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**MONTANA FIFTH JUDICIAL DISTRICT COURT,**
**MADISON COUNTY**

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| STATE OF MONTANA,<br><br>Plaintiff,<br><br>vs.<br><br>JESSE MICHAEL BOYD, BETHANY GRACE BOYD, CARTER NORMAN PHILLIPS, and ERIC ANTOHONY TRENT,<br><br>Defendants. | Cause Nos. DC-29-2022-022<br>DC-29-2022-023<br>DC-29-2022-024<br>DC-29-2022-026<br><br>**DEFENDANTS' DEFENDANTS RESPONSE TO STATE'S FOURTH MOTION IN LIMINE** |

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**MONTANA FIFTH JUDICIAL DISTRICT COURT**
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| , STATE OF MONTANA<br><br>Plaintiff,<br><br>vs.<br><br>JESSE MICHAEL BOYD, BETHANY GRACE BOYD, CARTER NORMAN PHILLIPS, ERIC ANTHONY TRENT,<br><br>Defendant(s). | Cause No(s). DC-29-2022-23<br>DC-29-2022-24<br>DC-29-2022-22<br>DC-29-2022-26<br><br>**DEFENDANTS RESPONSE TO STATE'S FOURTH MOTION IN LIMINE** |

COMES NOW Defendants Jesse M. Boyd ("Boyd"), Carter N. Phillips ("Phillips"), Bethany Boyd ("Bethany"), and Eric Trent ("Trent"), by and through their undersigned counsel, with this response and opposition to the State's fourth motion in limine.

**Defendants incorporate the following brief and memorandum of facts and law.**

Once again, the State seeks the Court to issue an improper ruling. The State's fourth motion in limine is, in every essence, a repeat of the State's first motion in limine. The State again seeks a ruling that would defy settled Montana law, and which would "preclude defendants from calling affirmative defense witnesses who have no personal knowledge of the events of Nov. 12, 2022."

Montana law has held for over a century that evidence of a purported victim's prior initiation of aggression is relevant where the question of who was the aggressor is at issue. See, *State v. Hanlon*, 38 Mont. 557, 100 P. 1035, 1039 (1909) ("The character of violence, then, wanton and unprovoked as it appears to have been, was material to show who was the aggressor; for it would have tended to show an aggressive and dangerous disposition in the deceased, not only then existing but continuing up to the moment of the affray").

The Montana Supreme Court held more than a century ago, in *State v. Jones*, 48 Mont. 505, 139 P. 441, 446-47 (1914), that "[w]hile there is some diversity in the opinions of the courts as to whether evidence of the reputation of the deceased is competent for any purpose unless it is known to the defendant at the time of the homicide . . ., *the weight of authority, we think, gives support to the rule that when, as in this case, the issue is self–defense, and there is doubt as to who was the aggressor, such evidence is admissible* in order to enable the jury to resolve the doubt**;** for it is entirely in accord with everyday experience that a turbulent, violent man is more aggressive and will more readily bring on an encounter, than one who is of the contrary disposition." *Id.* (emphasis added)(citing *State v. Shafer*, 22 Mont. 17, 55 Pac. 526; 1 McClain on Criminal Law, 307; 1 Wigmore on Evidence, § 63).

In this case, defendants have named, on their witness list, a number of Terrell's neighbors who have knowledge of Terrell's violent, dangerous, and dishonest nature and reputation. Some of these witnesses will likely be rebuttal and impeachment witnesses, as defendants anticipate the State will present its case in accord with what the State has already proffered (i.e., a heartbreaking story of a local man who politely asked transients to move their car, whereupon the transients savagely assaulted him with weapons). If the State plans to present its case differently, the State *has an obligation to so inform the defense*.

Defendants have a right under the confrontation clause, the notice clause, the due process clause, and the Montana Rules of Evidence to introduce evidence refuting, impeaching and rebutting the State's false allegations in this case.

