STATE OF WISCONSIN **CIRCUIT COURT BRANCH 13** **DANE COUNTY**

STATE OF WISCONSIN,

Plaintiff,

vs.

MARK WAGNER,

Defendant.

Court Case No.: 2022CF002481

For Official Use

THE STATE OF WISCONSIN'S RESPONSE MEMORANDUM OF LAW TO THE DEFENDANT'S MOTION TO INTRODUCE *MCMORRIS* EVIDENCE

INTRODUCTION

Defendant Mark Wagner has filed a motion—Doc. 70—seeking to introduce so-called *McMorris* evidence—*McMorris v. State*, 58 Wis.2d 144, 205 N.W.2d 559 (1973)—regarding the victim in this matter. It is unclear to the State what precisely Wagner is alleging to be potentially admissible *McMorris* evidence and the State opposes the admission of such evidence until it is clarified what Wagner wishes to introduce about the victim, for what purpose Wagner wishes to introduce the evidence, and how Wagner intends to introduce the evidence. Following the resolution of those issues, the State also believes it will be necessary to resolve issues of what corroborating evidence may be allowed subject to Wis. Stat. § 904.03 and 906.11.

ARGUMENT

1. The general admissibility of *McMorris* evidence.

Wisconsin courts allow, in limited circumstances, a defendant who has sufficiently placed self-defense in issue to present evidence of the prior violent acts of the victim to a jury in support of that self-defense claim. *See State v. Head*, 2002 WI 99, ¶126-27, 255 Wis.2d 194, 648 N.W.2d 413 (citations omitted). A defendant is only allowed to present evidence of

prior violent acts of the victim that were known to the defendant at the time of the incident. *See State v. Daniels*, 160 Wis.2d 85, 94, 465 N.W.2d 633 (1991). Trial courts have discretionary authority to decide what evidence of prior violent acts to admit, if any, and such evidence is not admissible to prove that a victim acted in conformity with his character or that the victim was the aggressor in any altercation. *See Werner v. State*, 66 Wis.2d 736, 743-45, 226 N.W.2d 402 (1975). *McMorris* evidence may not be admitted if a sufficient factual basis for self-defense is not established. *See Head*, 2002 WI 99, ¶ 122. Even if a trial court concludes that *McMorris* evidence is not being offered as propensity evidence, it should still engage in the balancing test articulated in Wis. Stat. § 904.03 of the Wisconsin Statues and determine whether or not the probative value of any such evidence is substantially outweighed by the factors enumerated therein: the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, and needless presentation of cumulative evidence. *See Head*, 2002 WI ¶ 129.

2. *McMorris* evidence's limited purpose.

McMorris evidence is only admissible when it bears on the reasonableness of a defendant's apprehension of danger at the time of the incident. *See McMorris*, 58 Wis.2d at 149. Wisconsin law establishes a low bar for a defendant who seeks a jury instruction on the privilege of self-defense. *See State v. Stietz*, 2017 WI 58, ¶ 375 Wis.2d 572, 895 N.W.2d 796. Even evidence which is weak, insufficient, inconsistent, or of doubtful credibility may satisfy the burden of production to entitle a defendant to receive a self-defense instruction. *See id.*, ¶¶ 17-19. But, that low bar does not mean there is no bar.

The Supreme Court of Wisconsin has held:

> To raise the issue of perfect self-defense, a defendant must meet a reasonable objective threshold. The trial evidence must show: (1) a reasonable belief in the existence of an unlawful interference; and (2) a reasonable belief that the amount of force the person intentionally used was necessary to prevent or terminate the interference.

Head, 2002 WI 99, ¶ 84; *see also* Wis. Stat. § 939.48(1).
In other words, clearly-established Wisconsin law requires there to be evidence or what a defendant actually believed for purposes of self-defense. The same actual belief requirement is also part of a defense based on the privilege of defense of others:

> Thus, the privilege of defense of others, like the privilege of self-defense has two components, both of which must be satisfied by a defendant claiming the privilege: (1) subjective – the defendant must have actually believed he or she was acting to prevent or terminate an unlawful interference….

State. v. Giminski, 2001 WI App 211, ¶ 13, 247 Wis.2d 750, 634 N.W.2d 604.

