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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  <b>STATE'S FIFTH MOTION IN        LIMINE AND BRIEF IN        SUPPORT</b>
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**MOTION**

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. Precluding the Defendants from asserting the “affirmative defense” of selective prosecution on the basis of “religious intolerance and bias.”
2. Precluding the Defendants from asserting the “affirmative defense” of “selective enforcement” based on “religious discrimination, intolerance, and bias.”
3. Precluding the Defendants from asserting the “affirmative defense” of “authority” based on their “attempt...to make a citizens arrest.”

The undersigned has contacted opposing counsel and has confirmed that this *Fifth Motion in Limine* is **opposed**.

## **BRIEF IN SUPPORT**

### **I. Procedural background.**

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 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<sup>1</sup>). 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).

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<sup>1</sup> Each of the cases have been consolidated and the document numbers are referenced as they appear in *State of Montana v. Jesse Michael Boyd*, DC-22-23.

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 23, 2023, the Defendants appeared before the District Court and plead not guilty to the charged offenses. *Minutes* at p.1 (Ct. Doc. #38).
4. On March 8, 2023, the Defendants notified the State of their intent to assert the affirmative defenses of: (1) "Justifiable use of force by all four defendants (not to protect property, but to protect themselves and each other) (and to some extent, a child)"; (2) "Selective prosecution on the basis of religious intolerance and bias"; (3) "Selective enforcement on the basis of religious discrimination, intolerance and bias"; and (4) "Authority, in that the defendants used force to stop a violent criminal and make a citizens [sic] arrest." *Email* attached hereto as **Exhibit 1**.

## **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 preclude the Defendants from asserting the “affirmative defenses” of “selective prosecution” and “selective enforcement”.**

**1. Selective prosecution.**

The Montana Supreme Court has held:

A prosecutor has broad discretion in determining whether or not to prosecute. Thus, the conscious exercise of some selectivity in the enforcement of criminal laws, without more, does not constitute a violation of constitutional rights. A person asserting that his or her constitutional rights have been violated by selective prosecution

must allege and prove that the selection was deliberately based on an unjustifiable standard such as race, religion or other arbitrary classification.

*State v. Harris*, 1999 MT 115, ¶ 23, 294 Mont. 397, 983 P.2d 881 (Internal citations omitted).

Analyzing the significant burden of proof that a defendant must show in a selective prosecution claim, the Montana Supreme Court has held that the reviewing court “must presume the regularity of prosecutorial decisions.” *In re Himes*, 2013 Mont. LEXIS 299 (2013), 8-14<sup>2</sup> (Citing *United States v. Armstrong*, 517 U.S. 456, 458-470, 116 S. Ct. 1480, 1483-89, 134 L.Ed. 2d 687 (1996); *Unites States v. Venable*, 666 F.3d 893-904 (4<sup>th</sup> Cir. 2012)). To prevail, the Defendants must show that the government declined to prosecute similarly situated suspects. *Id.* “[D]efendants are similarly situated when their circumstances present no distinguishable prosecutorial factors that might justify making different prosecutorial decisions with respect to them.” *Id.* “Recounted hearsay, and reported personal conclusions based on anecdotal evidence” is insufficient. *Id.*

## **2. Selective enforcement.**

The term “selective enforcement” is defined as:

The practice of law enforcement officers who use wide or even unfettered discretion about when and where to carry out certain laws; esp., the practice of singling a person out for prosecution or

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<sup>2</sup> *Writ of Supervisory Control*.

punishment under a statute or regulation because the person is a member of a protected group or because the person has exercised or is planning to exercise a constitutionally protected right.

*Black's Law Dictionary* 1390 (Bryan A. Garner, ed., 8<sup>th</sup> ed. 1999).

“Selective prosecution” and “selective enforcement” are closely related and rely on the same standard articulated in *Armstrong. United States v. Sellers*, 906 F.3d 848, 852-854 (9<sup>th</sup> Cir. 2018). The material difference between “selective prosecution” and “selective enforcement” is that “law enforcement officers do not enjoy the same strong presumption that they are constitutionally enforcing the laws that prosecutors do.” *Id.* “*Armstrong* was grounded in part on the special solicitude courts have shown to prosecutors' discretion” which “does not inevitably flow to the actions of law enforcement.” *Id.*

Addressing the significant burden of proof that a defendant must show in a selective enforcement claim, the Montana Supreme Court has held:

[T]he selective enforcement of a criminal law, without more, does not constitute a constitutional violation...The conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation absent an allegation and showing that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification such as sex, or the exercise of the First Amendment right to free speech.

*State v. Stanko*, 1998 MT 323, ¶ 51, 292 Mont. 214, 974 P.2d 1139 (Internal quotes and citations omitted).

