HON. LUKE BERGER
Montana Fifth Judicial District Court
Madison County
110 W. Wallace St.
P.O. Box 185
Virginia City, MT 59755
Tel: 406-843-4235

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 **OPINION & ORDER ON STATE'S MOTIONS IN LIMINE 1-3**

THIS MATTER comes before the District Court on the *First Motion in Limine*, *Second Motion in Limine*, and *Third Motion in Limine* filed by the State of Montana. The Defendants oppose the *Motions*, which have been fully briefed and are now ripe for a ruling.

The State of Montana is represented by Assistant Attorney General Thorin A. Geist and Madison County Attorney David Buchler. Defendants are

represented by Alexander L. Roots of Planalp & Roots, PC and John Pierce of John Pierce Law.

OPINION

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[1]). 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).

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

[1] 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.

Court granted the *Motion for Joinder* on January 4, 2023. *Or*. at pp. 1-5 (Ct. Doc. #13).

4. On January 20, 2023, the State filed their *First Motion in Limine* (Ct. Doc. #22), *Second Motion in Limine* (Ct. Doc. #24), and *Third Motion in Limine* (Ct. Doc. #25). The Defendants' response briefs (Ct. Doc. #s 45-47) were filed on February 17, 2023. The State's reply briefs (Ct. Doc. #s 50-52) were thereafter filed on February 27, 2023.

5. Trial in this matter has not yet been set.

II. Factual background.

a. Initial Report - Brad Terrell.

On November 12, 2022, at 2:48 p.m., Brad Terrell contacted the Madison County Dispatch Center (hereinafter "911") and reported that he had been assaulted and that a gun had been pulled on him. *Terrell 911 Audio*[2] at 0:00 to 22:00. Terrell provided his address, located in Madison County, Montana, and the license plate of his assailant's vehicle. *Id.* Terrell confirmed that he did not know the assailants, that they remained on scene, and were still armed. *Id.* Terrell stated that he had been "sucker punched," that his assailants had said that all Montana's were "baby killers," and described the pistol that had been pointed at his face. *Id.* A few minutes into the call Terrell explains that his

[2] Filed in support of the Defendants' *Response* briefs as Exhibit 10.

assailants had left the scene, with two males in the vehicle, and with two others walking down the road with a flag and a cross. *Id.*

b. Initial Report – Jesse Boyd.

At 2:53 p.m., the Defendant, Jesse Michael Boyd, called 911 and reported that he was a father, with a son and daughter, and that he had been attacked by "some locals" and that he was forced to pull a gun to defend himself and his child. *Boyd 911 Audio*[3] at 0:00 to 11:00. Boyd identified himself as a Christian Pastor that was walking across America. *Id.* Boyd confirmed that he was still armed with a .410-gauge pistol, noting his constitutional right to do so. *Id.* Boyd attempted to provide his location, and that he was he was pulled over on the side of the road. *Id.*

Boyd explained that they were walking down the highway and that their support vehicle had pulled onto the side of a road into a driveway to "switch up" walkers. *Id*. Boyd indicated that they had not gone onto private property, and that they explained why they were there when a guy pulled up in a white truck. *Id.* Boyd stated that the driver started cussing, threatened them, and that he thereafter got out of the vehicle and rushed at them. *Id.* Boyd stated that he was in fear for his life and the life of his child and that he pulled his gun ordering the driver to get back into his truck and leave. *Id.* Boyd stated

[3] Filed in support of the Defendants' *Response* briefs as Exhibit 9.

that multiple showed up, and that they threatened to ram their vehicle and kill them if they didn't leave. *Id.*

When asked, Boyd confirmed that he was not bleeding, that none of them had been hurt, and that the driver had gotten "the worst of that deal." *Id.* Boyd indicated that he contacted 911 because he believed the driver called 911 first, explained that he was following the two walkers, and that he would cooperate if he needed to. *Id.* Boyd confirmed that they were all armed, and that his firearm was loaded and in the driver's side door "where I can reach it quickly if needed." *Id.*

c. Initial Contact – Brad Terrell & Witnesses.

At 3:10 p.m., Warden Robbie Pohle of Montana Department of Fish, Wildlife, & Parks arrived on scene and made contact with Terrell. *Pohle Body Cam 1*[4] at 3:10 to 3:20 p.m. Warden Pohle spoke with Terrell and witnesses Dennis Crabtree and Thomas Ferguson and confirmed that nobody needed medical attention. *Id.* Ferguson and Crabtree stated that they had been witnessed the altercation. *Id.* Ferguson explained that the Defendants had been parked at the start of the driveway for quite some time before Terrell showed up and pulled into his driveway. *Id*. The Defendant, later identified as Jesse Boyd, said something to him through the window, at which time Terrell got out and walked up to him. *Id.* Terrell was standing there talking to Boyd

[4] Filed in support of the Defendants' *Response* briefs as Exhibit 1.

when the other Defendant, later identified as Trent, punched him and kept punching him until they tumbled into the ditch. *Id*. Terrell interjected stating that Boyd pulled a gun on him before the punch occurred. *Id.* Terrell stated that he did not know the Defendants who were "badmouthing" Montana stating that it's full of "baby killers." *Id.* Terrell stated that he invited them to leave several times, and that is when Trent punched him the head. *Id.* Terrell punched back, and they ended up in the ditch with someone hitting him in the back and side. *Id.* Terrell described the gun as a little two cylinder pistol, confirming that was the only firearm that he saw. *Id.* Crabtree and Ferguson stated that they didn't see the pistol. *Id.* Warden Pohle thereafter relayed the information that he obtained from Terrell and the witnesses to dispatch and the investigating officers. *Id.*

Warden Pohle recontacted Terrell and the witnesses and obtained written statements from them. *Pohle Body Cam 2*[5] at 3:20 to 3:42 p.m. Terrell said that he had just come back from Virginia City, that he pulled into the driveway of his business[6]. *Id.* Terrell could "barely squeak by them" and asked them to move because people with trailers wouldn't be able to get in. *Id.* Terrell said that Boyd got "twisted weird with me right away" arguing "who the fuck are you" before accusing Terrell of swearing in front of his kids. *Id.* Terrell

[5] Filed in support of the Defendants' *Response* briefs as Exhibit 2.
[6] The Dream Drift Motel & Flyshop.

stated that Boyd said something that provoked him, but he couldn't remember what it was specifically. *Id.* Boyd then said "come on" and Terrell exited the vehicle, and when he got around the front Boyd had the pistol "pointed right [at] my forehead." *Id.* Terrell said "you gonna, point a fucking gun at me" and that Boyd was an idiot because there was "probably" a rifle "on you right now." *Id.* Boyd told him that he had every right to protect himself from "baby killers in Montana." *Id.* Terrell again told them to leave, but Boyd refused. *Id.* Terrell explained that he didn't want to turn his back on Boyd since he just had a pistol pointed at him before Boyd handed it over to Trent. *Id.* Terrell said that he got closer and that he was going to try to get Boyd's bag because he didn't know what was in it, Boyd pushed him, and that is when Trent "sucked punched" him in the side of the head. *Id.* Terrell explained that he had Trent by the hoodie, and that the other two started hitting him when they went into the ditch. *Id.* Terrell noted that it was four on one, and that he didn't even know that the defendant's son, J.B.[7], was there. Terrell explained that he had already taken a picture of the license plate since he pulled a gun on him. *Id.*

d. Initial Contact – Traffic stop.

At 3:11 p.m., Deputies from the Madison County Sheriff's Office and Ennis Police Department executed a felony traffic stop on the Defendants'

[7] Age 12.

vehicle. *Winn Body Cam*[8] at 3:11 to 3:26 p.m. initiated a traffic stop. The Defendants were individually ordered out of their vehicle at gun point without incident. *Id.* The Defendants were detained during the investigation, were kept warm, and appear to have been treated respectfully. *Id.*

e. Initial Contact – Jesse Boyd.

