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COUNSEL FOR STATE

MONTANA FIFTH JUDICIAL DISTRICT COURT
MADISON COUNTY

STATE OF MONTANA, Plaintiff, v. JESSE MICHAEL BOYD, BETHANY GRACE BOYD, CARTER NORMAN PHILLIPS, ERIC ANTHONY TRENT, Defendant(s).	Cause No(s). DC-29-2022-23 DC-29-2022-24 DC-29-2022-22 DC-29-2022-26 **STATE'S FIRST MOTION IN LIMINE AND BRIEF IN SUPPORT**

COMES NOW the State of Montana, by and through Assistant Attorney General Thorin A. Geist and Madison County Attorney David Buchler, and hereby move the District Court for an *Order in Limine*:

1. Prohibiting the Defendants from asserting the affirmative defense of Justifiable Use of Force at trial.

2. Prohibiting the Defendants from arguing the affirmative defense of Justifiable Use of Force unless they testify at trial and admit that

they purposely or knowingly committed the charged offenses.

3. Prohibiting the Defendants from relying on the character of the victim to support a Justifiable Use of Force Defense.

4. Prohibiting the Defendants from seeking a lesser included offense instruction if they assert an affirmative defense of Justifiable Use of Force.

5. Prohibiting the Defendants from selectively asserting Fifth Amendment protection if he testifies at trial.

6. Prohibiting the Defendants from seeking jury nullification.

The undersigned has attempted to contact counsel for the Defendants and presumes that this *First Motion in Limine* is **opposed.**

I. Factual and Procedural background.

a. ***State of Montana v. Jesse Michael Boyd*** **(DC-29-2022-23).**
State of Montana v. Bethany Grace Boyd **(DC-29-2022-24).**
State of Montana v. Carter Norman Phillips **(DC-29-2022-22).**

1. On November 28, 2022, the State of Montana filed a *Motion for Leave to File Information and Affidavit in Support* (hereinafter "*MFL*") seeking to charge the Defendants, Jesse Michael Boyd, Bethany Grace Boyd, and Carter Norman Phillips with Assault with a Weapon, a felony in violation of §§ 45-5-213(1)(a) and (2)(a), MCA. *MFL* at pp. 1-4 (Ct. Doc. #1). The facts which form the basis for the charges are set forth in the *MFL* and are incorporated herein by reference.

2. On November 28, 2022, the District Court reviewed the *MFL* and determined that there was sufficient probable cause to support the charges against each of the Defendants. *Or.* at p. 1 (Ct. Doc. #2). The State's *Information* was filed the same day. *Info.* at pp. 1-2 (Ct. Doc. #3).

3. On January 3, 2023, the State filed an *Unopposed Motion for Joinder* (Ct. Doc. #12) consolidating each of the Defendants cases. The District Court granted the *Motion for Joinder* on January 4, 2023. *Or.* at pp. 1-5 (Ct. Doc. #13).

b. *State of Montana v. Eric Anthony Trent* (DC-29-2022-26).

1. On January 3, 2023, the State filed an *MFL* seeking to charge the Defendant Eric Anthony Trent with Accountability for Assault with a Weapon, a felony in violation of §§ 45-5-213(1)(a) and (2)(a), 45-2-301 and 302. *MFL* at pp. 1-4 (Ct. Doc. #1). The facts which form the basis for the charges are set forth in the MFL and are incorporated herein by reference.

2. On January 3, 2023, the District Court reviewed the *MFL* and determined that there was sufficient probable cause to support the charges. *Order* at p. 1 (Ct. Doc. #2). The State's *Information* was filed the same day. *Info.* at pp. 1-2 (Ct. Doc. #3).

3. On January 3, 2023, the State filed an *Unopposed Motion for Joinder* (Ct. Doc. #7) consolidating each of the Defendants cases. The District Court granted the *Motion for Joinder* on January 4, 2023. *Or.* at pp. 1-5 (Ct. Doc. #9).

II. Discussion.

a. Legal Standard – Motions in Limine.

