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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 THIRD 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. Excluding witnesses from the courtroom, except as authorized by law.

2. Precluding the Defendants from eliciting testimony and/or presenting argument as to the offenses charged.

3. Precluding either party from commenting on the failure of the other to call a witness.

4. Precluding either party from presenting argument during their opening statement, and/or from presenting inadmissible evidence.

5. Precluding counsel for either side from acting as a witness in the case.

6. Precluding speaking objections in the presence of the jury.

7. Precluding the introduction of defenses, objections, and or requests that are not identified by the deadline set forth in the *Omnibus Conference Order*.

8. Precluding lay witnesses from giving legal conclusions or applying the law to the facts.

9. Precluding witnesses from commenting on the credibility of another witness.

10. Precluding the Defendants from introducing improper character evidence.

11. Preclude either party from eliciting testimony or presenting argument on the level of offense charged, including the ramifications of punishment.

12. Precluding the Defendants from arguing that they were ignorant of the law.

13. Clarifying that the State is not required to disclose rebuttal witnesses, except for those called to directly rebut an affirmative defense.

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

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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).

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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 exclude witnesses from the courtroom, except as authorized by law.

> At the request of a party, the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.

Rule 615, M. R. Evid.

The State moves to exclude witnesses from the courtroom at trial, with two exceptions. First, Montana law specifically allows victims to be in the

courtroom, and that they may not be excluded on the basis that they may be called as a witness. § 46-24-106(1) and (4), MCA. Victims can only be excluded for disruptive behavior or upon the finding of specific facts supporting exclusion and must be allowed to address the court on the issue of exclusion. § 46-24-106(2)(a) and (3), MCA. Brad Terrell is the victim in this case, and he has a statutory right to be present at trial. Mr. Terrell's presence in the courtroom will not jeopardize the Defendants' right to a fair trial even if he is called as witnesses in the case.

Second, Montana law specifically allows the State to designate a representative to be present in the courtroom at trial, even if they are to be called as witness. Rule 615, M. R. Evid; *Faulconbridge v. State.* 2006 MT 198, ¶¶ 52-53, 333 Mont. 186, 142 P.3d 777; *State v. Nichols*, 2014 MT 343, ¶ 26, 377 Mont. 384, 339 P.3d 1274. The State reserves the right to designate a representative to be present at trial. The Defendants do not have a legal right to object to the State's designation.

c. The District Court should preclude the Defendants from eliciting testimony and/or presenting argument as to the offenses charged.

Under Montana law the discretion to charge specific offenses rests solely with the prosecution. *State v. Beavers*, 1999 MT 260, ¶ 36, 296 Mont. 340, 987 P.2d 371.

In *Beavers*, the defendant wanted to cross examine the officer about "whether any alternative [lesser] charges were more appropriate." *Id.*, ¶ 35. The Eighth Judicial District Court disallowed that line of questioning since charging a defendant is a prosecutorial function, and because the defendant had no relevant basis for questioning the officer as to potential charges. *Id.*, ¶ 36. On appeal, the Montana Supreme Court affirmed the conviction. *Id.*

The State moves to preclude the Defendants from attempting to elicit testimony and/or presenting argument that the case should have been charged differently. The decision to charge a case is exclusively within the authority and discretion of the prosecution and is not relevant testimony for any witness who may testify at trial.

d. The District Court should preclude either party from commenting on the failure of the other to call a witness.

Montana law provides:

> The fact that a witness's name is on a list furnished pursuant to this part[,] but the witness does not testify or that a matter contained in a pretrial notice is not raised may not be commented upon at trial unless the court, on motion of a party, allows comment after finding that the inclusion of the witness's name or the pretrial notice constituted an abuse of the applicable disclosure requirement or that other good cause is shown.

§ 46-15-325, MCA.

The State moves the District Court for an order prohibiting either party from commenting upon the failure of the other party to call a witness.

e. The District Court should preclude either party from presenting argument during their opening statement, and/or from presenting inadmissible evidence.

> Under [§] 25-7-301, MCA, either counsel may briefly state his or her case and the evidence he or she expects to introduce to support the same, and to refer in opening statements to evidence to be adduced, if those statements are made in good faith and with reasonable ground to believe the evidence is admissible. It is improper to expound or argue legal theories or to attempt to instruct the jury as to the law of the case in an opening statement...