HERE, THE QUESTION OF WHO WAS THE AGGRESSOR IS DISPOSITIVE; THEREFORE VIOLENT DISPOSITION IS AN ESSENTIAL ELEMENT OF THE OFFENSE AND DEFENDANTS HAVE A RIGHT TO INTRODUCE SUCH PROPENSITY OR CHARACTER EVIDENCE

Montana Code Annotated 45-3-111(2) essentially makes the determination of who was the aggressor in a confrontation dispositive of a justifiable use of force claim.[1] And the law is settled that under such circumstances a defendant arguing justified use of force has a right to present evidence of the 'victim's' character and propensity for violent aggression. Such evidence can come in two forms: (1) reputation evidence; and (2) evidence of other specific acts of violence by the victim-aggressor.

In this case, there are both kinds of propensity evidence regarding the State's claimed victim. Many of Brad Terrell's neighbors report Terrell's reputation for unprovoked violence and threats in the community. Several have been physically attacked, threatened, or beaten by Terrell. These witnesses will testify that they live in daily fear of Terrell and have armed themselves in anticipation that they will need to use force in self defense against Terrell's unprovoked violence.

Defendants did not know Terrell on November 12, nor did they have any information regarding why a stranger would intrude upon them with curses, shouting and commands and then suddenly charge at them physically. The law is settled that under such circumstances a

[1] "If a person reasonably believes that the person or another person is threatened with bodily harm, 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.

defendant arguing justified use of force has a right to present evidence of the 'victim's' propensity for violent aggression.

45-3-111(2) essentially makes the determination of who was the aggressor in a confrontation dispositive of a justifiable use of force claim. "If a person reasonably believes that the person or another person is threatened with bodily harm, 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.

What does "dispositive" mean in this context? The U.S. 9th Circuit addressed this question in *United States v. Keiser*, 57 F.3d 847 (9th Cir. 1995), where Keiser was tried for assault in violation of 18 U.S.C. § 113. Id. at 848. Keiser's only defense was that he was acting in defense of his brother, whom the victim was assaulting at the time Keiser shot the victim. *Id*. at 852.

Keiser "attempted to introduce a specific instance of the victim's conduct that had occurred *after* the shooting to prove that the victim has a propensity for violence, supporting the proposition that the victim was using unlawful force at the time of the shooting and thereby bolstering Keiser's self-defense claim." The Ninth Circuit held, however, that "victim character evidence introduced to support a claim of self-defense or defense of another should be limited to [general] reputation or opinion evidence." *Id*. at 855.

But the *Kaiser* case did not involve a law that explicitly enshrines a right to threaten deadly force if a person reasonably believes he is "threatened with bodily harm." In this case, where § 45-3-111(2) is directly at issue, the absence of reasonableness of such a belief <u>is an essential element</u>.

As the 9th Circuit wrote in *United States v. Charley*, 1 F.4th 637 (9th Cir. 2021), "in determining whether violent character is "an essential element" of a self-defense claim under [Federal Rule of Evidence] 405(b), "[t]he relevant question should be: would proof, or failure of proof, of the character trait by itself actually satisfy an element of the charge, claim, or defense? If not, then character is not essential and evidence should be limited to [general] opinion or reputation" testimony."

> Specific instances of prior conduct offered to prove one's character "possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time," so "the rule confines the use of evidence of this kind to cases in which character is, in the strict sense, in issue and hence deserving of a searching inquiry." Advisory Committee Notes, Fed. R. Evid. 405. Although Charley's testimony about Begay may have opened the door to general reputation or opinion testimony about her propensity for violence under Rule 405(a), she did not open the door to detailed descriptions of "specific instances of conduct" that were completely unrelated to Begay to show that she has a propensity for violence under Rule 405(b).

Charley, at 647.

Here, in the case of Boyd, Boyd, Trent and Phillips, the answer to the above question is yes. Under 45-3-111(2), a strange cursing man who exits his vehicle and advances angrily at innocent Christian missionaries can only be seen objectively as a reasonable threat justifying the use or display of a weapon in self defense.