A motion in limine is made for the purpose of preventing the introduction of evidence, which is irrelevant, immaterial, or unfairly prejudicial. *City of Helena v. Lewis*, 260 Mont. 421, 425-26, 860 P.2d 698, 700 (1993). "Accordingly, the authority to grant or deny a motion in limine rests in the inherent power of the court to admit or exclude evidence and to take such precautions as are necessary to afford a fair trial for all parties." *Id.*

A district court has broad discretion to determine whether evidence is relevant and admissible. *State v. Frey*, 2018 MT 238, ¶ 12, 393 Mont. 59, 427 P.3d 86. Evidentiary rulings are reviewed for an abuse of discretion. *Id.* "A district court abuses its discretion 'if it acts arbitrarily without the employment of conscientious judgement or [if it] exceeds the bounds of reason, resulting in substantial injustice.'" *Id* (internal citation omitted). Under this standard, there may be more than one correct answer to an evidentiary issue. *Id.* The district court is bound by the rules of evidence or applicable statutes in exercising its discretion. *State v. Daniels*, 2011 MT 278, ¶ 11, 362 Mont. 426,

265 P.3d 623.

b. The District Court should prohibit the Defendants from asserting the affirmative defense of Justifiable Use of Force at trial.

In Montana, Justifiable Use of Force (hereinafter "JUOF") is an affirmative defense. § 45-3-115, MCA. The JUOF defense provides:

> A person is justified in the use of force or threat to use force against another when and to the extent that the person reasonably believes that the conduct is necessary for self-defense or the defense of another against the other person's imminent use of unlawful force. However, the person is justified in the use of force likely to cause death or serious bodily harm only if the person reasonably believes that the force is necessary to prevent imminent death or serious bodily harm to the person or another or to prevent the commission of a forcible felony.

§ 45-3-102, MCA.

The Montana Supreme Court has repeatedly held that the affirmative defense of JUOF only "allows a person to use force to defend himself or herself in a degree commensurate with the threat of harm the person faces." *State v. Lackman*, 2017 MT 127, ¶ 15, 387 Mont. 459, 395 P.3d 477 (citing *State v. Archambault*, 2007 MT 26, ¶ 15, 336, Mont. 6, 152 P.3d 698; *State v. Stone*, 266 Mont. 345, 347, 880 P.2d 1296, 1298 (1994); *State v. Miller*, 1998 MT 177, ¶ 28, 290 Mont. 97, 966 P.2d 721).

Summarizing the defendant's argument in *Lackman*, the Montana Supreme Court noted:

[The defendant] points out that § 45-3-102, MCA—upon which the

> instruction is based—justifies the use of lethal force "where a defendant reasonably believes that the force is necessary *either* to prevent death or serious bodily harm *or* to prevent a forcible felony." [The defendant] also observed that § 45-3-101(2), MCA, in turn, defines a "forcible felony" as "any felony which involves the use or threat of physical force or violence against any individual." [The defendant] asserts that both aggravated assault (§ 45-5-202(1), MCA) and assault with a weapon (§ 45-5-213(1), MCA) are forcible felonies that can be accomplished by creating a "reasonable apprehension of serious bodily injury."
>
> [The defendant] thus argues that under the forcible felony provision of § 45-3-102, MCA, "a person can be legally justified in the use of lethal force to prevent an attacker from creating reasonable apprehension of serious bodily injury . . . even if actual serious bodily injury is not imminent." Because [the defendant's] use of force was the main question at trial, and under his reading the forcible felony standard "is a more expansive standard for justified use of lethal force than requiring imminent serious bodily injury," [the defendant] argues that the District Court "misstated the law and lessened the State's burden to prove that [his] force was not justified."

Lackman at ¶¶ 12-13 (emphasis in the original).

Rejecting the argument that JUOF can be established by demonstrating reasonable apprehension of serious bodily injury, the Montana Supreme Court held:

> [The defendant's] argument that § 45-3-102, MCA, authorizes the use of lethal force "to prevent the commission of a forcible felony" is correct as far as it goes. Predicate, however, is the first sentence of § 45-3-102, MCA, which authorizes "the use of force" only "when and to the extent that the person reasonably believes that the conduct is necessary for self-defense . . . against the other person's *imminent use of unlawful force*." Section § 45-3-102, MCA (emphasis added); see and *State v. Dahms*, 252 Mont. 1, 13-14, 825 P.2d 1214, 1222 (1992) (noting that "the term 'imminent' does not refer to any element of felony assault but applies to

> the justifiable use of force"). We have held that § 45-3-102, MCA, "allows a person to use force to defend himself or herself in a degree commensurate with the threat of harm the person faces." Under the statute's plain language, [the defendant] was justified in using force against [the victim]—including lethal force—only if [the defendant] reasonably believed that [the victim's] use of unlawful force against him was imminent, and if the force he used in response was commensurate to [the victim's] threat of force.