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### **3. “Selective prosecution” and “selective enforcement” as affirmative defenses.**

The Defendants have indicated that they intend to rely on the “affirmative defenses” of “selective prosecution on the basis of religious intolerance and bias” and “selective enforcement on the basis of religious discrimination, intolerance and bias.” *Exhibit 1* at p.1. However, the Defendants attempt to assert “selective prosecution” and “selective enforcement” as an “affirmative defense” defies logic.

First, as the Defendants have been repeatedly made aware in prior briefing<sup>3</sup>, the Montana Supreme Court has held that affirmative defense is “one that admits the doing of the act charged, but seeks to justify, excuse or mitigate it.” *State v. R.S.A.*, 2015 MT 202, ¶¶ 32-37, 308 Mont. 118, 357 P.3d 899; *State v. Daniels*, 2011 MT 278, ¶¶ 5-28, 362 Mont. 426, 265 P.3d 623). As an affirmative defense neither the prosecution nor the enforcement can be “selective” where – as an affirmative defense – the Defendants must first admit the crime.

Second, “a selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution.” *Armstrong*,

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<sup>3</sup> State’s *First Motion in Limine* at pp. 10-11 (Ct. Doc. #22); State’s *Reply to Defendant’s Response to State’s Fourth Motion in Limine* at pp. 3-4 (Ct. Doc. #57).

517 U.S. at 463-464, 116 S. Ct. at 1486. As the United States Supreme Court made clear, “[a] selective-prosecution claim asks a **court** to exercise judicial power over a ‘special province’ of the Executive.” *Id* (Emphasis supplied). Similarly, “selective enforcement” is a violation of a defendant’s right to equal protection and due process. *State v. Maldonado*, 176 Mont. 322, 176 Mont. 322, 328-29, 578 P.2d 296, 300 (1978). Such questions involve a question of law. *State v. Haskins*, 255 Mont. 202, 208, 841 P.2d 542, 546 (1999) (“The existence of police misconduct as a violation of due process is a question of law for the court to decide.”); See also § 46-16-103(2), MCA (Questions of law must be decided by the court and questions of fact by the jury).

The District Court should grant the State’s *Motion in Limine* and preclude the Defendants from asserting “selective prosecution” or “selective enforcement” as affirmative defenses. Neither are affirmative defenses that can be presented to the jury under Montana law.

**c. The District Court should preclude the Defendants from asserting the “affirmative defense” of “authority, in that the defendants used force to stop a violent criminal and make a citizens [sic] arrest.”**

(1) A private person may arrest another when there is probable cause to believe that the person is committing or has committed an offense and the existing circumstances require the person’s immediate arrest. The private person may use reasonable force to detain the arrested person.

(2) A private person making an arrest shall immediately notify the nearest available law enforcement agency or peace officer and give custody of the person arrested to the officer or agency.

§ 46-6-502, MCA.

The term "arrest" means "taking a person into custody in the manner authorized by law." *City of Helena v. Parsons*, 2019 MT 56, ¶ 10, 395 Mont. 84, 436 P.3d 710 (Citing § 46-1-202(3), MCA). In the case of a citizen's arrest, "arrest" means restraining a person in accordance with § 46-6-502(1), MCA, pending immediate notification and relinquishment of the person to a law enforcement officer or agency. *See* §§ 46-1-202(3), 46-6-104(1), -502, MCA. *See also State v. May*, 2004 MT 45, ¶ 13, 320 Mont. 116, 86 P.3d 42 (elements of an "arrest" include authority to arrest; assertion of the authority with intent to arrest; and restraint of the person).

The Defendants have indicated that they intend to rely on the "affirmative defense" of "authority" in that the defendants used force to stop a violent criminal and make a citizens [sic] arrest." *Exhibit 1* at p. 1. Again, the Defendants attempt to assert "authority" as an affirmative defense defies logic.

First, each of the Defendants waived their right to remain silent and each provided a statement to law enforcement. *See Body Camera Footage* at 15:15 - 33:15, attached to State's *First Motion in Limine* (Ct. Doc. #22) as Exhibit 1; and *2<sup>nd</sup> Body Camera Footage* at 16:35 - 40:40, attached to State's *First Motion in Limine* as Exhibit 2. At no point did the Defendants ever indicate that they were attempting to make a citizen's arrest.