State v. Otto, 2014 MT 20, ¶ 14, 373 Mont. 385, 317 P.3d 810 (internal quotes and citations omitted).

The Montana Supreme Court has also held that it is improper for counsel to use an opening statement for any purpose other than to provide an overview of the evidence that will be presented. *State v. Martinez*, 188 Mont. 271 (1908). In *Martinez*, the Court stated that counsel may not "expound or argue legal theories or attempt to instruct the jury as to the law of the case" in an opening statement. *Martinez*, 188 Mont. at 285. The *Martinez* Court cited to 23A C.J.S. Criminal Law § 1086 and American Bar Association Standard 4-7.4, which states:

> Defense counsel's opening statement should be confined to a statement of the issues in the case and the evidence defense counsel believes in good faith will be available and admissible. Defense counsel should not allude to any evidence unless there is a good faith and reasonable basis for believing such evidence will be tendered and admitted in evidence.

The State moves the District Court for an order precluding either party from attempting to argue the case during their opening statement, and from alluding to evidence during their opening statement unless there is a good faith basis to believe that such evidence will be admitted as evidence at trial.

f. The District Court should preclude counsel for either side from acting as a witness in the case.

The Montana Supreme Court has held that "a lawyer's statements are not evidence." *State v. High Elk*, 2006 MT, ¶ 17, 330 Mont. 359, 127 P.3d 432. Similarly, the Rules of Professional Conduct prohibit a lawyer from acting as a witness. See M.R. Prof. Cond. 3.7(a). According to the Comments to Rule 3.7(a) from the American Bar Association Model Rules of Professional Conduct, which mirrors M.R. Prof. Cond. 3.7(a), "combining 'the roles of advocate and witness can prejudice the tribunal and the opposing party.'" *State v. Lehrkamp*, 2017 MT 203, ¶ 18, 388 Mont 295, 400 P.3d 697) (quoting *Stock v. State*, 2014 MT 46, ¶ 14, 374 Mont. 80, 318 P.3d 1053). This distinction is necessary because a witness gives testimony or presents evidence based on personal knowledge, whereas an advocate is expected to explain or comment on evidence given by others. *Id.* (quoting *Stock* at ¶ 14). Further, a witness may not testify as to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Mont. R. Evid. 602.

The Montana Rules of Evidence do not authorize attorneys arguing a case the ability to impeach based on personal knowledge alone. In fact, the Rules of Professional Conduct prohibit an attorney from even "alluding to . . . or asserting personal knowledge of facts in issue except when testifying as a witness." *State v. Dobrowski*, 2016 MT 261, ¶ 29, 385 Mont. 179, 382 P.3d 490. As such, if an attorney plans on providing personal testimony or submitting evidence on the basis of personal knowledge, a different attorney must argue the case. *Lehrkamp, supra*, at ¶ 19.

The State moves the District Court for an order precluding counsel for either side from presenting evidence based on their personal knowledge. Such a prohibition should extend to any attempt by counsel to vouch for a witness in any capacity.

g. The District Court should limit speaking objections in the presence of the jury.

> In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

Rule 103(c), M. R. Evid.

The State moves the District Court for an order precluding either party from making "speaking objections." Objections by counsel should refer to the specific rule of evidence for the basis on the objection. It should not contain a lengthy argument in the presence of the jury. If longer argument is needed, the

State would request the jury be excused while the discussion occurs.

h. The District Court should preclude the introduction of defenses, objections, and or requests that are not identified by the deadline identified in the *Omnibus Conference Order.*

Montana Code Annotated § 46-13-101, provides:

> (1) Except for good cause shown, any defense, objection, or request that is capable of determination without trial of the general issue must be raised at or before the omnibus hearing unless otherwise provided by Title 46.
>
> (2) Failure of a party to raise defenses or objections or to make requests that must be made prior to trial, at the time set by the court, constitutes a waiver of the defense, objection, or request.
>
> (3) The court, for cause shown, may grant relief from any waiver provided by this section. Lack of jurisdiction or the failure of a charging document to state an offense is a nonwaivable defect and must be noticed by the court at any time during the pendency of a proceeding.
>
> (4) Unless the court provides otherwise, all pretrial motions must be in writing and must be supported by a statement of the relevant facts upon which the motion is being made. The motion must state with particularity the grounds for the motion and the order or relief sought.