Lackman at ¶ 15.

It is anticipated that the Defendants will assert a JUOF defense at trial. The facts that are pertinent to each Defendant are addressed in turn.

1. Defendant Jesse Michael Boyd.

The Defendants waived their right to remain silent and provided statements to law enforcement. Jesse Michael Boyd initially told law enforcement that he drew his firearm because Bradley Terrell got out of his vehicle and rushed towards him. *Body Camera Footage* at 15:15 - 33:15, attached hereto as **Exhibit 1**. Mr. Boyd explained that he thought that Terrell was going to tackle him, and that he stated that he was in fear for his life and the safety of his family. *Id.* Mr. Boyd stated that Terrell was cussing, but that he did **not** know if Terrell was armed. *Id.* Mr. Boyd then handed the firearm to Eric Anthony Trent. *Id.* Br. Boyd explained that Terrell chest bumped him, which resulted in an altercation that took them both to the ground. *Id.* When they regained their footing, Mr. Boyd asked Carter Norman Phillips for a firearm, which he **again** pointed at Terrell. *Id*; *Body Camera Footage* at 16:35

- 40:40, attached hereto as **Exhibit 2**.

Montana law provides that "[i]f a person reasonably believes that the person or another person is threatened with bodily harm[1], the person may warn or threaten the use of force, including deadly force, against the aggressor, including drawing or presenting a weapon." § 45-3-111(2), MCA. The State assumes that Mr. Boyd's rendition of the facts are true for purposes of this analysis. In such a situation, Mr. Boyd would have been within his rights to warn or threaten the use of force, and/or to draw or present his firearm if he was confronted with a threat of bodily injury. However, Mr. Boyd's actions went farther than drawing or presenting a firearm.

Here, Mr. Boyd pointed the firearm directly at Terrell, at both the start and **again** at the conclusion of the engagement. As a matter of law Mr. Boyd could not point the firearm at Terrell unless he was confronted with an imminent threat of serious bodily harm[2] **and** if the force used was commensurate to Terrell's threat of force. Mr. Boyd admitted that he did not know if Terrell was armed when he pointed the firearm at Terrell either time. Under Mr. Boyd's own explanation of the facts his actions were not

[1] The term "bodily injury" means physical pain, illness, or an impairment of physical condition and includes mental illness or impairment. § 45-2-101(5), MCA.

[2] The term "serious bodily injury" means bodily injury that: (1) creates a substantial risk of death; (2) causes serious permanent disfigurement or protracted loss or impairment of the function or process of a bodily member or organ; or (3) at the time of injury, can reasonably be expected to result in serious permanent disfigurement or protracted loss or impairment of the function or process of a bodily member or organ. § 45-2-101(66)(a), MCA.

commensurate with the threat that Terrell allegedly presented. More importantly, the threat of harm was not imminent, and he is not entitled to a JUOF defense.

2. Defendants Bethany Grace Boyd, Carter Norman Phillips, and Eric Anthony Trent.

After Jesse Boyd recognized that Terrell was unarmed, he handed off his firearm to Eric Anthony Trent, and an altercation ensued. *Body Camera Footage* at 16:35 - 40:40, attached hereto as **Exhibit 2**. While Terryl and Jesse Boyd were on the ground, Bethany Grace Boyd and Mr. Phillips, began hitting Terryl with a flagpole and cross and Mr. Trent aided and abetted Bethany Boyd and Mr. Phillips during their attack. *Id.* Again, for the sake of argument the State assumes that the Defendants rendition of the facts are accurate. In such a situation, Bethany Boyd and Mr. Phillips would have been within their rights to warn or threaten the use of force, and/or to draw or present their weapons[3] if they or another were confronted with a threat of bodily injury. However, their use of the weapons, and Mr. Trent's assistance, went farther than the law allows.

