THORIN A. GEIST
Assistant Attorney General
Special Deputy Madison County Attorney
DAVID A. BUCHLER
Madison County Attorney
P.O. Box 201401
Helena, MT 59620-1401
Telephone: (406) 444-2026
Email: thorin.geist@mt.gov
dbuchler@madisoncountymt.gov

COUNSEL FOR STATE

MONTANA FIFTH JUDICIAL DISTRICT COURT
MADISON COUNTY

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

COMES NOW the State of Montana, by and through Assistant Attorney General Thorin A. Geist and Madison County Attorney David Buchler, and hereby replies to the Defendant's *Response to State's First Motion in Limine* (Ct. Doc. #45)[1].

[1] 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 prohibit the Defendants from asserting the affirmative defense of Justifiable Use of Force at trial.

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 (Citing § 45-3-102, MCA; *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)). 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, this is a work of fiction. 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.

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. 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.

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 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[2] (Emphasis supplied).

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[3]; *Senate Audio* at 8:24:55 to 11:37:00[4]. 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[5] (Emphasis supplied).

Both the sponsor of HB 228 and its proponents[6] testified in support of HB 228, including the specific restriction on the ability to point a firearm at someone. *Id.*[7] Similarly, and although § 3 to HB 228 was hotly contested on other grounds, none of the opponents[8] to HB 228 testified against the specific

---

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

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

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

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

[6] 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.

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

[8] 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)

restriction on the ability to point a firearm at someone. *Id.*[9] 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.*[10]

Ultimately, HB 228 was amended several times[11] 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.*[12]

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.

iii. The Defendants' fail to address the State's argument as it pertains to Bethany Boyd, Carter Phillips or Eric Trent.

The Defendants' do not address the State's arguments as they pertain to

---

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.

[9] 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

[10] 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

[11] https://leg.mt.gov/laws/bills/20091/HB0299/HB0228

[12] March 17, 2009, *Senate Audio* at 10:57:00 to 10:59:40.

Bethany, Phillips or Trent. The State's motion in limine should therefore be deemed well taken and Boyd, Phillips and Trent should be precluded from asserting the affirmative defense of JUOF.

b. The District Court should prohibit the Defendants from asserting the affirmative defense of Justifiable Use of Force in any capacity unless they testify at trial.

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 (Citing *State v. R.S.A.*, 2015 MT 202, ¶¶ 32-37, 308 Mont. 118, 357 P.3d 899; *State v. Daniels*, 2011 MT 278, ¶¶ 5-28, 362 Mont. 426, 265 P.3d 623; *State v. St. Marks*, 2020 MT 170, ¶¶ 20-22, 400 Mont. 334, 467 P.3d 550). 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.*

c. The District Court should prohibit the Defendants from relying on the character of the victim to support a Justifiable Use of Force Defense.

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 (Citing M. R. Evid. 404 and 405; *State v. Sattler*, 1998 MT 57, ¶ 44, 288 Mont. 79, 956 P.2d 54; *DeSchon v. State*, 2008 MT 380, ¶ 24, 347 Mont. 30, 197 P.3d 476; *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)). 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. 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 (Emphasis supplied). 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.

//

//

//

d. The District Court should prohibit the Defendants from seeking a lesser included offense instruction if they assert the affirmative defense of a Justifiable Use of Force at trial.

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 (Citing *State v. Martinez*, 1998 MT 265, ¶ 10, 291 Mont. 265, 968 P.2d 705; *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); *State v. German*, 2001 MT 156, ¶¶ 20-21, 406 Mont. 92, 30 P.3d 360). In response, the Defendants argue that: (1) the State's request is premature; and (2) at least Trent should be entitled to a lesser included offense instruction. *1st Response* at pp. 14-15.

First, 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.

Second, the Defendants fail to address the case law cited by the State and they do not 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 a lesser included offense instruction. As noted above,

each of the Defendants has a choice – they can rely on the affirmative defense of JUOF or they can enter a general denial. Such is another "hard decision" which the defense must make. *Mont. Ninth Judicial Dist. Court* at ¶ 13.

e. The District Court should preclude the Defendants from selectively asserting their Fifth Amendment protection if they testify at trial.