At 3:27 p.m., Deputy Alec Winn of the Madison County Sheriff's Office spoke with the Defendant, Jesse Michael Boyd. *Id* at 3:27 to 3:44 p.m. Deputy Winn advised Boyd of his rights. *Id.* Boyd waived his right to remain silent and explained that they had been walking across America for the last year and half. *Id.* Boyd stated that Carter Phillips, was dating his daughter, Bethany Boyd, and that he had recently brought out J.B., who Boyd identified as his son. *Id.* Boyd explained that they were going to continue their walk for another week or two before going home for Thanksgiving. *Id.* Boyd explained that they had recently been basing out of Island Park, Idaho, and that they would make progress in stages before returning to Island Park in the evening. *Id.* Boyd explained that he is a Baptist Pastor from North Carolina that believes "our country has turned from God" and that he was walking to pray and to talk to folks along the way. *Id.* Boyd explained that he would carry a cross, and another would carry a flag, and that they had been doing this for a long time. *Id.* Boyd explained that this was the seventeenth state that they had crossed

[8] Attached to State's *First Motion in Limine* as Exhibit 1.

and they had some people threaten them along the way, but that by and large they didn't have any trouble. *Id.*

Boyd stated that day he had been walking with Eric Trent and his son, J.B., and that had just met up with their support vehicle, driven by his daughter, Bethany, and Phillips. *Id.* Boyd explained that they were going to swap out walkers, and that there wasn't a lot of places to pull off because of the snow. Boyd said that he warned Bethany to be careful about getting in deep snow. *Id.* Boyd explained that Bethany had pulled into Terrell's driveway, which had a fence with no-trespassing signage. *Id.* Boyd said that Bethany didn't go past the fence and that she pulled off to the side with enough room to get by. *Id.*

As they were swapping out walkers, a gentlemen pulled into the driveway driving a white pickup. *Id.* Boyd indicated that he didn't know the individual, Terrell, but that he was angry. *Id.* Boyd said that he pulled up, rolled down his window, and Boyd said "I'm sorry, there's not many places for us to pull off" and that they were going to leave. *Id.* Boyd said that was when Terrell went to "cussing and threatening" at which point said "Sir, you don't have to be an asshole about it." *Id.* Boyd said that Terrell then got out of the vehicle and rushed toward him. *Id.* Boyd said that he thought Terrell was going to tackle him, and that his son and daughter were in close proximity. *Id.* Boyd said that he was in fear for their lives "based on the words that came out of his

mouth." *Id.* Boyd explained that he did what he thought he needed to do, pulled a firearm, and told him to "step back" and that they "didn't want any trouble." *Id.* At this point, Terrell "kinda back up" and as it simmered down Boyd handed the firearm to Trent telling him it wasn't needed. *Id.* After a minute, Terrell started getting back in Boyd's face. *Id.* Boyd didn't move, but repeated that he didn't want any trouble. *Id.* Boyd explained that Terrell was out of control, cursing right up in his face. *Id.* Terrell then lunged at Boyd with his chest, and Boyd pushed him back stating "don't do it." *Id.* Boyd explained that it was at this point that Terrell attacked him, and that Trent came to his aid. *Id.* Boyd and Terrell went to the ground, but Trent and I restrained themselves as "trained martial artists." *Id.* When Terrell got up he came at us again, and at this point Boyd asked Phillips for his firearm, which he took and that he "just held it there like look man this is over." *Id.*

At this point, three or four guys came out there to aid Terrell and that they "basically told us that if you guys don't leave we're going to ram your car…we're going to kill you." *Id.* Boyd stated that he wasn't stupid, that there were three to five guys with trucks who meant business, and that Boyd then got into his car to leave. *Id.* Boyd explained that he kept trying to call 911, but they couldn't hear him at first. *Id.* Boyd explained that Phillips and Bethany were walking down the road, but that they decided to pull over and wait for

law enforcement. *Id.* Boyd explained that they had never had this happen, that they are "peaceful people" and that Terrell was a "jerk." *Id.*

Deputy Winn then asked Boyd what was said before Terrell got out of his vehicle. *Id.* Boyd said that "he just started cussing…f-you, you better get out of here or I'm gonna this" and that was when Boyd said "you don't need to be an asshole." *Id.* Boyd said they were packing up to leave, were not blocking the driveway, and that Bethany didn't know where else to pull off. *Id.* Boyd said that he understood Terrell, that we was trying to talk to him, but that when he rushed out of his truck "like a football player" he was in fear for his life. *Id.* Boyd said "I didn't know if he was armed, I didn't know if he went had a knife on him." *Id.* Boyd also said that the didn't know what Terrell said when he got out of the vehicle. *Id.*

Deputy Winn asked what Terrell said specifically to threaten Boyd. *Id.* Boyd indicated that he didn't' remember, that it was a lot of cussing, but that the thing that scared him was the way he came around the car "liked bowed up, like right for me." *Id.* When asked, Boyd confirmed that Terrell wasn't running, that he "was just moving fast" with "a look in his eye." *Id.* Boyd explained that when he pulled a weapon Terrell backed up, and that it "dissolved the situation." *Id.* Boyd confirmed that the pistol that he first pulled was different from the one that he got from Phillips, and that when he pulled it, he didn't think Terrell was a threat anymore. *Id.* Boyd said "I realized he

was more talk" and that the reason he gave the gun to Trent was that Terrell "might try to grab it from me." *Id.*

Boyd said that he slipped in the snow, that is why he went to the ground, and that is when Terrell got on top of him. *Id.* Boyd said that Terrell was warned five-six times, that he kept getting up in my face. *Id.* Boyd again confirmed that he didn't know Terrell, and that in that moment he did what he had to do, and "if it gets me into trouble so be it…" but that they restrained themselves pretty good. *Id.* Boyd said that he tried to call law enforcement, but that he didn't have service. *Id.* Boyd speculated that maybe Terrell just hated Christians, and when asked again confirmed that he did not know if Terrell had a firearm, and that he didn't see any. *Id.*

f. Initial Contact – Carter Phillips.

At 3:34 p.m., Deputy Dan Wyatt of the Madison County Sheriff's Office spoke with the Defendant Carter Phillips Boyd. *Wyatt Body Cam*[9] at 3:20 to 3:42 p.m. Deputy Wyatt advised Phillips of his rights which he waived. *Id.* When asked what happened, Phillips sated that there was "just a confrontation and a scuffle" and my friend was threatened by a guy in a truck." *Id.* Phillips said that he took his pistol out of his holster and gave it to Boyd, who then "brandished" it. *Id.* The guy backed up and appeared threatening, so Boyd held the firearm there. *Id.* Phillips explained that he and Bethany Boyd were

[9] Attached to State's *First Motion in Limine* as Exhibit 2.

parked at the intersection waiting to swap out walkers. *Id.* Boyd, Trent, and J.B. arrived at about the same time as a guy in a truck. *Id.* Phillips said that Boyd apologized for being there and that there weren't many places to pull off on the side of the road. *Id.* Terrell then started cussing him out before getting out of the vehicle. *Id.* Phillips said that when Terrell came around the vehicle, Boyd apologized for being there and asked him not to get upset. *Id.* Phillips said that Boyd warned Terrell not to lay a hand on me, and that they "bantered" back and forth for a while. *Id.* Phillips said that he couldn't see exactly what happened from where he was and speculated that Terrell shoved Boyd first. *Id.* After they parted, Terrell shoved Boyd to the ground and got on top of him. *Id.* Phillips speculated that Trent hit Terrell while they were on the ground. *Id.* When they regained their feet, Terrel said that he was going to call the police and that Boyd called the police right away as well. *Id.*

Deputy Wyatt asked Phillips what prompted Boyd to ask for his firearm. *Id.* Phillips stated that Boyd asked after the gun they got off the ground. *Id.* Phillips gave Boyd the weapon when they were still in close proximity to Terrell, noting that he wasn't actually in fear for his life. *Id.* Boyd speculated that Boyd wanted the firearm in case Terrell came at him again. *Id.*

g. Initial Contact – Bethany Boyd.