As a matter of law Bethany Boyd and Mr. Phillips could not use a weapon when they attacked Terrell **unless** they were confronted with an imminent

[3] The term "weapon" means an instrument, article, or substance that, regardless of its primary function, is readily capable of being used to produce death or serious bodily injury. § 45-2-101(79), MCA.

threat of serious bodily harm **and** if the force used was commensurate to Terrell's threat of force. Such cannot be the case because Jessy Boyd had already determined that Terrell was unarmed. Under the Defendants own explanation of the facts their actions were neither commensurate with the threat that Terrell allegedly presented, nor was that threat imminent. As such, the Defendants are not entitled a JUOF defense at trial.

c. The District Court should prohibit the Defendants from asserting the affirmative defense of Justifiable Use of Force in any capacity unless they testify at trial.

> It is well-established in Montana's jurisprudence that a defendant has the initial burden of offering evidence of justifiable use of force. Section 46-16-131, MCA, provides that in a criminal trial, when the defendant has offered evidence of justifiable use of force, the state has the burden of proving beyond a reasonable doubt that the defendant's actions were not justified. Moreover, § 26-1-401, MCA, states the initial burden of producing evidence as to a particular fact is on the party who would be defeated if no evidence were given on either side. Thereafter, the burden of producing evidence is on the party who would suffer a finding against that party in the absence of further evidence.

State v. R.S.A., 2015 MT 202, ¶¶ 32-37, 308 Mont. 118, 357 P.3d 899 (Internal quotes omitted, citing *Daniels* at ¶ 15).

> In *Daniels*, Daniels and his adult son, both intoxicated, became embroiled in a heated argument on the evening of May 21, 2009. During the argument, Daniels retrieved a handgun and shot his son. He called 9-1-1 and told the dispatcher what he had done. He was charged with deliberate homicide which was later amended to mitigated deliberate homicide. He pled not guilty and noticed his intent to rely on JUOF. The State argued that Daniels should not be able to argue that his son had a violent nature without first laying a proper foundation. The trial court agreed

> and required Daniels to testify in order to lay such a foundation in support of his JUOF defense. Daniels testified and offered sufficient evidence to raise the defense and the jury was instructed accordingly. Daniels was convicted and he appealed.
>
> Daniels argued on appeal that the district court misinterpreted newly-enacted legislation pertaining to JUOF that had gone into effect on April 27, 2009. In addressing the new legislation, we observed that under prior law, the State bore the burden of proving the elements of the charged offense beyond a reasonable doubt, but it did not need to prove the absence of justification. We also noted, however, that the new legislation did not change § 45-3-115, MCA, which continued "to provide that JUOF is an affirmative defense, which we have defined as 'one that admits the doing of the act charged, but seeks to justify, excuse or mitigate it.'" We further explained "[i]f the defendant offers no evidence, then he fails to satisfy his initial burden and the defense fails." We noted that in *State v. Cartwright*, 200 Mont. 91, 104, 650 P.2d 758, 765 (1982), we held that "the accused must first lay a foundation that he acted in self-defense before he can introduce evidence of the violent character of the victim." Applying *Cartwright* and other relevant cases, we concluded that the district court did not err in requiring Daniels to lay a proper foundation by testifying.

Id (citing *Daniels* at ¶¶ 5-28).

The Montana Supreme Court has repeatedly held that "a defendant who relies upon the defense of justifiable use of force concedes that he acted purposely or knowingly." *State v. St. Marks*, 2020 MT 170, ¶¶ 20-22, 400 Mont. 334, 467 P.3d 550 (citing *State v. Nick*, 2009 MT 174, ¶ 13, 350 Mont. 533, 208 P.3d 864; *State v. Houle*, 1998 MT 235, ¶ 15, 291 Mont. 95, 966 P.2d 147; *State v. Sunday*, 187 Mont. 292, 306, 609 P.2d 1188, 1197 (1980); *People v. Joyner*, 50 Ill. 2d 302, 278 N.E.2d 756, 760 (Ill. 1972)).