The evidence will show that Terrell's neighbors live in daily fear of Terrell. Several have armed themselves and taken other security precautions to protect themselves from Terrell. (Yes, it is true that Defense counsel have enumerated a fairly large number of Terrell's neighbors, in part to protect these witnesses from potential retaliatory violence by Terrell or other retaliation by Madison County authorities.) Cf. *United States v. Bond,* 552 F.3d 1092 (9th Cir. 2009) (there was no Brady violation when government failed to call coconspirator as witness after indicating

that it would); *Taylor v. Illinois*, 484 U.S. 400 (1988) (parties may list names on witness lists but not call them at trial). Further, some of these witnesses may rebut claims regarding honesty and credibility regarding not only Terrell but the investigators in question.

THE STATE'S PURPORTED VICTIM'S REPUTATION FOR DISHONESTY

A number of names on defendants' witness list are potential character witnesses regarding not just Brad Terrell's reputation for unprovoked terror and violence, but regarding Terrell's reputation for dishonesty (and that of certain officers). For the most part, these are likely to be rebuttal witnesses, as defendants anticipate the prosecution will introduce witnesses with reputations for dishonesty. Although "reference to specific instances of a witness' conduct for the purpose of proving his character for truthfulness or untruthfulness is never permitted on direct examination," *State v. Bonamarte*, 351 Mont. 419, 423, 213 P.3d 457 (2009); *State v. McClean*, 179 Mont. at 185, 587 P.2d at 25., such evidence is admissible on cross-examination and for impeachment purposes.

Defendants anticipate that the State will place the aggressor in this case, Brad Terrell, on the stand in the State's case in chief. If so, Defendants will present numerous witnesses with knowledge regarding Terrell's truthfulness. The evidence will show that the very first representations made by Terrell to the defendants on November 12, 2022 were false statements; and that Terrell then lied to investigators (on multiple bodycams) about these very conversations. The evidence will show that Terrell continued giving false and exaggerated statements to Madison County investigators throughout his interviews and conversations.

If the State presents Terrell's version of events to be accurate, defendants have a near-absolute right to present evidence rebutting such claims. If the State changes its version of events

and presents another narrative, defendants have a near-absolute right to illuminate investigators' and Terrell's changing statements and bad faith in this case.

Specifically, on November 12, 2022, Terrell violently disrupted the defendants' missionary work by falsely and angrily telling defendants they were blocking "his" property. Later, on bodycams and on 9-1-1 calls, Terrell repeated these untrue statements. The evidence will show that perhaps every statement made by Terrell regarding this topic on that day were inaccurate. In fact, the Boyd Subaru was temporarily parked on public parking areas adjacent to trust property many yards away from any property under the control of Terrell.

To rebut the State's false claims, defendants have a right to introduce evidence regarding Brad Terrell's reputation for honesty in the community. Evidence will show that Terrell has defrauded and deceived numerous members of his community. Further evidence will show that when confronted for payments as promised, Terrell threatens violence and terror rather than paying up.

In fact, evidence will show that since moving to Montana, Terrell has employed contractors and workers who sacrificed greatly and performed hundreds of hours of work for him; whereupon Terrell refused to pay, citing trivial or inconsequential imperfections in the work. On several occasions Mr. Terrell threatened either (or both) physical violence or improper use of process. Further evidence will show that Terrell has in fact filed abusive, frivolous, dishonest and false lawsuits in Madison County in order to avoid paying his promises. Terrell now has lost several such suits; and liens totally many tens of thousands of dollars remain on Mr. Terrell and his properties.

This character and habit evidence is directly relevant to the most important aspects of the State's case against Jesse Boyd, Bethany Boyd, Eric Trent and Carter Phillips. If the State presents evidence that Terrell claimed to be a victim of defendants on November 12, Terrell's character and well-developed reputation for calculating deception and making a mockery of Madison County courts will be fair game for the defense.