At 3:34, p.m., Deputy Wyatt contacted the Defendant Bethany Grace Boyd. *Id* at 3:34 to 3:40 p.m. Deputy Wyatt advised Bethany of her rights which

she waived. *Id.* Bethany explained that they were walking across America and that she was driving down the road with her boyfriend, Defendant Carter Phillips. *Id.* Bethany pulled over and noticed that there were some signs in the driveway warning of trespassing, so she stayed outside the gate and out of the way so they wouldn't block the entrance. *Id.* Bethany explained that they were waiting, and that her dad, Defendant Jessy Boyd, her little brother J.B., and Defendant Eric Trent, came walking up. *Id.* We were swapping out walkers, and that is when a guy, Terrell, pulled into the driveway in his pickup. *Id.* Bethany explained that Terrell seemed angry, and that he got out of his vehicle and was cursing. *Id.* Bethany said that Terrell's demeanor seamed "strange" and "scary" and that he came out of the car with his hands flailing, but that they couldn't see his hands and that they didn't know what he was going to do. *Id.* Bethany said that is when Boyd pulled his gun because they were in fear for their lives. *Id.* Bethany said that Boyd said "don't come any closer" and that he tried to explain what they were doing, but that Terrell remained angry. *Id.* Bethany said that they put the gun away, and that Terrell then got closer, at which point Boyd warned him not to come any closer. *Id.* Bethany said that Terrell "shoved up" against my dad, so my dad pushed Terrell, who slipped and went to the ground. *Id.* Terrell then got up angry, and swung on her dad. *Id.* Bethany stated that they are all trained in martial arts, that her dad used a technique on Terrell, and told him no more. *Id.* Bethany said that Terrell then

swung again and that is when everyone "tussled" to the ground. *Id.* Bethany said that is when Trent stepped in and when she began hitting Terrell with the flag. *Id.* Bethany said that when Terrell got up, he told them they needed to leave and that he was going to call the police. *Id.*

h. Initial Contact – Eric Trent.

At 3:40, p.m., Deputy Wyatt contacted the Defendant Eric Trent. *Id* at 3:40 to 3:48 p.m. *Id.* Deputy Wyatt advised Trent of his rights, which he waived. *Id.* When asked, Trent explained that he had been walking with Boyd and J.B, and that Phillips and Bethany were parked on the side of the road. *Id.* Trent said that Terrell, pulled up in his truck, rolled down his window and started yelling. *Id.* Trent couldn't hear what was being said, but that it was something about he couldn't get past them and that it was his property. *Id.* Terrell got out of truck and started coming over in an "aggressive manner" and by the time he got around the truck he pulled out his "little derringer his little pistol" and was like "just back off." *Id.* Trent confirmed that Boyd had the weapon pointed at Terrell's gut. *Id.* Boyd then handed the pistol to Trent stating that he didn't need it. *Id.* Terrell was hot, and was making threats, and Boyd was telling them what they were doing in Montana. *Id.* Terrell started pushing up on Boyd, who then pushed Terrell back, and at that time Terrell swung and missed Boyd, and Boyd then "returned with a tag" and I pushed him telling him to stop. Next thing I know they are on the ground, with Terrell

on top of Boyd, so Trent tried to push him off. Trent didn't know what he was going to do and admitted to hitting Terrell several times in the back of the head. *Id.* Terrell got a hold of Trent's hoodie, but Trent wiggled out of it. *Id.* When asked, Trent confirmed that he did not see any other firearms come into play. *Id.*

III. 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 State's *First Motion in Limine* (Ct. Doc. #22).

1. The Defendants shall be precluded 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.

The State argues that the District Court should prohibit the Defendants from relying on the affirmative defense of Justifiable Use of Force (hereinafter "JUOF") because the Defendants were not presented with an imminent threat of harm and because their conduct was not commensurate with the threat of harm the that they faced. *1st MIL* at pp. 5-10. In response, the Defendants argue that: (1) Terrell was seen reaching for a weapon and that Boyd was therefore entitled to draw and present his weapon; and (2) § 46-3-111(2), MCA, allowed Boyd to point a firearm at Terrell. *1st Response* at pp. 12. Each argument is addressed in turn.

i. The Defendants did not see Brad Terrell reach for a weapon.

The Defendants argue that they saw Terrell reach for a weapon. *1st Response* at p. 12. However, each of the Defendants waived *Miranda* and provided statements to law enforcement. None of the Defendants' reported

seeing Terrell reach for a weapon when he exited his vehicle, or at any other point during the altercation. In fact, Boyd specifically stated that he did not know if Terrell was armed. As such, the Defendants cannot show that Boyd's use of a firearm was commensurate to the threat that they faced, and the State's *Motion in Limine* on this issue is GRANTED.

ii. The plain language of § 45-3-111(c), MCA, does not authorize pointing a firearm at someone.

The Defendants' do not dispute that Boyd pointed a firearm at Terrell but argue that the "plain language" of "drawing or presenting a weapon" in § 45-3-111(2), MCA, encompasses the ability to point a firearm at someone. *1st Response* at p. 12 (Citing, without specification "every source known to defense counsel."). The State disagrees and argues that § 45-3-111(2), MCA, does not allow someone to point a firearm at someone until there is a commensurate and imminent threat.[10]

In the construction of a statute, "the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." § 1-2-101, MCA. "Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." *Id*. In addition, "the intention of the legislature is to be pursued if possible." § 1-2-102, MCA. When

[10] The interpretation of § 45-3-111(2), MCA, constitute the single most important issue in this case, and weighed heavily in the State's decision to charge the Defendants.

a general and particular provision are inconsistent, the latter is paramount to the former, so a particular intent will control a general one that is inconsistent with it. *Id.*

In 2009, the Montana Legislature enacted § 45-3-111, MCA, but did not define the terms "drawing" or "presenting." Similarly, the terms are not defined elsewhere in the Montana Code Annotated, and they have never been defined by the Montana Supreme Court. However, both the plain language of the statute and the legislative intent make clear that the terms "drawing or presenting" did **not** include the ability to point a firearm at someone.

First, the plain language of § 45-3-111(2), MCA, is not specific to firearms. Instead, the statute applies to the use of "weapons" which are defined as 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. The pointing of a firearm is not a novel concept, and it is something that the Montana Legislature has historically addressed. See e.g. § 45-5-201(1)(d), MCA (1988) ("Reasonable apprehension [of bodily injury]…shall be presumed in any case in which a person knowingly points a firearm at or in the direction of another, whether or not the offender believes the firearm to be loaded."). Here, the Legislature was not specific, and the District Court may not insert into the Statute what they omitted.

Furthermore, when read in context with § 45-3-102, MCA, the plain

language of § 45-3-111(2), MCA, becomes clear. Under Montana law, a person cannot use JUOF by pointing a firearm at someone (thereby committing the offense of assault with a weapon) until there is an "imminent threat of death or **serious bodily injury**…" § 45-3-102, MCA (Emphasis supplied). The Defendants' interpretation would eviscerate § 45-3-102, MCA, and would allow someone to point a firearm anytime there was a threat of bodily injury.