If the Defendants are permitted to assert a JUOF defense in any

capacity, they must admit that they purposely or knowingly committed the offenses for which they have been charged. Specifically, the Defendants must each admit the following:

1. Jesse Michael Boyd must admit that he purposely or knowingly committed the offense of assault with a weapon by causing reasonable apprehension of serious bodily injury or death when he pointed a firearm at the victim, Brad Terrell. See *Info.* at p.1 (Ct. Doc. #3).
2. Bethany Grace Boyd and Carter Norman Phillips must each admit that they purposely or knowingly committed the offense of assault with a weapon[4] when they caused bodily injury to Mr. Terrell with a flagpole/cross. See *Info(s).* at p.1 (Ct. Doc. #3).
3. Eric Anthony Trent must admit that he either: (1) purposely or knowingly aided, abetted, or attempted to aid, Bethany Grace Boyd and/or Carter Norman Phillips when they caused bodily injury to Mr. Terrell with a flagpole/cross; or (2) purposely or knowingly aided, abetted, or attempted to aid Jesse Michael Boyd when he causing reasonable apprehension of serious bodily injury or death when he pointed a firearm at the victim, Brad Terrell. See *Info(s).* at p.1 (Ct. Doc. #3).

[4] Including that the cross and flagpole are weapons pursuant to § 45-2-101(79), MCA.

It is anticipated that the Defendants will assert a JUOF defense at trial. However, Montana law prohibits the use of the affirmative defense of JUOF unless the Defendants make the requisite admissions as to the underlying offenses. As such, the State moves the District Court for an order prohibiting the Defendants from asserting the affirmative defense of JUOF unless they testify at trial **and** unequivocally admit that they committed the offenses for which they have been charged.

d. The District Court should prohibit the Defendants from relying on the character of the victim to support a Justifiable Use of Force Defense.

In pertinent part, Montana Rule of Evidence 404 provides:

> (a) Character Evidence Generally. Evidence of a person's character or trait of character is not admissible for the purposes of proving action in conformity therewith on a particular occasion except:
> . . .
> (2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused . . .

Montana Rule of Evidence 405 identifies the ways that character evidence can be used:

> (a) Reputation or opinion. In all cases in which evidence of character or a trait of character is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.
>
> (b) Specific instances of conduct. In cases in which character or trait of character of a person is an essential element of a charge, claim or defense, or where the character of the victim relates to the reasonableness of force used by the accused in self-defense, proof may also be made of specific instances of that person's conduct.

Specific instances of conduct can only be used as proof of character in two situations: (1) where character or a trait of character of a person is an essential element of a charge, claim, or defense; and (2) where the character of the victim relates to the reasonableness of force used by the accused when there is a claim of self-defense. *State v. Sattler*, 1998 MT 57, ¶ 44, 288 Mont. 79, 956 P.2d 54. The victim's character for violence is not an "essential element" of a justifiable use of force defense and, therefore, the introduction of specific instances of conduct is not permissible to prove character under the first prong. *DeSchon v. State*, 2008 MT 380, ¶ 24, 347 Mont. 30, 197 P.3d 476; *Sattler* at ¶ 45.

The second prong allows for the introduction of specific instances of the victim's conduct by criminal defendants when the reasonableness of force used is at issue. However, prior to the introduction of such evidence, certain foundational requirements must be met: First, the Defendant must place self-defense at issue in the trial. *City of Red Lodge v. Nelson*, 1999 MT 246, ¶ 13, 296 Mont. 190, 989 P.2d 300 citing *State v. Logan*, 156 Mont. 48, 65, 473 P.2d 833 (1970). A pretrial notice, brief, motion, or other pleading stating the defendant's "intention to rely on self-defense served by defendant on the state prior to trial is immaterial and does not place [self-defense] in issue at the trial." *Logan*, 156 Mont. at 65. A "[d]efendant is not bound to rely on this defense at the trial not withstanding service of this notice." *Id.* Only when a

defendant takes the stand and admits to the killing is the issue of self-defense "joined at the trial." *Id.* Then "[e]vidence of the violent nature of the alleged victim of an assault is limited to **what the defendant knew at the time he used force against the victim**, and it is also required that the defendant show this knowledge led him to use the level of force he did." *DeSchon* at ¶ 24 (Emphasis supplied). If the defendant fails to establish that their knowledge of the victim's violent past led them to use the level of force that they did, the evidence is 'irrelevant and inadmissible.'" *DeSchon* at ¶ 24 (Citing *State v. Montgomery*, 2005 MT 120, ¶ 20, 327 Mont. 138, 112 P.3d 1014).