This type of character evidence is admissible both as impeachment evidence if Terrell takes the witness stand in this case; and as rebuttal evidence if the State presents its case through investigators alone. A "party may impeach the credibility of a witness via "opinion or reputation" evidence regarding the witness's character for "untruthfulness." *State v. Pelletier*, 401 Mont. 454, 473 P.3d 991 (2020); Montana R. Evid. 404(a)(3) and 608(a). "A party may also cross-examine the witness regarding specific instances of his or her prior conduct for the purpose of impeaching his or her credibility if probative of the witness's character for untruthfulness." Id. "[B]y definition, specific instances of prior conduct probative of a witness's character for untruthfulness narrowly include prior instances where the witness lied, made false reports or accusations, or otherwise acted dishonestly, untruthfully, deceitfully, or fraudulently." *Id*. *See also State v. Frey*, 2018 MT 238, ¶ 20, 393 Mont. 59, 427 P.3d 86; *State v. Cunningham*, 2018 MT 56, ¶ 25, 390 Mont. 408, 414 P.3d 289 (citing *State v. Weisbarth*, 2016 MT 214, ¶ 21, 384 Mont. 424, 378 P.3d 1195). *See also State v. Martin*, 279 Mont. 185, 198-200, 926 P.2d 1380, 1388-90 (1996) ("certain criminal acts" such as "suppression of evidence, false pretenses, cheating and embezzlement" are probative of "dishonesty" but theft or burglary are not).

In this case, the evidence will show embezzlement and fraud-type dishonesty on the part of Terrell. Further evidence will show that Brad Terrell uses threats of violence to extort and deceive his way out of making promised payments.

PART 2. AN EXPERT ON MONTANA GUN LAWS AND SELF-DEFENSE STATUTES WILL ASSUST THE COURT AND THE JURY.

Next, the State seeks to prohibit defendants from calling an expert to discuss the application of Montana gun and self defense laws. Defendants have provisionally named expert Gary Marbut as a potential expert in this case.[2] Although defense counsel summarily described Marbut on the witness list as an expert on Montana gun laws and self-defense statutes, Mr. Marbut is much more than that. Mr. Marbut literally wrote the book on *Gun Laws of Montana* (2018). Marbut is president of the Montana Shooting Sports Association (MSSA) and is a recognized expert on Montana's history, culture and laws regarding use of weapons.

For 30 years, Mr. Marbut has been a shooting safety and self-defense instructor. And he is one of the few use-of-force expert instructors who specifically instructs his students on the rigors of Montana firearm and self-defense laws. Additionally, Marbut has authored shooting safety materials that have been used by hundreds of Montana kids.

Marbut may be the most successful private policy advocate for legislation in the United States, having authored parts of more than 40 laws that are presently on Montana's books. Indeed, Marbut is the originator and author of several of the laws at issue in this case. Marbut can testify regarding the use of force alleged in this case, the propriety of the defendants' responses, and aspects of the investigation. He is state's foremost authority on the legislative process, the debates and the application of each of the laws at issue in this case.

[2] Note that Marbut has not yet agreed to testify as an expert in this case. Counsel listed him as a *likely* expert witness. Upon the State's fourth motion in limine, however, we have reached out to Mr. Marbut and Mr. Marbut is reading up on the issues and pleadings in the case. Marbut agrees to be described as a 'provisional' expert for the defense in this case.

Marbut has testified as an expert witness in a number of state and federal trials. Note that Marbut previously testified as an expert in the *State v. Cooksey* case, 366 Mont. 346 286 P.3d 1174 (2012), regarding Section 45–3–112, MCA (which Marbut partially authored). That statute, and other statutes partially authored by Marbut, are directly at issue in this case.

Marbut's expertise would directly assist this Court in this case, whether before a jury trial or in pretrial litigation.

## CONCLUSION

For all the above stated reasons, the State's fourth motion in limine should be DENIED.

Respectfully submitted this 7th day of March, 2023.

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## CERTIFICATE OF SERVICE

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