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COUNSEL FOR STATE

**MONTANA FIFTH JUDICIAL DISTRICT COURT  
 MADISON COUNTY**

STATE OF MONTANA,  Plaintiff,  v.	Cause No(s). DC-29-2022-23 DC-29-2022-24 DC-29-2022-22 DC-29-2022-26
JESSE MICHAEL BOYD, BETHANY GRACE BOYD, CARTER NORMAN PHILLIPS, ERIC ANTHONY TRENT,  Defendant(s).	<b>STATE'S REPLY TO        DEFENDANT'S RESPONSE TO        STATE'S FOURTH MOTION IN        LIMINE</b>

COMES NOW the State of Montana, by and through Assistant Attorney General Thorin A. Geist and Madison County Attorney David Buchler, and hereby reply to the Defendant's *Response to State's Fourth Motion in Limine* (Ct. Doc. #56)<sup>1</sup>.

<sup>1</sup> For the convenience of the District Court, the State will reference documents numbers as they appear in *State of Montana v. Jesse Michael Boyd*, DC-22-23.

## **I. Continued Discussion.**

### **a. The District Court should preclude the Defendants from calling affirmative defense witnesses who have no personal knowledge of the events of November 12, 2022.**

The State argues that the District Court should preclude the Defendants from calling 72 affirmative defense witnesses who have no personal knowledge of the events of November 12, 2022. *4<sup>th</sup>. MIL* at pp. 4-5 (Citing M. R. Evid. 602). The Defendant's do not dispute that the witnesses have no personal knowledge of the events of November 12, 2022, and instead argue that the witnesses may testify as to reputation. *4<sup>th</sup> Resp.* at pp. 1-9. Specifically, the Defendants argue (or imply) that the witnesses may testify: (1) as to the Defendants' reputation for peacefulness; (2) as to Brad Terrell's reputation for violence; and (3) as to Terrell and the investigating officers' reputation for dishonesty. *Id.* Each issue is addressed in turn.

#### **1. The Defendants' alleged reputation for peacefulness.**

The Defendants do not address the issue outright but appear to imply that the identified witnesses may testify as to the Defendants' reputation for peacefulness.<sup>2</sup> There are two problems with the implication. First, the Defendants have failed to disclose the defense of good character as is required by § 46-15-323(2), MCA. The term character includes "the sum total of all [of a

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<sup>2</sup> Many of the identified witnesses appear to be located outside the State of Montana.

person's] moral traits, including honesty, fidelity, peacefulness, etc." *State v. Pelletier*, 2020 MT 249, ¶ 15, 401 Mont. 454, 473 P.3d 991. The Defendants may not now add this defense unless they first obtain an order from the District Court determining that sufficient good cause exists to be relieved from their waiver. § 46-13-101(2), MCA.<sup>3</sup> More importantly, even if the District Court were to make such a finding, it would be well within the discretion of the District Court to limit the number of character witnesses called in this case. *State v. Cassill*, 71 Mont. 274, 286-87, 229 P. 716 (1924) (Citing 16 C.J. 859).

Second, "evidence 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). An exception to this rule exists for "evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same." M. R. Evid. 404(a)(1). To be admissible, the evidence must be "inconsistent with the alleged offense (e.g., that he or she is honest, trustworthy, has moral integrity, or is a peaceful, non-violent, loving, caring, or law-abiding person) for the purpose of supporting an inference that he or she is not guilty of the offense." *Pelletier* at ¶ 16.

Here, the Defendants have identified the affirmative defense of Justifiable Use of Force (hereinafter "JUOF") and an affirmative defense is

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<sup>3</sup> The ignorance of counsel as to the requirements of Montana law should not form the basis for any good cause determination.

“one that admits the doing of the act charged, but seeks to justify, excuse or mitigate it.” *State v. R.S.A.*, 2015 MT 202, ¶¶ 32-37, 308 Mont. 118, 357 P.3d 899 (Citing *State v. Daniels*, 2011 MT 278, ¶¶ 5-28, 362 Mont. 426, 265 P.3d 623). By relying on a JUOF defense, the Defendants admit that they committed the charged offenses, but seek to be excused from it. As such, witness testimony on the Defendants’ reputation for peacefulness would not be admissible under Rule 404(a)(1) because they will have admitted the crime. The evidence would therefore not be “inconsistent with the alleged offense.”

## **2. Brad Terrell’s alleged reputation for violence.**

The Defendants argue that the witnesses may testify as to Terrell’s reputation for violence. *4<sup>th</sup> Resp.* at pp. 4-6. Specifically, the Defendants argue that “[m]any of Brad Terrell’s neighbors report Terrell’s reputation for unprovoked violence and threats in the community.” *Id.* However, the Defendants also concede that they “did not know Terrell” on November 12, 2022. *Id.*

As argued in the State’s *First Motion in Limine* (Ct. Doc. #22), “evidence 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.” *1<sup>st</sup> MIL* at pp. 13-15 (Citing M. R. Evid. 404(a)). An exception to this rule exists for “evidence of a pertinent trait of character of the victim of the crime offered by

an accused...” *Id* (Citing M. R. Evid. 404(a)(2)). In such cases 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.

*Id* (Citing M. R. Evid. 405).

As the Montana Supreme Court has held, the victim’s character for violence is **not** an “essential element” of a justifiable use of force defense and “[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.” *Id* (Citing *State v. Sattler*, 1998 MT 57, ¶ 45, 288 Mont. 79, 956 P.2d 54; *DeSchon v. State*, 2008 MT 380, ¶ 24, 347 Mont. 30, 197 P.3d 476).