Here, the Defendants admitted to law enforcement that they had never previously met Brad Terrell and had no idea who he was. *Body Camera Footage* at 15:15 - 33:15, attached hereto as **Exhibit 1**. As such, the State moves the District Court for an order prohibiting the Defendants from relying on the character of the victim to support a JUOF defense. If the Defendants now change their story, then they will have the burden of satisfying the foundational requirements **prior** to the introduction of evidence concerning the victim's character. M. R. Evid. 404(a). To avoid the risk of prejudice, foundation should be established outside the presence of the jury and should be subject to cross-examination from the State.[5]

[5] This is process is analogous to a party conducting voir dire of an opposing expert witness to determine whether a proper foundation has been laid prior to the introduction of an expert opinion.

e. The District Court should prohibit the Defendants from seeking a lesser included offense instruction if they assert the affirmative defense of a Justifiable Use of Force at trial.

> A criminal defendant is entitled to an instruction on a lesser included offense if the jury, in light of the evidence presented, could be warranted in finding the defendant guilty of the lesser, rather than the greater, offense. Two criteria must be met before a defendant is entitled to a lesser included offense instruction. First, the offense must actually constitute a lesser included offense of the offense charged, and, second, there must be sufficient evidence to support the included offense instruction. **Furthermore, although a defendant is entitled to jury instructions on every issue or theory having support in the evidence, a lesser included offense instruction is not supported by the evidence where the defendant's evidence or theory, if believed, would require an acquittal.**

State v. Martinez, 1998 MT 265, ¶ 10, 291 Mont. 265, 968 P.2d 705 (emphasis supplied and citing § 46-16-607(2), MCA; *State v. Fisch*, 266 Mont. 520, 522, 881 P.2d 626, 628 (1994); *State v. Schmalz*, 1998 MT 210, ¶ 23, 290 Mont. 420, 964 P.2d 763); followed in *State v. German*, 2001 MT 156, ¶¶ 20-21, 406 Mont. 92, 30 P.3d 360 ("As a matter of logic and, under *Martinez* and as a matter of law, a defendant's evidence and theory which, if believed, would require an acquittal of a "greater" offense cannot--at the same time--support a conviction on a lesser offense).

It is anticipated that the Defendants will assert a JUOF defense at trial, which if believed would result in an acquittal. As such, the State moves the

District Court for an order prohibiting the Defendants from seeking a lesser included offense instruction if they assert the affirmative defense of JUOF.

f. The District Court should preclude the Defendants from selectively asserting their Fifth Amendment protection if they testify at trial.

The United States Supreme Court has held:

> Where an accused party waives his constitutional privilege of silence, takes the stand in his own behalf and makes his own statement, it is clear that the prosecution has a right to cross-examine him upon such statement with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the alleged crime. While no inference of guilt can be drawn from his refusal to avail himself of the privilege of testifying, he has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts.

Fitzpatrick v. United States, 178 U.S. 304, 315, 20 S. Ct. 944, 948-49, 44 L. Ed. 1078, 1083 (1900).

Montana has long held the same view. "A defendant in a criminal case, if he is sworn and testifies, is subject to the same rules of cross-examination and impeachment as any other witness." *State v. Coloff*, 125 Mont. 31, 36, 231 P.2d 343, 345 (1951) (citations omitted). *See also Brown v. United States*, 356 U.S. 148, 154-155, 78 S. Ct. 622, 626-627, 2 L. Ed. 2d 589, 596-597 (1958).

In the event the Defendants waive their Fifth Amendment right, take the stand and testify in their own defense, cross-examination should not be limited to the immediate scope of direct testimony, but rather to any relevant

information, including matters that pertain to credibility. The necessity of ensuring a complete presentation of all relevant evidence has led to a century-old rule that a criminal defendant who voluntarily foregoes his privilege not to testify and presents exculpatory or mitigating evidence thereby subjects himself to relevant cross-examination without the right to reclaim Fifth Amendment protection on a selective basis.