Second, the intent of the legislature is easily discernable and did **not** include the ability to point a weapon at someone. As initially introduced in the 61st Regular Session of the Montana Legislature, HB 228 provided:

> Section 3. Defensive display of firearm not offense.
> (1) A person who displays or shows a firearm for a harmless defensive purpose needs no justification for the display and may not be charged with or convicted of an offense for that display.
> (2) Displaying or showing a firearm includes but is not limited to:
> (a) openly wearing, carrying, or possessing a firearm;
> (b) verbally informing another that one possesses a firearm; and
> **(c) holding a firearm in a position so that the firearm does not point directly at another person.**
> (3) The right to show or display a firearm does not include the following situations, and justification is required for the display:
> **(a) intentionally or recklessly pointing a firearm directly at another person or sweeping another person with the muzzle of a firearm;**
> (b) intentionally discharging a firearm in the direction of another person; or
> (c) deliberately provoking another person into threatening words or actions when possessing a firearm.

HB 228 at § 3[11] (Emphasis supplied).

[11] https://leg.mt.gov/bills/2009/HB0299//HB0228_1.pdf.

HB 228 was heard in the House Judiciary Committee on January 22, 2009, and in the Senate Judiciary Committee on March 17, 2009. *House Audio* at 8:37:15 to 11:06:38[12]; *Senate Audio* at 8:24:55 to 11:37:00[13]. Representative Krayton Kerns sponsored the bill and stated during his introduction that § 3 was a "critical section" and that:

> [Y]ou as a law abiding citizen…can **present** in a defensive manner your weapon, **holding it to the ground** – you cannot waive it around…but a lot of the times just by merely showing that you are armed or stating that you are armed you can avoid…the confrontation.

Id[14] (Emphasis supplied).

Both the sponsor of HB 228 and its proponents[15] testified in support of HB 228, including the specific restriction on the ability to point a firearm at someone. *Id.*[16] Similarly, and although § 3 to HB 228 was hotly contested on other grounds, none of the opponents[17] to HB 228 testified against the specific

[12] January 22, 2009, House Judiciary Committee Hearing located online at: https://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20090122/-1/28467

[13] March 17, 2009, Senate Judiciary Committee Hearing located online at: https://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20090317/-1/23136.

[14] January 22, 2009, *House Audio* at 8:42:35 to 8:43:22.

[15] Proponents in the Senate include *inter alia*: (1) Gary Marbut, who appeared on behalf of the Montana Shooting Sports Association, Gun Owners of America, Citizen's Committee on the Right to Bear Arms, Western Montana Fish & Game Association, Weapons Collector's Society of Montana, Big Sky Practical Shooting Club, Custer Rod and Gun Club, Big Money Practical Shooting Association, Montana Women's Shooting Association, Richland County Sportsman, Montana Rifle & Pistol Association, and the Big Fork Gun Club; and (2) Brian Judy, who appeared on behalf of the National Rifle Association.

[16] *House Audio* at 8:37:15 to 9:47:25; March 17, 2009, *Senate Audio* at 8:24:55 to 9:15:55.

[17] Opponents in the Senate include *inter alia*: (1) Lincoln County Sheriff Daryl Anderson and Gallatin County Sheriff Jim Cashell on behalf of the Montana Sheriff's & Peace Officers Association; (2) Chief Mark Muir on behalf of the Montana Association of Chiefs of Police; (3) Training Coordinator John Schaeffer of the Great Falls Police Department on behalf of Montana Police Protective Association; (4) County Missoula County Attorney Fred Van Valkenburg; and (5) President Merl Rath and Lewis & Clark County Attorney on behalf of the Montana County Attorney's Association.

restriction on the ability to point a firearm at someone. *Id.*[18] In fact, none of the questions raised by the members of House and Senate Judiciary Committees questioned the restriction on the ability to point a firearm at someone. *Id.*[19]

Ultimately, HB 228 was amended several times[20] and became what is now § 45-3-111(2), MCA. However, upon questioning by Senator Jesse Laslovich discussing the amendments that were to be made, the sponsor of HB 228 testified that the original intent of HB 228 and § 3 would not be changed by any of the proposed amendments. *Id.*[21]

The intent of the legislature could not be more clear. The terms "drawing or presenting" in § 45-3-111(2), MCA, do not include the ability to point a firearm at someone until there exists an "imminent threat of death or serious bodily injury" in accord with § 45-3-102, MCA. The Defendants by their own admissions were never presented with such a threat, and they are not entitled to assert the affirmative defense of JUOF at trial. The State's *Motion in Limine* as to this issue is GRANTED.

//

//

[18] January 22, 2009, *House Audio* at 9:47:26 to 10:37:15; March 17, 2009, *Senate Audio* at 9:29:15 to 10:21:30
[19] January 22, 2009, *House Audio* at 10:43:15 to 11:06:38; March 17, 2009, *Senate Audio* at 10:21:31 to 11:37:00
[20] https://leg.mt.gov/laws/bills/20091/HB0299/HB0228
[21] March 17, 2009, *Senate Audio* at 10:57:00 to 10:59:40.

iii. JUOF does not apply to Defendants' Bethany Boyd, Carter Phillips, or Eric Trent

The Defendants' do not address the State's arguments as they pertain to Bethany Boyd, Carter Phillips or Eric Trent. The State's motion in limine should therefore be deemed well taken and Bethany Boyd, Carter Phillips and Eric Trent should be precluded from asserting the affirmative defense of JUOF. The State's *Motion in Limine* as these Defendants is therefore GRANTED.

2. The Defendants shall be precluded 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)).

The State argues that if the Defendants assert the affirmative defense of JUOF they must take the stand and unequivocally admit that they committed the offenses for which they have been charged. *1st MIL* at pp. 10-13. In response, the Defendants argue: (1) they are not required to make any admissions; and (2) that they cannot be compelled to incriminate themselves. *1st Response* at p.13. Specifically, the Defendants argue that Bethany and Phillips should not be required to admit that the flagpole and cross are weapons, and/or that the Trent aided or abetted bodily injury to Terrell. *Id.*

JUOF is an affirmative defense which the Montana Supreme Court has defined as a defense that "admits the doing of the act charged, but seeks to justify, excuse or mitigate it." *R.S.A.* at ¶¶ 32-37 (Citing *Daniels* at ¶¶ 5-28). As such, the Defendants cannot rely on JUOF and also question the elements of the offense charged. Each of the Defendants instead has a choice – they can rely on the affirmative defense of JUOF or they can enter a general denial, but they cannot do both. As the Montana Supreme Court has explained, "a defendant, in the course of [a] defense, must necessarily make a number of hard decisions many of which bear on the exercise or waiver of constitutional rights. *State v. Mont. Ninth Judicial Dist. Court*, 2014 MT 188, ¶ 13, 375 Mont. 488, 329 P.3d 603, "Often...the choice is a difficult one." *Id.* "However, it does not follow that such choices cannot be constitutionally required." *Id.*

The State's *First Motion in Limine* on this issue is GRANTED.

3. The Defendants shall be precluded 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).

The State argues that the Defendants should be precluded from relying on the character of the victim to support a JUOF defense because they admitted that they had no idea who Terrell was prior to November 12, 2022. *1st MIL* at pp. 13-15. In response, the Defendants argue that "evidence of a purported victim's prior initiation of aggression is relevant where the question of who the aggressor is at issue." *1st Response* at pp. 13-14 (citing *State v. Hanlon*, 38 Mont. 557, 100 P. 1035, 1039 (1909) and *State v. Jones*, 48 Mont. 505, 139 P. 441, 446-47 (1914)).

The cases cited by the Defendants are inapposite to the facts presented in this case. First, both *Hanlon* and *Jones* predate the Montana Rule of Evidence which now precludes character evidence from being used to show action in conformity therewith. *Sattler* at ¶¶ 40-43. Second, the defendant in *Hanlon* knew that his victim had made prior threats against his life. *Hanlon*, 38 Mont. at 557.