Under Montana law, the Defendants may not use reputation or opinion under M. R. Evid. 405(a) or evidence or specific instances of conduct under the first prong of M. R. Evid. 405(b). More importantly, the Defendants have conceded that they did not know Terrell on November 12, 2022. *4<sup>th</sup> Resp.* at pp.

4-6; See also *Body Camera Footage* at 15:15 - 33:15, attached to State's *First Motion in Limine* as Exhibit 14. As such, witness testimony under the second prong of M. R. Evid. 405(b) is also inadmissible.

### **3. Brad Terrell and law enforcement's alleged reputation for dishonesty.**

The Defendants argue that some of the named witnesses have been identified to show that Terrell and/or law enforcement have a reputation for dishonesty. *4<sup>th</sup> Resp.* at pp. 7-9 (Citing *State v. Bonamarte*, 2009 MT 243, 351 Mont. 419, 213 P.3d 457). Specifically, the Defendants argue that Terrell has a reputation and/or he has engaged in specific acts of dishonesty because he has refused to pay employees and/or filed "abusive, frivolous dishonest and false lawsuits" in Madison County. *Id.*

The Montana Supreme Court has held:

As a separate propensity character evidence exception applicable to party and non-party witnesses, party may impeach the credibility of a witness via "opinion or reputation" evidence regarding the witness's character for "untruthfulness." M. R. Evid. 404(a)(3) and 608(a). A party may also cross-examine the witness regarding specific instances of his or her prior conduct for the purpose of impeaching his or her credibility if probative of the witness's character for untruthfulness. M. R. Evid. 608(b). However, unlike with Rule 404(a)(1) good character impeachment and rebuttal evidence, a party may not introduce extrinsic evidence to impeach or rebut a witness's character for truthfulness under Rule 608(b). M. R. Evid. 608(b). Moreover, by definition, specific instances of prior conduct probative of a witness's

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<sup>4</sup> Wherein Defendant Jesse Boyd admits that they had never met Brad Terrell and that they had no idea who he was.

character for untruthfulness narrowly include prior instances where the witness lied, made false reports or accusations, or otherwise acted dishonestly, untruthfully, deceitfully, or fraudulently.

*Pelletier* at ¶ 17 (Citations omitted).

Evidence that would otherwise be admissible under Rule 608 may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

*Bonamarte* at ¶ 17 (Citing M. R. Evid. 403).

First, any inquiry into the admissibility of any such evidence would need to occur outside the presence of the jury pursuant to M. R. Evid. 103(c). At a minimum the Defendants should be ordered to immediately identify which witnesses will be used to attack Terrell's credibility so that the State and the District Court can adequately prepare for trial.

Second, the burden is on the Defendant to show that Terrell's alleged refusal to pay employees or his the filing of lawsuits is somehow relevant to this proceeding. Unless the Defendant can show that Terrell has been judicially determined to be dishonest, and/or convicted of a crime of dishonesty, such evidence is not relevant and must be excluded. Even if the evidence is somehow relevant, the District Court should conclude that it is more prejudicial than probative and exclude it pursuant to M. R. Evid. 403.



Third, the Montana Supreme Court has made clear that character evidence cannot be attacked with extrinsic evidence. Extrinsic evidence is “[e]vidence that is calculated to impeach a witness’s credibility, **adduced by means other than cross examination of the witness.**” *Black’s Law Dictionary* 597 (Bryan A. Garner ed., 8<sup>th</sup> ed 1999) (Emphasis supplied). Witness testimony on Terrell’s alleged refusal to pay employees and/or his filing of lawsuits are extrinsic evidence and cannot be introduced at trial.

**b. The District Court should preclude the Defendants from calling any expert witness to discuss “Montana gun laws and/or self-defense statutes.”**

The State argues that the District Court should preclude the Defendants from calling an expert witness to discuss “Montana gun laws and/or self-defense statutes. 4<sup>th</sup> MIL at pp. 5-7 (Citing *State v. Mills*, 2018 MT 254 ¶ 39, 393 Mont. 121, 428 P.3d 834; *Perdue v. Gagnon Farms, Inc.*, 2003 MT 47, ¶ 28, 314 Mont. 303, 65 P.3d 570; *Comm.’r of Political Practices for Mont. v. Wittich*, 2017 MT 210, ¶ 39-41, 388 Mont. 347, 400 P.3d 735; and M. R. Evid. 704-705). In response, the Defendants needlessly stroke the ego of Gary Marbut by reciting his resume, without addressing the State’s argument, and while incorrectly suggesting that he was permitted to testify at trial in *State v. Cooksey*, 2012 MT 226, 366 Mont. 346, 286 P.3d 1174.<sup>5</sup> 4<sup>th</sup> Resp. at pp. 10-11.

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<sup>5</sup> Mr. Marbut only testified at a pretrial hearing. *Cooksey* at ¶¶ 31-37 and 89-91.



Neither Mr. Marbut nor any other expert may discuss “Montana gun laws and/or self-defense statutes.” To do so would impermissibly allow the “expert” to invade the province of the District Court.

## II. Conclusion.

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

1. Precluding the Defendants from calling affirmative defense witnesses who have no personal knowledge of the events of November 12, 2022.
2. Precluding the Defendants from calling an expert witness to discuss “Montana gun laws and/or self-defense statutes.”

DATED this 8 day of March, 2023.

By: \_\_\_\_\_

  
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## **CERTIFICATE OF SERVICE**

I, Thorin Aidan Geist, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Reply to the following on 03-08-2023:

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Dated: 03-08-2023