Further, the Defendants have "no right to set forth to the jury all the facts which tend in [their] favor without laying [themselves] open to a cross-examination upon those facts." *Brown*, 356 U.S. at 154-155, 78 S. Ct. at 626-627 (internal citations omitted). The basis of this rule is that "it is otherwise a positive invitation to mutilate the truth (the defendant) offers to tell." *Id.* Moreover, "[t]here is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility." *Id* (Citing *Walder v. United States*, 347 U.S. 62, 65 (1954)). Consequently, here, if the Defendants testify the State should be allowed wide leeway in the scope of cross-examination to prevent frustration of the truth-seeking function of the trial.

The State moves the District Court for an order precluding the Defendants from selectively asserting his right against self-incrimination at trial. If the Defendants waive their right against self-incrimination and elect to testify at trial, the District Court should confirm on the record and outside

the presence of the jury that the Defendants fully understands the scope and consequences of their actions. If the Defendants thereafter refuse to answer the State's questions during cross examination their testimony should be stricken from the record. *United States v. Panza*, 612 F.2d 432, 438-440 (9th. Cir. 1979).

g. The District Court should preclude the Defendants from seeking jury nullification at trial.

> Jury nullification occurs when a jury acquits a defendant, even though the government proved guilt beyond a reasonable doubt. It is well established that jurors have the *power* to nullify, and this power is protected by "freedom from recrimination or sanction" after an acquittal. However, juries do not have a *right* to nullify, and courts have no corresponding duty to ensure that juries are able to exercise this power, such as by giving jury instructions on the power to nullify. On the contrary, courts have the duty to forestall or prevent nullification, whether by firm instruction or admonition or...dismissal of an offending juror, because it is the duty of juries in criminal cases to take the law from the court, and apply that law to the facts as they find them to be from the evidence.

United States v. Kleinman, 880 F.3d 1020, 1031-1036 (9th. Cir. 2018) (internal quotes and citations omitted).

Montana law makes clear that all "[q]uestions of law must be decided by the court and questions of fact by the jury, except that on a trial for criminal defamation the jury shall determine both questions of law and of fact..." § 46-16-103, MCA; *See also generally* §§ 3-15-104 and 26-1-201, MCA. To prevent nullification in a criminal trial the District Court typically gives Montana's

Uniform Criminal Jury Instruction 1-102 forbidding the jury from making its decision on anything but the law, even if the jurors believe the law ought to be otherwise. MCJI 1-102. The jury must make its decision uninfluenced by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." *Id.*

The State moves the District Court for an order precluding the Defendants from seeking jury nullification at trial. Such action would include the presentation of any argument that suggests that jurors, or potential jurors, have a right to ignore the law or to disregard the District Court's instructions.

III. Conclusion.

Based on the foregoing, the State of Montana respectfully requests that the District Court issue and *Order in Limine*:

1. Prohibiting the Defendants from asserting the affirmative defense of Justifiable Use of Force at trial.

2. Prohibiting the Defendants from arguing the affirmative defense of Justifiable Use of Force unless they testify at trial and admit that they purposely or knowingly committed the charged offenses.

3. Prohibiting the Defendants from relying on the character of the victim to support a Justifiable Use of Force Defense.

4. Prohibiting the Defendants from seeking a lesser included offense instruction if they assert an affirmative defense of Justifiable Use of Force.

5. Prohibiting the Defendants from selectively asserting Fifth Amendment protection if he testifies at trial.

6. Prohibiting the Defendants from seeking jury nullification.

DATED this 20 day of January 2023.

By: _____
THORIN A. GEIST
DAVID BUCHLER
Attorney for the State of Montana

CERTIFICATE OF SERVICE

I hereby certify that on the ___ day of January 2023, a true and correct copy of the foregoing document was served:

[ ] U.S. Mail
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[6] Courtesy copy provided pending admission to Montana bar *pro hac vice*.

CERTIFICATE OF SERVICE

I, Thorin Aidan Geist, hereby certify that I have served true and accurate copies of the foregoing Motion - Motion in Limine to the following on 01-20-2023:

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Electronically signed by Maggie Sowisdral on behalf of Thorin Aidan Geist
Dated: 01-20-2023