Failure to raise defenses or objections, or to make required requests prior to trial constitutes a waiver of the defense, objection, or request. The State moves the District Court for an order precluding the Defendant from asserting any defense or objection which are not identified by the deadline specified in the *Omnibus Conference Order.*

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i. The District Court should preclude lay witnesses from giving legal conclusions or applying the law to the facts.

Montana Rule of Evidence 701 provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

While testimony in the form of an opinion is not objectionable because it embraces an ultimate issue to be decided by the trier of fact, a witness may not give a legal conclusion or apply the law to the facts in testimony. *Heltborg v. Modern Machinery*, 244 Mont. 24, 29-30, 795 P.2d 954, 957-958 (1990). Lay witness' testimony in the form of opinions or inferences is limited to those which are rationally based on perception and helpful to a clear understanding of the witness' testimony or determination of a fact in issue. Rule 701, M. R. Evid. Testimony that amounts to no more than expression of the witness's general belief as to how a case should be decided has the impermissible appearance of shifting this responsibility from the jury. *Heltborg*, 244 Mont. at 31, 795 P.2d at 958 (citing *McCormick on Evidence* § 12, at 27).

Consequently, witnesses can give collective fact/shorthand rendition opinions by describing their sensory observations of what happened. However, it is for the factfinder to draw the inferences, evaluate the facts in the light of the applicable rules of law, and make the ultimate conclusions based on the

entirety of the evidence presented by all witnesses. Therefore, it would be erroneous for any one witness, including upon cross-examination, to give an opinion that impermissibly invades the province of the fact finder. As a result, no witness should be allowed to give an opinion speculating or critiquing what could have been done differently, whether the charged offense occurred, or who committed the offense charged.

j. The District Court precluding witnesses from commenting on the credibility of another witness.

The Montana Supreme Court has stated:

> We have consistently held that the determination of the credibility of witnesses and the weight to be given their testimony is solely within the province of the jury. A witness may not comment on the credibility of another witness's testimony.

State v. Hayden, 2008 MT 274, ¶ 26, 345 Mont. 252, 190 P.3d 1091; *State v. Byrne,* 2021 MT 238, ¶ 23, 405 Mont. 352, 495 P.3d 440.

The State moves the District Court for an order precluding the Defendants from eliciting testimony as to the credibility of another witness. Testimony that a witness believes one witness over another, thinks a defendant is wrongly charged, or otherwise has an opinion on the proceedings invades the province of the jury and should be prohibited.

k. The District Court should preclude the Defendants from introducing improper character evidence.

Montana Rule of Evidence 608 provides:

> (a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
>
> (b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The State moves the District Court for an order prohibiting the Defendants from introducing character evidence that is not related to a witness's reputation for truthfulness. The State requests that the Defendants be required to obtain a ruling from the District Court on any such evidence prior to introducing it through cross-examination, and that discussion pertaining to such a request for ruling occur outside the presence of the jury.

l. The District Court should preclude either party from eliciting testimony or presenting argument on the level of offense charged, including the ramifications of punishment.

The Montana Supreme Court has held:

> Under section 46-18-103, MCA, all sentences shall be imposed exclusively by the judge of the court. Because of that statute, we held...that punishment is not the concern of the jury whose sole function is to determine guilt or innocence. Instructing the jury as

> to various possibilities of sentence, we said...impermissibly suggests to a jury that it should give weight to the possible punishment in reaching a verdict.

State v. Brodniak, 221 Mont. 212, 226-227, 718 P.2d 322 (1986) (internal quotes and citations omitted); *State v. Zuidema*, 157 Mont. 367, 373-374, 485 P.2d 952, 955 (1971) (Concluding that the inclusion of penalty information allows irrelevant matters to be considered by the jury which may influence its decision aside from the standard of proof by the evidence beyond a reasonable doubt.); *State v. Martin*, 2001 MT 83, ¶¶ 66-67, 305 Mont. 123, 23 P.3d 216 (Holding that sentencing is solely the duty of the trial court and the jury's verdict should not be influenced in any way by sentencing considerations.); See also *Small v. Mont. Fourth Jud. Dist. Court*, 395 Mont. 523, 437 P.3d 115 (2019).

The State moves the District Court for an order prohibiting the either party from presenting argument and/or from commenting on the penalties that could be imposed in this case. The prohibition should be imposed at all stages of this proceeding and should include a prohibition against talking about the ramifications of going to prison, the loss of liberty, the potential loss of firearms, probation, or any other aspect of a potential penalty that could be imposed if the Defendants are convicted at trial.

m. The District Court should preclude the Defendants from arguing that they were ignorant of the law.