The victim's character for violence is not an "essential element" of a JUOF defense and therefore cannot be used to show that Terrel had a reputation for violence pursuant to Rule 405(a). *DeSchon* at ¶ 24. Similarly, the Defendants also cannot rely on specific conduct evidence pursuant to Rule

405(b) because such evidence 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. Here, the Defendants do not dispute that they had no idea who Terrell was prior to November 12, 2022, and they therefore cannot rely on the character of the victim in support of their JUOF defense. The State's *First Motion in Limine* on this issue is GRANTED.

4. The Defendants shall be precluded 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).

The State argues that the Defendants should be precluded from seeking a lesser included offense instruction at trial if they assert the affirmative defense of JUOF. *1st MIL* at pp. 16-17. In response, the Defendants argue that: (1) the State's request is premature; and (2) Trent should be entitled to a lesser included offense instruction. *1st Response* at pp. 14-15.

The Defendants fail to address the case law cited by the State or to present any legal authority to support their position. Regardless, Montana law is clear that a defendant who asserts an affirmative defense is not entitled to an instruction on a lesser included offense. The State's *Motion in Limine* on this issue is GRANTED.

5. The Defendants shall be precluded 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).

The State argues that the Defendants should be precluded from selectively asserting their Fifth Amendment protection if they testify at trial, and that if they make such an attempt their testimony should be stricken from the record. *1st MIL* at pp. 17-19. In response, the Defendants argue without citation to pertinent legal authority that the "rule [waiving 5th Amendment protection] is not absolute, and there are instances where the 5th Amendment may be asserted even where a defendant testifies in his own defense." *1st Response* at pp. 15.

As the United States Supreme Court has held 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, the State's *Motion in Limine* on this issue is GRANTED. If the Defendants testify the State shall be allowed wide leeway in the scope of cross-examination to prevent frustration of the truth-seeking function of the trial. If the Defendants thereafter refuse to answer the State's questions during cross examination their testimony shall be stricken from the record. *United States v. Panza*, 612 F.2d 432, 438-440 (9th. Cir. 1979).

6. The Defendants shall be precluded 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 moved the District Court for an order precluding the Defendants from seeking jury nullification at trial, which "…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." *1st MIL* at pp. 19-20. In response, the Defendants suggest that it is "unclear…what the State has in mind" but that they will not seek "'jury nullification' if that term means seeking that a jury acquit a guilty offender improperly." *1st Response* at p. 15. Having therefore conceded the issue, the State's *Motion in Limine* is GRANTED.

//

b. The State's *Second Motion in Limine* (Ct. Doc. #24).

i. The District Court should preclude the Defendants from discussing their religious beliefs or opinions at trial.

1. Montana Rule of Evidence 610.

Montana Rule of Evidence 610 provides that "[e]vidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by their nature the witness's credibility is impaired or enhanced." The Montana Supreme Court has never addressed Rule 610, which identical to its federal counterpart.

Federal Rule 610 "expressly forecloses inquiry into the witness's religious beliefs or opinions to show that they affect his or her character for truthfulness." 4 Weinstein's Federal Evidence § 610.02 (2021). "For purposes of Rule 610, no distinction exists between a challenge to a witness's credibility on the ground of his or her religious beliefs and a challenge on the ground of actions relating to those beliefs." *Id* at § 610.02. Rule 610 exists "to guard against the prejudice which may result from disclosure of a witness's faith." *United States v. Sampol*, 636 F.2d 621, 666 (D.C. Cir. 1980).

However, "[e]vidence probative of something other than veracity is not within the prohibition of the rule." 3 J. Weinstein and M. Berger, Weinstein's Evidence § 610-2 (1985); See also *United State v. Davis*, 779 F.3d 1305, 1309-1311 (11th Cir. 2015) (Allowing evidence that witness held title of "chaplain"

was not abuse of discretion where no evidence of religious beliefs or opinions was offered); *United States v. Teicher*, 987 F.2d 112, 118-119 (2nd Cir. 1993) (Inquiry into religious beliefs for purposes of showing interest or bias because of them is not within the Rule's prohibition.)

In *Teicher*, the U.S. District Court was asked to determine whether a witness's views were probative of bias. *Id.* The District Court asked the witness about whether anything in his religious views made him feel that he should help in the prosecution. *Id.* The witness:

> [O]ffered three reasons for his reluctance: first, it caused him personal disruption and aggravation; second, he considered the [the Defendant's] family his friends; and, third, because "one of the cardinal rules is . . . Jews aren't supposed to turn other Jews over.

Id.

Based on this, the District Court ruled that the witnesses' messianic beliefs were not probative of bias and therefore were inadmissible under Fed. R. Evid. 610. *Id.* The Second Circuit Court of Appeals concluded that the District Court's ruling "was not only proper, it was in fact compelled by Fed. R. Evid. 610." *Id* (citing *United States v. Sampol*, 636 F.2d 621, 666 (D.C. Cir. 1980)).

The State moves the District Court for an order prohibiting the Defendants from discussing their religious beliefs or opinions at trial to impair the credibility of a witness for the State, or to enhance the Defendants'

credibility or of a defense witness pursuant to Rule 610. If the Defendants intend on introducing evidence of interest or bias, any such examination should occur outside the presence of the jury for a Rule 610 determination by the District Court.

a. Relevance.

Even though Rule 610 does not preclude all forms of evidence with respect to religion, the District Court is not "without tools to control improper use of this kind of evidence." *Davis*, 779 F.3d at 1309-1311. The Eleventh Circuit Court of Appeals held:

> Federal Rule of Evidence 403 allows a court to exclude evidence "if its probative value is substantially outweighed by a danger of . . . unfair prejudice." This is a far better tool for dealing with issues of this kind.

Id.

"Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." M. R. Evid. 401. "Relevant evidence may include evidence bearing upon the credibility of a witness or hearsay declarant." *Id.* "All relevant evidence is admissible, except as otherwise provided by constitution, statute, these rules, or other rules applicable in the courts of this state." M. R. Evid. 402. "Evidence which is not relevant is not admissible." *Id.* "Although relevant, evidence may

be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.*

"A person's beliefs, superstitions, or affiliation with a religious group is properly admissible where probative of an issue in a criminal prosecution." *United States v. Beasley*, 72 F.3d 1518, 1527 (11th. Cir. 1996). Analyzing probative examples, the Hon. Thomas M. McKittrick of the Montana Eighth Judicial District Court stated:

> In *State v. Stone,* 151 Ariz.455, 728 P.2d 674 (1986*)*, the defendant filed a petition for post-conviction relief arguing that the interjection of references to religion at trial violated Rule 610 Arizona Rules of Evidence. (Rule 610 Ariz.R.Evid. is identical to Montana's Rule 610 M.R.Evid.) In Stone, the Arizona Supreme Court found that the references to religion were not to enhance a witness's credibility but went directly to the **identification** of petitioner as the intruder. The Arizona Supreme Court stated that if the admission of religious information is "probative of something other than veracity, it is not inadmissible simply because it may also involve religious subject as well.
>
> In [*Beasley*], a defendant appealed on grounds that the admission of his religious practices and beliefs was a violation of Rule 610, Federal Rule of Evidence. The United States Court of Appeals for the Eleventh Circuit held that a person's beliefs, superstitions, or affiliation with a religious group is properly admitted where probative of an issue in a criminal prosecution. In Beasley the government agreed that it would have been improper to attack [a] witnesses' credibility with their religious beliefs by suggesting that because of those beliefs, their testimony was untrustworthy.

> However, in Beasley the government was allowed to show the background of the RICO enterprise.[22]

State v. Reavley, 2003 ML 821, 135-136, 2003 Mont. Dist. LEXIS 2525[23] (Internal citations omitted); *United States v. Hoffman*, 806 F.2d 703, 716 (1986) (Will, dissenting) ("Religion is a highly emotional issue with a natural tendency to play upon a jury's passions.).