Second, the Montana Supreme Court has expressly held that “authority” to make a citizen’s arrest is not an affirmative defense. *Parsons* at ¶ 17. As the Supreme Court held:

As a matter of law, proof of the elements of an affirmative defense completely negates otherwise sufficient proof of the essential elements of a charged offense. In contrast to an affirmative defense, *Parsons* merely sought to present evidence and argument on his authority and intent to make a citizen's arrest as a non-affirmative fact defense, i.e., as a relevant factual consideration among others to undermine or rebut the State's proof on the elements of the charged offenses. In particular, *Parsons* sought to present evidence and argument supported by jury instruction that, rather than in negligent, willful, or wanton disregard of the safety of others, he acted reasonably under the circumstances within his lawful authority to make a citizen's arrest using reasonable force. With appropriate instruction that the authority to make a citizen's arrest does not necessarily preclude criminal liability but is nonetheless a factual matter the jury may consider, *inter alia*, in determining whether *Parsons* acted in negligent, willful, or wanton disregard of the safety of others beyond a reasonable doubt as alleged, the jury could have fairly assessed the sufficiency of the State's evidence as a matter of fact without prejudice to either party. Consequently, as a matter of law on the record in this case, *Parsons's* contemplated assertion of his authority and intent to make a citizen's arrest was not an assertion of an affirmative defense or immunity from criminal liability.

*Id* (Internal citations omitted).

*Parsons* did not involve a justifiable use of force claim. Instead, the Supreme Court determined that the defendant should have been permitted to present evidence related to his citizen’s arrest to rebut the mental state requirement of negligence in negligent endangerment. *Id*. Unlike *Parsons*, the Defendants have not been charged with an offense that has a mental statement

requirement of negligence.

Third, unlike “authority” to make a citizen’s arrest, the Defendants previously identified justifiable use of force as an affirmative defense. Again, as the Defendants have been repeatedly made aware in prior briefing<sup>4</sup>, “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)). As a matter of law the Defendants cannot assert justifiable use of force while at the same time arguing that they were attempting to make a citizen’s arrest.

The District Court should grant the State’s *Motion in Limine* and preclude the Defendants from asserting “authority” to make a citizen’s arrest as an affirmative defense. Authority is not an affirmative defense, and it is inconstant with the Defendants previously asserted affirmative defense of justifiable use of force.

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<sup>4</sup> State’s *First Motion in Limine* at pp. 10-11 (Ct. Doc. #22).

### III. Conclusion

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

1. Precluding the Defendants from asserting the “affirmative defense” of selective prosecution on the basis of “religious intolerance and bias.”
2. Precluding the Defendants from asserting the “affirmative defense” of “selective enforcement” based on “religious discrimination, intolerance, and bias.”
3. Precluding the Defendants from asserting the “affirmative defense” of “authority” based on their “attempt...to make a citizens arrest.”

DATED this 9<sup>th</sup> day of March, 2023.

By: 

THORIN A. GEIST  
DAVID BUCHLER

*Attorney for the State of Montana*

# **EXHIBIT 1**

## Geist, Thorin

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**From:** John Pierce <jpierce@johnpiercelaw.com>  
**Sent:** Wednesday, March 8, 2023 5:53 PM  
**To:** Geist, Thorin; alex@planalplaw.com  
**Cc:** David Buchler; Sowisdral, Maggie; Emily Lambert  
**Subject:** [EXTERNAL] RE: MADISON - SOM v. Boyd et al.

Thanks Thorin:

You need assume no such thing. We will have our proposed form sent to you shortly—in accordance with the law. A heads up: we object to your proposed *Omnibus Conference Order* form. Your checkmark idea goes far beyond the requirements of the rules and asks us to essentially concede to some of your legal conclusions which are very much contested under Montana law.

At minimum, we will be asserting four (4) affirmative defenses:

1. Justifiable use of force by all four defendants (not to protect property, but to protect themselves and each other) (and to some extent, a child);
2. Selective prosecution on the basis of religious intolerance and bias;
3. Selective enforcement on the basis of religious discrimination, intolerance and bias; and
4. Authority, in that the defendants used force to stop a violent criminal and make a citizens arrest. (Defendants relented and were frustrated in their citizens arrest by the presence of armed men who pointed guns directly at them and explicitly threatened to kill them.) (The fact that Madison County authorities, upon arrival, did not arrest either Brad Terrell or the gunmen further illustrates the selectiveness of the prosecution and enforcement in this case.)

Thanks so much for your hard work on this Thorin,

Respectfully,  
John M Pierce  
John Pierce Law  
P: (662) 665-1061  
21550 Oxnard Street  
3rd Floor PMB #172  
Woodland Hills, CA 91367



**JOHN PIERCE LAW**

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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 03-09-2023:

John M. Pierce (Attorney)  
21550 Oxnard Street  
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Woodland Hills CA 91367  
Representing: Jesse Michael Boyd  
Service Method: eService

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Service Method: eService

Electronically signed by Tia Corwin on behalf of Thorin Aidan Geist  
Dated: 03-09-2023