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 (citing *Fitzpatrick v. United States*, 178 U.S. 304, 315, 20 S. Ct. 944, 948-49, 44 L. Ed. 1078, 1083 (1900); *State v. Coloff*, 125 Mont. 31, 36, 231 P.2d 343, 345 (1951); *Brown v. United States*, 356 U.S. 148, 154-155, 78 S. Ct. 622, 626-627, 2 L. Ed. 2d 589, 596-597 (1958); *United States v. Panza*, 612 F.2d 432, 438-440 (9th. Cir. 1979)). In response, the Defendants argue 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.

The Defendants again fail to address the case law cited by the State and they do not present any legal authority to support their position. Regardless, it is well settled that the 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). As such, the Defendants should be precluded from selectively asserting their Fifth Amendment protection if they testify at trial. If the Defendants attempt to do so and refuse to answer the State's questions during cross examination, their testimony should be stricken from the record. *United States v. Panza*, 612 F.2d 432, 438-440 (9th. Cir. 1979).

f. The District Court should preclude the Defendants from seeking jury nullification at trial.

The State argues that the District Court should prohibit the Defendants from seeking jury nullification at trial. *1st MIL* at pp. 19-20 (Citing *United States v. Kleinman*, 880 F.3d 1020, 1031-1036 (9th. Cir. 2018); § 46-16-103, 3-15-104 and 26-1-201, MCA). In response, the Defendants argue 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." *Response* at p. 15 (Citing *State v. Koch*, 33 Mont. 490, 85 P. 272 (1906)[13]).

First, what the State "has in mind" was set forth clearly in its *First Motion in Limine.* The State articulated that jury nullification "...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. The Defendant's feigned ignorance

[13] The case does not stand for the proposition articulated by the Defendants.

is unavailing, and their failure to address this issue should be deemed an admission that the State's request is well taken.

Second, despite arguing that there exists "extensive case law standing for the proposition that that every jury...has absolute power to acquit", the Defendants fail to cite any or to differentiate between a jury's power to nullify and their right to do so. *1st Response* at p.15. Regardless, as noted by the State, "juries do not have a *right* to nullify" and courts "...have the duty to forestall or prevent nullification." *1st MIL* at pp 19-20 (Citing *Kleinman*, 880 F.3d at 1031-1036).

II. Conclusion.

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

1. Prohibiting the Defendants from asserting the affirmative defense of Justifiable Use of Force at trial.

2. Prohibiting the Defendants from arguing the affirmative defense of Justifiable Use of Force unless they testify at trial and admit that they purposely or knowingly committed the charged offenses.

3. Prohibiting the Defendants from relying on the character of the victim to support a Justifiable Use of Force Defense.

4. Prohibiting the Defendants from seeking a lesser included offense instruction if they assert an affirmative defense of Justifiable Use of Force.

5. Prohibiting the Defendants from selectively asserting Fifth Amendment protection if he testifies at trial.

6. Prohibiting the Defendants from seeking jury nullification.

DATED this 27 day of February 2023.

By: _____
THORIN A. GEIST
DAVID BUCHLER
Attorney for the State of Montana

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 02-27-2023:

Alexander Louis Roots (Attorney)
27 N Tracy Ave
P.O. Box 1
Bozeman MT 59771
Representing: Jesse Michael Boyd
Service Method: eService

David A. Buchler (Govt Attorney)
P.O. Box 73
100 W. Wallace Street
Virginia City MT 59755
Representing: State of Montana
Service Method: eService

John M. Pierce (Attorney)
21550 Oxnard Street, 3rd Floor PMB #172
Woodland Hills 91367
Representing: Jesse Michael Boyd
Service Method: Email

Electronically signed by Maggie Sowisdral on behalf of Thorin Aidan Geist
Dated: 02-27-2023