The State argues that the Defendants should be precluded from discussing their religious beliefs or opinions at trial. *2nd MIL* at pp. 5-9. In response, the Defendants state that they "do not intend to make religion any part of their defense" but that they should be permitted to discuss their religious beliefs: (1) to explain how they got to Madison County; and (2) to explain the motive of Brad Terrell and the Madison County Sheriff's Office in the context of their self-defense claim. *2nd Response* at pp. 11-12.

i. Limited testimony about how the Defendants came to be in Madison County should be admissible.

The Defendants argue that they should be permitted to discuss their religious beliefs to explain how they got to Madison County. *Id.* The State has indicated that it is not seeking to exclude testimony that the Defendants are Christian missionaries, or that they were walking across the United States in

[22] The Eleventh Circuit noted that the "evidence admitted was highly relevant to the jury's understanding of the existence, motives, and objectives of the RICO conspiracy and the means by which it was conducted" because the Defendant "used [his] religion as a means of exhorting followers to commit the racketeering acts..."

[23] The State acknowledges that the *Reavley* is a District Court decision and is not binding, but is nevertheless instructive.

support of their beliefs. *2nd Reply* at p.2. The State agrees that those facts are necessary to explain how the Defendants came to be in Madison County on November 12, 2022. The District Court agrees that these facts are relevant and should be admissible at trial. Testimony about the specific nature of the Defendants beliefs and/or why those beliefs prompted their walk across the United States are not relevant to the crimes charged and are not admissible.

ii. The Defendants are not entitled to introduce evidence of their religious beliefs to speculate on the motives of Brad Terrell or the Madison County Sheriff's Office.

Despite acknowledging that the Defendants "do not intend to make religion any part of their defense" they nevertheless argue that their religious beliefs were "likely the motivation behind Bradley Terrel's raging aggression against the [D]efendants" and by the Madison County Sheriff's Office to "coverup civil rights violations and possible hate crimes." *2nd Response* at p. 11 (Citing *State v. Blatz*, 2017 MT 164, ¶ 14, 388 Mont. 105, 398 P.3d 247). The State's *Second Motion in Limine* on this issue shall be GRANTED for the following reasons:

1. Bradley Terrell - Rule 404(a).

> Generally, "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion," M. R. Evid. 404(a), with an exception for "[e]vidence of a pertinent trait of character of the victim of the crime offered by an accused." When character

evidence is admissible, Rule 405 provides the methods of proving character. Rule 405 provides:

> (a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person 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 a 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.

Daniels at ¶ 23 (Internal citations omitted).

The Defendants may not introduce evidence that their religious beliefs were "likely the motivation" behind Mr. Terrell's "raging aggression" under Rule 404(a) because they admitted that they had never met Terrell before November 12, 2022. The Montana Supreme Court has made clear that evidence of the victim's past is "irrelevant and inadmissible," where the defendants can't establish that their knowledge led them to use the force that they employed. *Daniels* at ¶ 26 (Citing *State v. Montgomery*, 2005 MT 120, ¶¶ 19-20, 327 Mont. 138, 112 P.3d 1014).

2. Bradley Terrell - Rule 404(b).

> Rule 404 generally excludes evidence of a person's character or character trait when its purpose is to prove the person acted in conformity with that trait on a particular occasion. M. R. Evid. 404(a). Under Rule 404(b), however, "[e]vidence of other crimes, wrongs, or acts" may be admissible for non-propensity purposes, such as "proof of motive, opportunity, intent, preparation, plan,

> knowledge, identity, or absence of mistake or accident." Rule 404(b) aims to "ensure jurors do not impermissibly infer that a defendant's prior bad acts make that person a bad person, and therefore, a guilty person." A defendant may introduce "reverse 404(b) evidence" of another witness's crimes or conduct to inculpate another person, thus exculpating himself.

State v. James, 2022 MT 177, ¶ 12, 410 Mont. 55, 517 P.3d 170 (citing *State v. Clifford*, 2005 MT 219, ¶ 44, 328 Mont. 300, 121 P.3d 489).

However, the Montana Supreme Court has also held:

> Other acts evidence is admissible for a permissible Rule 404(b) purpose only if the proponent can clearly articulate how that evidence fits into a chain of logical inferences, no link of which may be the inference that the defendant has the propensity to commit the crime charged. A defendant may not introduce reverse 404(b) evidence where it lacks connection with the crime, is **speculative** or remote, or does not tend to prove or disprove a material fact in issue at the defendant's trial.

James at ¶ 13 (Internal quotes omitted; emphasis supplied).

The Defendants may not introduce evidence that their religious beliefs were the "likely the motivation" behind Terrell's "raging aggression" because such evidence is speculative. As noted above, the Defendants had never met Terrell, and Boyd specifically confirmed that he did not know if the altercation was religiously motivated. The Defendants cannot show that their religious beliefs were what motivated Terrell's actions on November 12, 2022. To suggest otherwise is beyond disingenuous.

3. Madison County Sherriff's Office.

The Defendants fail to cite any authority to suggest that their religious

beliefs were the basis for their belief that the Madison County Sheriff's Office attempted to "cover up civil rights violations and possible hate crimes." *2nd Response* at p. 11. At best, the Defendants argument is speculative and would constitute a clear violation of Rule 610.

iii. The Defendants shall not inquire into the religious beliefs and opinions of prospective jurors during voir dire.

> It has long been held in this state and other jurisdictions that a trial judge has wide discretion in conducting voir dire. We find that the trial court here properly limited inquiry into the jurors' belief in God rather than detailed inquiries into the prospective jurors' secular beliefs. In *Yarborough v. United States* (1956), 230 F.2d 56, cert. denied 351 U.S. 969, 76 S. Ct. 1034, 100 L. Ed. 1487, the court held that a defendant prosecuted for tax evasion was not entitled to voir dire jurors on their religious beliefs. Given the wide discretion allowed a trial judge, the lack of relevancy of religion to the issues at bar, and the permitted inquiry into the jurors' general belief in God, defendant's contention is without merit.

State v. Poncelet, 187 Mont. 528, 541, 610 P.2d 698, 706 (1980) (Internal citations omitted).

The Minnesota Supreme Court addressed the issue of religious inquiry during voir dire in *State v. Davis*, 504 N.W.2.d 767, 771, 772 (Minn. 1993). The Minnesota Court held:

> Ordinarily at common law, inquiry on voir dire into a juror's religious affiliation and beliefs is irrelevant and prejudicial and to ask such questions is improper. Questions about religious beliefs are relevant only if pertinent to religious issues involved in the case, or if a religious organization is a party, or if the information is a necessary predicate for a voir dire challenge. The trial court, in the exercise of its discretion, controls the questions that can be

> asked to keep the voir dire within relevant bounds…proper questioning for a challenge should be limited to asking jurors if they knew of any reason why they could not sit, if they would have any difficulty in following the law as given by the court, or if they would have any difficulty in sitting in judgment.

Id at 772 (Cited with approval in *Davis v. Minn.*, 511 U.S. 1115, 1115-1116, 114 S. Ct. 2120, 128 L. Ed. 2d 679 (1994), Ginsburg, concurring).

The State argues that the Defendants should be precluded from inquiring into the religious beliefs and opinions of prospective jurors during voir dire. *2nd MIL* at pp. 10-11. In response, the Defendants concede that they "do not intend to make religion or religious beliefs a part of their defense," but suggest that they are entitled to wide latitude during voir dire to ask such questions. *2nd Response* at pp. 12-13 (Citing *Bockman v. Fryberg*, 2018 MT 202, 392 Mont. 350, 424 P.3d 600).