For either defense, evidence of a defendant's actual beliefs needs to come from the defendant. This could happen because a defendant testifies or—potentially—if the State introduces evidence of the defendant's actual beliefs as statements of a party opponent pursuant to Wis. Stat. § 908.01(4)(b)1. Unless or until that happens, however, there is no evidence of what a defendant actually thought when he threatened or intentionally used force against someone else. Without the admission of evidence of his actual beliefs, a defendant cannot meet his burden of production on self-defense or defense of others and, prior to that the admission of that belief evidence, any *McMorris* evidence would simply be irrelevant and inadmissible propensity evidence.

3. *McMorris* evidence in this case.

The State concedes that Wagner—if he testifies and subject to Wis. Stat. §§ 904.03 and 906.11—may testify about prior violent acts of the victim of which Wagner was aware and that caused Wagner to intentionally use force likely to cause death or great bodily harm because he reasonably believed that such force was necessary to prevent death or great bodily harm to himself or to a third person. *See* Wis. Stat. §§ 939.48(1) and (4). The State also concedes that Wagner can submit some corroborating evidence—subject to the Court's discretion—of the

prior violent acts about which Wagner testifies. *See McAllister v. State*, 74 Wis.2d 246, 250-51, 246 N.W.2d 511 (1976).

This still leaves several issues in dispute. First, the State believes that no *McMorris* evidence should be commented on or admitted into evidence until or unless Wagner testifies—or the State introduces into evidence—evidence that Wagner intentionally used deadly force in self-defense or defense of others based in part on Wagner's knowledge of the victim's prior violent acts. The sole relevance of the *McMorris* evidence is based on Wagner's knowledge of it and his reliance on that knowledge in using deadly force.

Second, Wagner's motion leaves unclear what *McMorris* evidence he wishes to offer. Wagner identifies several incidents in his motion—*see* Doc. 70, pp. 2-4—but it is not clear if Wagner is claiming these incidents were made known to him at the February 3, 2022, briefing. *See* Doc. 70, p. 5. Wagner also discusses the victim's criminal history going back to 2002. *See* Doc. 70, p. 2. Under Wis. Stat. § 904.03, the State believes that at some point the probative value of the victim's behavior is substantially outweighed by the danger of unfair prejudice. Wagner's lack of specificity in terms of what he wants to offer and how he knew about the information prior to the shooting make it difficult for the State to respond more fully.

Some of the incidents mentioned by Wagner also do not appear to bear on any potential threat of the victim to Wagner, such as Wagner's claim that the victim was involved in the death of an 11-year-old; there is no evidence that the State is aware of that the victim shot at that child although the State concedes that one potential motive for the shooting—committed by other people who are now serving prison sentences—was to target the victim and associates in connection with other illegal activity. Likewise, a suspicion that the victim supplied drugs to an overdose victim do not appear relevant to any apprehension of danger by Wagner.

Third, the lack of clarity in Wagner's motion also render it difficult at this point to decipher what potential corroborating evidence Wagner might attempt to offer under *McAllister*. Again, the State does not dispute—in general—Wagner's right to offer some corroborating evidence of specific violent acts of which Wagner had knowledge, but that right is not unlimited and still subject to Wis. Stat. §§ 904.03 and 906.11.

Related to this point, the State also opposes what it understands to be Wagner's desire to introduce evidence that "many law enforcement officers can and will corroborate that the way Wagner acted was reasonable." Doc. 70, p. 12. This is not *McMorris* evidence and indeed is inadmissible inasmuch as this is an issue for the jury. Furthermore, no one except Wagner can testify as to what Wagner was thinking. Also to this end, the State opposes the attempt to introduce other specific acts of the victim unknown to Wagner under Wis. Stat. § 904.05(2). The State believes such unknown specific acts evidence is barred by *State v. Jackson*, 2014 WI 4, ¶ 84, 352 Wis.2d 249, 841 N.W.2d 791.

CONCLUSION

As outlined above, the State in in agreement with Wagner on many of the legal underpinnings of *McMorris* evidence. At the same time, Wagner's motion does not address certain key aspects of the admission of *McMorris* evidence in this case and the State opposes the motion pending further clarification.

Date Signed: 01/17/24

Electronically Signed By:

Matthew Moeser

Assistant District Attorney

State Bar #: 1034198