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TO: Andrew Solmark, Assistant District Attorney

FROM: Applicant

DATE: July 30, 2019

RE: State v. Martin

### MEMORANDUM

You have asked to draft an objective memorandum describing whether we can use any of the incidents as substantive evidence and whether we can use any of the incidents to impeach Ms. Martin.

We have charged Ms. Bernice Martin with two counts of identity theft for using the name and Social Security Number (SSN) of Bernecia Martinez. Ms. Martin acquired Ms. Martinez' information through her former employment at FastCom, a cell phone company. Ms. Martin attempted to open a bank account at several stores, and was successful in one case. Ms. Martinez eventually discovered the use of her name and SSN when Mr. Franks, the accounts manager at Chiclet's Clothing women's store contacted her about an effort to open another card in her name. Ms. Martinez instructed Mr. Franks to put a fraud alert on her cards.

#### **1) Whether any of the incidents can be admitted as Substantive Evidence**

Columbia Rule of Evidence (CRE) 404(b)(1) prohibits the admission of prior bad acts to establish an individual's character or propensity to commit a crime. CRE 404(b)(2) does permit the admission of bad acts "for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Additionally, under CRE 404(b)(2) courts consider whether evidence has relevance for some purpose other than to prove propensity with certain factors, including but not limited to (1) the degree of similarity to the charged crime, and (2) the temporal relationship of the other acts.

In *State v. Landreau*, Supreme Court of Columbia (2011), the Court held that admission of a mortgage application is relevant to show intent or abuse of mistake because the evidence rebuts an innocent involvement defense. *Id.* The court also held that admission of a violent assault has no impact on the verdict and admitting the evidence constitutes a harmless error. *Id.* In *Landreau*, the defendant was convicted of passing a series of bad checks in amounts that totaled over \$10,000. *Id.* The defense argued that she lacked the requisite intent to defraud or deceive.

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In *State v. Rodgers*, the court affirmed admitting evidence of prior acts of importing drugs to rebut the defendant's claim that he was an innocent participant in the charged importation.

In *State v. Vargas*, the court held that admitting prior fraudulent transactions to rebut a claim that the defendant had been duped into joining the charged transactions is not an abuse of discretion.

a) Broken Tail Light - Different Name and License

Here, when Ms. Martin was pulled over for a broken tail light she gave the officer her sister's name and driver's license. This evidence would be admissible to prove identity, intent, knowledge, and even plan under CRE 404(b)(2). Ms. Martin would argue that this traffic stop was a mistake and should not be admitted. She could also argue that this was a mistake and that she grabbed the wrong driver's license on the way out the door (assuming that they live together). However, this evidence is most likely to be admissible under CRE 404(b)(2) and we could use it substantive evidence.

b) Intoxication

In *Landreau*, the court reasoned that acts of violence or intoxication are insufficient to satisfy the similarity to the crime of passing bad checks to allow for any inference of knowledge or intent.

Here, approximately two months ago, Ms. Martin was stopped by an officer due to her visible intoxication, inability to stand, and strong odor of alcohol on her breath. She began shouting at the officer but was merely given a warning. She then walked away and proceeded to get into a taxi cab. This evidence would not likely be admissible as substantive evidence. It would be difficult for us to show that Ms. Martin's one instance of intoxication outside of Blue Moon bar constitutes as a prior bad act to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident under CRE 404(b)(2). The defense would argue that this evidence, in addition to a failure to prove any of the exceptions under CRE 404(b)(2), that the evidence has no relevance other than to proof propensity. In applying the factors that courts examine, there are no similarities in degree to the charged crime of identity theft and intoxication.

Therefore, we would not likely be able to admit this evidence as substantive evidence.

c) Phone Threats

Here, the court would reason similarly to the point above, that acts of violence or intoxication

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are insufficient to satisfy the similarity to the crime of passing bad checks to allow for any inference of knowledge or intent. We would argue that the phone threats that Ms. Martin made to Ms. Martinez would likely be admissible under two factors mentioned in *Landreau*. This act is similar to the broken tail light incident and has a temporal relationship to the identity theft charge at hand. Ms. Martin would likely argue that this phone call does not relate to any truthfulness issue, and relates more to violence. Ms. Martin would further argue that we would be attempting to prove that she was a violent person. The court would likely admit the part of the phone threat that pertains to Ms. Martin asking Ms. Martinez to testify that she gave "Bernice" permission to open those accounts but suppress the threats that Ms. Martin made.

**2) whether any of the incidents can be used to impeach Ms. Martin (Defendant) if she takes the stand.**

CRE 608(b) states that a witness can be asked about specific instances of conduct that are probative to the witnesses's character for truthfulness or untruthfulness. In *State v. Proctor*, Supreme Court of Columbia (2008), the court held that shoplifting was a specific instance of conduct that is probative of truthfulness under CRE 608(b). In *Proctor*, the defendant was charged with aggravated battery of a 13-year old child. *Id.* The Supreme Court ruled that the trial court incorrectly interpreted CRE 608(b) and abused its discretion in finding the defense counsel's question "*Well, last July, you and Josh stole \$100 from your mother's store in Danville, didn't you?*" improper.

The court in *Proctor* provided reasoned most with the middle approach for truthfulness or dishonesty. This is the standard that we should apply in our case. *Id.* The middle approach incorporates the narrow approach and allow counsel to question about conduct indicating a willingness to gain personal advantage through dishonest means, including taking from others in violation of their rights or by encouraging dishonest behavior in others. *Id.* The narrow approach requires that acts have an affirmative element of false statement or deception, limiting the inquiry to acts including perjury, false statements, criminal fraud, embezzlement, or false pretenses. *Id.*

**a) Broken Tail Light - Different Name and License**

Here, in applying the middle approach, evidence of Ms. Martin being pulled over for a broken tail light and giving a Ms. Martin's sister's name and driver's license would be admissible to impeach Ms. Martin under 608(b) if she were to take the stand and testify. Ms. Martin would argue that this traffic stop was a mistake. If there is evidence to show that Ms. Martin and her sister lived together, that she accidentally took her sister's driver's license and felt it was best to

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give her sister's name, then the court may deny the evidence, however it is more likely that the court would admit this evidence under the middle approach in *Proctor*.

b) Intoxication

Here, in applying the middle approach, the result would be similar to above with substantive evidence. The incident that occurred here do not fall into any category or reasoning under *Proctor's* middle approach. Ms. Martin would argue that being drunk does not ask an individual a liar and the court would likely agree with the her and not admit this incident.

c) Phone Threats

Here, in applying the middle approach utilized in *Proctor*, Ms. Martin's phone threat to Ms. Martinez would be admissible for impeachment purposes. Ms. Martin called Ms. Martinez and said that if she testified at trial, she would regret it, and if Ms. Martinez were to testify, that it would be better if Ms. Martinez would testify that she gave Ms. Martin permission to open said account. Ms. Martin would argue that this evidence should not be admitted because it is not about truthfulness, but the court would likely admit this evidence.

Sincerely,

Applicant

Question #6 Final Word Count = 1414

**END OF EXAM**