Specifically, the Defendants argue that they will inquire whether the prospective jurors "hold any biases against missionaries that might hinder or prevent them from judging the evidence fairly." *2nd Response* at p.12. The State does not take issue with this question, and agree that it falls within the permissible scope of voire dire. However, the Defendants also specifically state that they intend to inquire: (1) about the jurors own religious experiences; and (2) whether they can set aside those religious views and experiences. *Id.* Such questions are improper given the Defendants' concession that they do not intend to make religion a part of their defense. *Davis*, 504 N.W.2.d at 771-772

(Cited with approval in *Davis v. Minn.*, 511 U.S. 1115, 1115-1116, 114 S. Ct. 2120, 128 L. Ed. 2d 679 (1994), Ginsburg, concurring). The *State's Second Motion in Limine* on this issue is GRANTED.

c. The State's *Third Motion in Limine* (Ct. Doc. #25).

i. Witnesses shall be excluded 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. *3rd MIL* at pp. 5-6. 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. 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 Defendants do not oppose the State's request. *3rd MIL* at p.2. As such, the State's *Third Motion in Limine* on this issue is GRANTED.

ii. The Defendants shall be precluded from eliciting testimony and/or presenting argument as to the offenses charged.

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 argues that the Defendants should be precluded from eliciting testimony and/or from presenting argument as to the offenses charged. *3rd MIL* at pp. 6-7. In response, the Defendants argue that: (1) they have a right to challenge the nature of the investigation by the Madison County Sheriff's Office; and (2) to question why Terrell wasn't charged with "assault and hate crimes." *3rd Response* at pp. 12-13.

The Defendants first argue that they are entitled to show the complete, improper, sloppy, biased, deceptive and slipshod nature of the investigation in

this case. *Id.* As authority, the Defendants cite to *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed 2d 281, arguing that the "defendants may show bad faith investigations, for example those conducted out of animosity the defense or deceptively secure a conviction."

In *Youngblood*, a kidnapping and molestation case, the police failed to refrigerate a victim's clothing and to perform tests on semen samples that were seized. *Id.* Due to the failure a police criminologist, the police were unable to obtain information about the identity of the victim's assailant. *Id.* The United States Supreme Court found that the failure by the police was, at worst, negligent and that there was no suggestion of bad faith on the part of the police. *Id.*

The Defendants reliance on *Youngblood* is misplaced. The issue in *Youngblood* was not whether evidence of bad faith could be presented to the jury, but whether the case should be dismissed based on a violation of the Defendants due process rights. The Montana Supreme Court has held that the existence of police misconduct as a violation of due process is a question of law for the court to decide. *State v. Haskins*, 255 Mont. 202, 209, 841 P.2d 542, 546 (1992). The presentation of such evidence to the jury would be reversible error.

The Defendant's next argue that they have a right under the "Sixth Amendment and the Rules of Evidence" to inquire why others were not charged

with similar offenses. *3rd Response* at pp. 12-13. However, neither the Sixth Amendment nor the Rules of Evidence allow for such an inquiry. First, the discretion to charge specific offenses rests solely with the prosecution and are a matter of prosecutorial discretion. *Beavers* at ¶ 36; *Small v. Mont. Fourth Judicial Dist. Ct.*, 395 Mont. 523, 437 P.3d 115 (2019)[24] (Writ of Supervisory Control affirming the Fourth Judicial District Court's decision to declare a mistrial after defense counsel attempted to question the charges.) Second, any such inquiry would be irrelevant to whether the Defendants committed the charged offenses. M. R. Evid. 402.

The State's *Third Motion in Limine* is GRANTED.

iii. The parties shall be precluded 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 argues that the parties should be precluded from commenting on the failure of the other to call a witness. *3rd MIL* at p.7. In response, the

[24] Published in table format.

Defendants argue that there are "numerous aspects of the Madison County investigation which merit severe and vigorous inquiry" and that if the State fails to call a witness, they should be entitled to a missing witness inference instruction. *3rd Response* at pp. 13-14. The Defendants do not address § 46-15-325, MCA, and instead cite to *United States v. Ramirez*, 714 F.3d 1134, 1139 (9th Cir. 2013) and *Washington v. Perez*, 430 N.J. 121, 62 A.3d 335 (N.J. Super App. 2013) for authority.

Both *Ramirez* and *Perez* stand for the proposition that:

> A missing witness instruction is appropriate if two requirements are met: (1) the party seeking the instruction must show that the witness is peculiarly within the power of the other party and (2) under the circumstances, an inference of unfavorable testimony [against the non-moving party] from an absent witness is a natural and reasonable one.

Id (Internal quotation marks and citations omitted).

The burden is on the party seeking the missing witness instruction to make a prima fascia showing demonstrating the necessary elements. *United States v. Allison*, 765 Fed. Appx. 252, 253 (2019). However, just because a witness is identified on a witness list does not mean that they are peculiarly within the control of the party. For example, the Ninth Circuit has held that the United States was peculiarly within the control of the government when they caused the witness to be deported. *United States v. Leal-Del Carmen,* 697 F. 3d 964, 975 (9th Cir. 2012). In contrast, a witness was found not to be within

the peculiar control of the government where the witness went missing and was equally unavailable to both sides. *United States v. Noah*, 475 F. 2d 688, 691-692 (1973). Similarly, as *Ramirez* makes clear, no "natural and reasonable inference" can be drawn from the mere absence of a government witness. *Ramirez*, 714 F.3d at 1137.

The State's *Third Motion in Limine* on this issue is GRANTED. If either party intends to seek a missing witness instruction, they shall make a prima facie showing meeting the requisite elements outside the presence of the jury.

iv. Counsel shall be precluded 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 argues that both sides should be precluded form presenting argument during their opening statements, and/or from referring to inadmissible evidence. *3rd MIL* at pp. 8-9. In response, the Defendants argue, without citation to authority, that they are entitled to "discuss the application of the facts to the law." *3rd Response* at pp. 15. However, Montana law does not permit the jury to be instructed on the law until after the close of evidence. § 46-16-401, MCA. As such, a discussion of the application of the facts to the law is precisely what defense counsel may not do in opening statements. The State's *Third Motion in Limine* on this issue is hereby GRANTED.

v. Counsel shall be precluded 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 State argues that counsel should not be permitted to act as a witness in this case. *3rd MIL* at pp. 9-10. The Defendants don't oppose the State's request but argue that counsel should be permitted to make offers of proof during the trial. *3rd Response* at p.15. The State has clarified that it did not intend to preclude either party from making an offer of proof. *Third Reply* at 7. As such, the State's *Third Motion in Limine* on this issue is GRANTED. Any offers of proof shall be made outside the presence of the jury in accord with M. R. Evid. Rule 103(c).

//

vi. Speaking objections shall be limited 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." *3rd MIL* at pp. 10-11. The Defendants do not oppose the State's request. *3rd. Response* at p.2. As such, the State's *Third Motion in Limine* on this issue is GRANTED. 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 jury will be excused while the discussion occurs.

vii. The parties shall be precluded from introducing 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.

The State argues that the District Court should preclude the introduction of defenses, objections, and/or requests that are not identified by the deadline in the *Omnibus Conference Order*. *3rd MIL* at pp. 11-12. In response, the Defendants argue that they have the right to raise issues at any time, without citation to authority, and that the issue is premature. *3rd Response* at pp. 16.

First, the State is entitled to a fair trial and seeks to hold the Defendants to the requirements of § 46-13-101, MCA. Defenses, objections, and requests which are not asserted by the requisite deadlines are waived and cannot be introduced unless the Defendants first obtain relief from their waiver upon a showing of good cause. Defendants counsel has twice asserted in open court an unfamiliarity with Montana law, and such ignorance does not constitute good cause to grant relief from a waiver. "Good cause" is defined as a "legally sufficient reason" and refers to "the burden placed on a litigant (usu. by court rule or order) to show why a request should be granted or an action excused."

City of Helena v. Roan, 2010 MT 29, ¶ 13, 355 Mont. 172, 226 P.3 601 (Citing *Black's Law Dictionary* 251 (Bryan A. Garner ed., 9th ed., West 2009)). The State has indicated that it has no objection to being held to the same standard.