> For at least a century, it has been the law in Montana that "ignorance of the law is no defense. *State ex rel. Rowe v. District*

> *Court*, 44 Mont. 318, 324, 119 P. 1103, 1106 (1911), *superseded by statute on other grounds in State ex rel Shea v. Judicial Standards Comm.*, 198 Mont. 15, 643 P.2d 210 (1982) ("If a person accused of a crime could shield himself behind the defense that he was ignorant of the law which he violated, immunity from punishment would in most cases result. No system of criminal justice could be sustained with such an element in it to obstruct the course of its administration."). We reiterated this rule in *State v. Trujillo*, 2008 MT 101, ¶ 15, 342 Mont. 319, 180 P.3d 1153, when we held that Trujillo unlawfully trespassed onto another's land despite his assertions that he had not passed through any gates or barriers intended to bar access. Similarly, in *State v. G'Stohl*, 2010 MT 7, ¶ 14, 355 Mont. 43, 223 P.3d 926, we noted that "people are presumed to know the law" and will not be relieved of criminal liability for their failure to comply with it.

State v. Payne, 2011 MT 35, ¶ 22, 359 Mont. 270, 248 P.3d 842.

The Defendants in this case are from North Carolina and were only passing through Montana. As such, the State moves the District Court for an order prohibiting the Defendants from arguing that they were ignorant of the law, including Montana's Justifiable Use of Force statutes codified as §§ 45-3-101 through 45-3-115, MCA.

n. The District Court should clarify that the State is not required to disclose rebuttal witnesses, except for those called to directly rebut an affirmative defense.

"The State is **not** statutorily obligated to provide pretrial notice of a witness called to impeach the credibility of a defense witness." *State v. Torres*, 2021 MT 301, ¶ 25, 406 Mont. 353, 498 P.3d 1256 (Emphasis supplied, citing *State v. Weitzel*, 2000 MT 86, ¶¶ 31-32, 299 Mont. 192, 998 P.2d 1154; *State v. Hildreth*, 267 Mont. 423, 430-31, 884 P.2d 771, 775-76 (1994)). "State law

limits pretrial disclosure of rebuttal witnesses to those called related to "evidence of good character or the defenses of alibi, compulsion, entrapment, justifiable use of force, or mistaken identity or the defense that the defendant did not have a particular state of mind that is an element of the offense charged." *Id* (citing § 46-15-322(6), MCA; *Riggs v. State*, 2011 MT 239, ¶¶ 34-35, 362 Mont. 140, 264 P.3d 693).

It is anticipated that the Defendants will assert the affirmative defense of Justifiable Use of Force. When that occurs the State will comply with § 46-15-322(6), MCA, and will identify rebuttal witnesses who will be called to directly rebut the affirmative defense. However, under Montana law the State is not required to identify rebuttal witnesses for any other purpose. E.g. Witnesses who are called to rebut the credibility of a witness. The District Court should clarify that the State is not required to identify rebuttal witnesses who are not called to directly rebut an affirmative defense.

III. Conclusion.

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

1. Excluding witnesses from the courtroom, except as authorized by law.
2. Precluding the Defendants from eliciting testimony and/or presenting argument as to the offenses charged.
3. Precluding either party from commenting on the failure of the other to call a witness.

4. Precluding either party from presenting argument during their opening statement, and/or from presenting inadmissible evidence.

5. Precluding counsel for either side from acting as a witness in the case.

6. Precluding speaking objections in the presence of the jury.

7. Precluding the introduction of defenses, objections, and or requests that are not identified by the deadline set forth in the *Omnibus Conference Order*.

8. Precluding lay witnesses from giving legal conclusions or applying the law to the facts.

9. Precluding witnesses from commenting on the credibility of another witness.

10. Precluding the Defendants from introducing improper character evidence.

11. Preclude either party from eliciting testimony or presenting argument on the level of offense charged, including the ramifications of punishment.

12. Precluding the Defendants from arguing that they were ignorant of the law.

13. Clarifying that the State is not required to disclose rebuttal witnesses, except for those called to directly rebut an affirmative defense.

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 20 day of January 2023, a true and correct copy of the foregoing document was served:

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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