDCL 19-19-404(b), evidence of a crime, wrong or other act is admissible for the purpose of proving “motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” In *State v. Wright*, 593 N.W.2d 792 (S.D. 1999), the court re-examined the principles attendant to other acts evidence and reminded trial courts and advocates that, though the prohibition against character evidence remains strong, SDCL 19-19-404(b) is an inclusionary rule rather than an exclusionary one. According to *Wright*, trials should not be decided “on unreal facts, tailored” to create a “sanitized” impression of the defendant. *Wright*, 1999 SD 50 at ¶ 16, 593 N.W.2d at 799.

The party offering the evidence has the burden to establish its relevance. As provided in SDCL 19-19-401, evidence is relevant if it has 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. If the only reason for offering the evidence is to show a defendant’s propensity to commit the crime in question, then it is irrelevant. *State v. Moeller*, 548 N.W.2d 465, 468 (1996). If the evidence is relevant, however, the balance tips emphatically in favor of admission unless the danger of

introducing the evidence substantially outweighs its probative value. SDCL 19-19-403; *Wright*, 1999 SD 50 at ¶ 16, 593 N.W.2d at 799.

Before a jury may consider whether other acts evidence is proof of an issue relevant to the present offense, the court need not conclude that the defendant committed the other acts by a preponderance of the evidence. *State v. McDonald*, 500 N.W.2d 243, 246 (S.D. 1993)(declining to impose a clear and convincing standard). The inquiry is simply whether there is sufficient evidence of the other act to permit a jury to find that it occurred. Once evidence is found relevant and offered for a non-character purpose, the party seeking its exclusion must establish that the danger of unfair prejudice substantially outweighs the probative value of the evidence. SDCL 19-19-403 favors admission absent strong considerations to the contrary.

Because juries should hear all relevant evidence, exclusion of other acts evidence is an “extraordinary remedy which should be used only sparingly.” *Wright*, 1999 SD 50 at ¶ 15, 593 N.W.2d at 799. “[T]o exclude relevant evidence because it might also raise a forbidden character inference ignores the reality that almost any bad act evidence simultaneously condemns by besmirching character and by showing one or more of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.” *United States v. Beasley*, 809 F.2d 1273, 1279 (7<sup>th</sup> Cir. 1987); *United States v. Bentacourt*, 734 F.2d 750, 757 (11<sup>th</sup> Cir. 1984)(noting that in criminal trials relevant evidence is generally inherently prejudicial). Thus, damage to the defendant’s position at trial is no basis for exclusion; the harm must come not from prejudice, but from *unfair* prejudice. *State v. Hulland*, 346 N.W.2d 302, 309 (S.D. 1984).

Unlike SDCL 19-19-609(a), there is no time requirement in relation to SDCL 19-19-404(b). “[W]hether prior acts are too remote must realistically depend on their nature.” *State v. Wedemann*, 339 N.W.2d 112, 115 (S.D. 1983). Each case is analyzed on its own facts. *Wedemann*, 339 N.W.2d at 115.

The facts here show that defendant Phelps was the CEO of AIII. AIII was organized as a 501(c)(3) non-profit corporation. Its declared mission was to enhance education opportunities for Native American youth. At all times in question, Phelps, as CEO, answered to a board of directors of between two and three persons. Scott Westerhuis served as AIII's CFO. Westerhuis used AIII as a vehicle to embezzle as much as one million dollars in funds from Mid-Central Educational Cooperative (MCEC) and/or AIII to fund his lifestyle. As administrative and legislative scrutiny of MCEC and AIII spending threatened to expose Westerhuis' embezzlement, Westerhuis killed himself and his entire family.

The backdated contracts in question aided Westerhuis' scheme by retroactively defining AIII as a "sub-contractor" performing work for MCEC on contract as opposed to a "sub-recipient" of federal grant funds passed through MCEC and administered by AIII. The significance of the distinction between being a "sub-contractor" as opposed to a "sub-recipient" is that a sub-recipient is subject to a federal audit pursuant to the Single Audit Act but a sub-contractor is not.

Here, the conduct and evidence summarized in Paragraphs 1-2 is *res gestae* of the charged offenses. Paragraph 1 and accompanying exhibits reflect that Phelps spent excessively on himself and his close family from AIII funds. Phelps spending at high-end restaurants and for personal expenses was not consistent with AIII's non-profit status or in furtherance of the company's "charitable, educational and scientific" mission. As reflected in Paragraph 2, Phelps wanted AIII board members to believe it was a "bare bones" organization. In reality, Westerhuis and Phelps used AIII to fund lifestyles beyond those permitted by their salaries or AIII's charitable mission.

The state expects Phelps to blame Westerhuis for preparing the backdated contracts. The state expects Phelps to say that he personally had no reason to backdate the contracts and that he signed them blindly simply trusting in Westerhuis. While Westerhuis' wholesale embezzlement from AIII and MCEC eclipses Phelps' abusive spending, the personal benefit Phelps

realized from his unchecked spending supplied a similar motive for avoiding a federal audit of AIII's finances. For both Westerhuis and Phelps, an audit would have put a stop to the misappropriation of funds and unchecked spending and brought their financial schemes to light. As reflected in Paragraph 2, Phelps and Westerhuis wanted to keep the board in the dark about AIII's operations, create the impression of a "bare bones" operation befitting a non-profit, and keep board members from asking "questions." The state's proffered 404(b) evidence, thus, explains Phelps' motive, intent and plan behind amending the contracts to retroactively designate AIII as a sub-contractor and the absence of mistake in his signing the backdated contracts.

Dated this 27<sup>th</sup> day of June 2016.

**MARTY J. JACKLEY  
ATTORNEY GENERAL**



Brent K. Kempema  
Paul S. Swedlund  
ASSISTANT ATTORNEYS GENERAL  
1302 East Highway 14, Suite 1  
Pierre, South Dakota 57501-8501  
Telephone: 605-773-3215  
[paul.swedlund@state.sd.us](mailto:paul.swedlund@state.sd.us)

### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 27<sup>th</sup> day of June 2016 a true and correct copy of the state's notice of intent to introduce 404(b) and *res gestae* evidence was served by e-mail on Dana Hanna and Mike Butler at [dhanna@midconetwork.com](mailto:dhanna@midconetwork.com) and [mike.butlerlaw@midconetwork.com](mailto:mike.butlerlaw@midconetwork.com).



Paul S. Swedlund  
ASSISTANT ATTORNEY GENERAL