Second, the State's motion in limine is not premature. As with many of the issues presented in the State's three motions in limine, the Defendants appear to be ignorant of the requirements of Montana law. Remedying this ignorance early promotes judicial economy and will allow the parties to efficiently prepare for trial if the case cannot be resolved beforehand.

The State's *Third Motion in Limine* on this issue is GRANTED and shall apply equally to both sides.

viii. 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).

The State argues that witnesses should be permitted to give collective fact/shorthand rendition opinions by describing their sensory observations of, but that 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. *3rd MIL* at pp. 12-13. The Defendants do not oppose the State's request. *3rd Response* at p.2. As such, the State's *Third Motion in Limine* on this issue is GRANTED.

ix. Witnesses shall be precluded 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 argues that the District Court should preclude the Defendants

from eliciting testimony as to the credibility of another witness. *3rd MIL* at p. 13. In response, the Defendants agree that they may not bolster a witnesses' testimony, but argue that they may impeach the credibility of a witnesses pursuant to Montana Rule of Evidence 607(a). *Response* at pp. 16-17.

The Defendants reference to Rule 607(a) is misplaced. Rule 607(a) allows for the impeachment of a witness through cross examination "to prove that a fact which the witness asserted or relied upon in [his or her] testimony is not true." *3rd Response* at pp. 16-17 (citing *McGee* at ¶¶ 18-19). Rule 607(a) does serve as a mechanism for a defendant to introduce improper opinion testimony regarding the credibility of a witness. The State's *Third Motion in Limine* on this issue is GRANTED.

x. The parties shall be precluded 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 argues that the Defendants should be precluded from introducing improper character evidence that is not related to a witness's reputation for truthfulness at trial, and that they should be required to obtain a ruling on the admissibility of any such evidence outside the presence of the jury. *3rd MIL* at pp. 13-14. In their response the Defendants don't contest the State's request, but suggest that the State is somehow attempting to deprive them of their right to a fair trial by not seeking to apply the rule to itself. *3rd Response* at pp. 17-18. In their reply, the State indicates that it has no objection to being held to the same standard. *3rd Reply* at 10. As such, the State' *Third Motion in Limine* is GRANTED and shall apply to both parties.

xi. The parties shall be precluded 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 argues that both sides should be precluded from eliciting testimony and from presenting argument on the level of offense charged, including the ramifications of punishment. *3rd MIL* at pp. 14-15. In response, the Defendants argue that they have been improperly charged and that it would be a "due process" violation to prohibit them from presenting this issue to the jury. *3rd Response* at p.18.

The Defendants' argument is devoid of analysis or citation to pertinent authority, and it is neither the role of the District Court nor the State to do the Defendants' analysis for them. Regardless, the issue of whether the Defendants' have been properly charged is a question of law that cannot be presented to the jury. *State v. Tichenor*, 2002 MT 311, ¶ 18, 313 Mont. 95, 60 P.3d 454; § 26-1-201, MCA (All questions of law…must be decided by the court). The State's *Third Motion in Limine* on this issue is GRANTED.

xii. The Defendants shall be precluded 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 State argues that the District Court should preclude the Defendants from arguing that they were ignorant of the law, including Montana's JUOF statutes. *3rd MIL* at ¶¶ 15-16. In response, the Defendants appear to argue that they should be permitted to make such an argument. *3rd Response* at pp. 18-19. As authority, the Defendants rely on *Morrissette v. United States*, 342 U.S. 246, 250-52, 72 S. Ct. 240, 96 L. Ed. 288 (1952), but fail to analyze the case.

In *Morrissette*, the defendant was charged with stealing government property after he took spent bomb cases from an Air Force bombing range. *Id*

342 U.S. at 247-63. At trial the defendant admitted that he took the property but argued that he thought the bomb cases were abandoned and that he did not have the intent necessary to steal government property. *Id.* The trial court refused to instruct on the issue of intent concluding that the crime was ostensibly a strict liability offense. *Id.* The defendant was convicted at trial, which was thereafter affirmed by the Sixth Circuit Court of Appeals who noted that Congress failed to include the element of criminal intent when it enacted the law. *Id.*

The United States Supreme Court granted *certiorari* and reversed the conviction holding that Congress' failure to include an intent element could "not be construed as eliminating that element from the crime denounced." *Id.* Addressing the requirement of intent, the Supreme Court held:

> The unanimity with which they have adhered to the central thought that wrongdoing must be conscious to be criminal is emphasized by the variety, disparity and confusion of their definitions of the requisite but elusive mental element. However, courts of various jurisdictions, and for the purposes of different offenses, have devised working formulae, if not scientific ones, for the instruction of juries around such terms as "felonious intent," "criminal intent," "malice aforethought," "guilty knowledge," "fraudulent intent," "willfulness," "*scienter*," to denote guilty knowledge, or "*mens rea*," to signify an evil purpose or mental culpability. By use or combination of these various tokens, they have sought to protect those who were not blameworthy in mind from conviction of infamous common-law crimes.

Id, 342 U.S. at 252.

The Defendants' reliance on *Morrissette* is misplaced because the

Supreme Court did not deal with the defendant's ignorance of the law. Instead, *Morrisette* dealt with the absence of a mental state requirement in the charged offense. Unlike *Morrissette,* the Defendants' have been charged with the offense of assault with a weapon, which contains the mental state requirement that the person acted "purposely or knowingly." § 45-5-213(1), MCA; *State v. Dr. Chris Arthur Christensen*, 2020 MT 237, ¶ 107, 401 Mont. 247, 472 P.3d 622 (Beginning in 1973, the Montana Legislature modified the *mens rea* culpability requirements, adopting "purposely" and "knowingly" to embody "intent."); *State v. Sharbono*, 175 Mont. 373, 393, 563 P.2d 61, 72 (1977).

The Defendants have indicated that they will rely on the affirmative defense of JUOF at trial. As the Montana Supreme Court has repeatedly held, "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)). The Defendants cannot concede the issue of mental state while at the same time claiming to be ignorant of it. The State's *Third Motion in Limine* on this issue is GRANTED.

//

xiii. 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).

The State anticipated that the Defendants will assert the affirmative defense of JUOF, and has confirmed that they will identify all rebuttal witnesses who will be called to directly rebut that defense in accord with § 46-15-322(6), MCA. The State seeks an order clarifying that they are not under an obligation to disclose rebuttal witnesses for any other purpose. In response, the Defendants argue: (1) that they are entitled to notice of all rebuttal witnesses; and (2) that they are entitled to a proffer before the impeachment witness may testify. *3rd Response* at pp. 19-20.

Regarding the first issue, the Defendants cite to *Weitzel* as authority for the proposition that the notice requirements set forth in § 46-15-322(6), MCA, are activated anytime "the testimony offered is capable of 'prejudice to the defendant.'" However, *Weitzel* neither contains such a quote nor stands for such a proposition. Under Montana law, including *Weitzel*, the State has no obligation to disclose rebuttal witnesses who are called for purposes other than to rebut a declared affirmative defense and the State's *Third Motion in Limine* on this issue is GRANTED.

Regarding the second issue, the Defendants' have failed to provide the District Court with authority to support their argument that they are entitled to a proffer outside the presence of the jury before rebuttal witness may testify. Neither the State nor the District Court are required to research issues for the Defendant. The Defendants' request as to this issue is therefore DENIED.

ORDER

IT IS HEREBY ORDERED that the State's *First Motion in Limine* (Ct. Doc. #22), *Second Motion in Limine* (Ct. Doc. #24), and *Third Motion in Limine* (Ct. Doc. #25) are GRANTED as set forth herein.

DATED this ____ day of March, 2023.

HON. LUKE BERGER
District Court Judge

C. Counsel of Record.