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COUNSEL FOR STATE

**MONTANA FIFTH JUDICIAL DISTRICT COURT
 MADISON COUNTY**

<p>STATE OF MONTANA,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>JESSE MICHAEL BOYD, BETHANY GRACE BOYD, CARTER NORMAN PHILLIPS, ERIC ANTHONY TRENT,</p> <p style="text-align: center;">Defendant(s).</p>	<p>Cause No(s). DC-29-2022-23 DC-29-2022-24 DC-29-2022-22 DC-29-2022-26</p> <p>STATE'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS FOR SELECTIVE PROSECUTION</p>
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COMES NOW the State of Montana, by and through Assistant Attorney General Thorin A. Geist and Madison County Attorney David Buchler, and hereby responds the Defendants' *Motion to Dismiss for Selective Prosecution*.

I. Factual background.

The following facts are taken from the State's *Motion for Leave to File Information and Affidavit in Support* (Ct. Doc. #1):

1. On or about November 12, 2022, the Madison County Sheriff's Office received a report of an assault with a firearm at or near 3 Cameron Drive, in Madison County, Montana. It was further reported that the Defendant and Co-Defendants were traveling northbound on U.S. Highway 287 in a silver Subaru with North Carolina license plates.
2. Deputies Wyatt, Winn and Jurgonski responded to the location, stopped the vehicle, and contacted the occupants: Jesse Boyd, Bethany Boyd, Carter Phillips, and Eric Trent (herein after collectively referred to as Defendants).
3. The Defendants were advised of their *Miranda* rights and agreed to speak with law enforcement.
4. All of the aforementioned individuals relayed substantially the same rendition of events: that they were parked on the shoulder of U.S. Highway 287, and were outside of their vehicle; the victim, Bradley Terrell (Terrell) stopped his vehicle and a verbal altercation ensued; Terrell exited his vehicle at which point Jesse Boyd aimed and/or pointed and/or threatened Terrell with a firearm.

5. The Defendants reported that Terrell thereafter pushed and/or chest bumped Jesse Boyd and the altercation became physical. Bethany Boyd stated that she struck and/or hit Terrell with a flagpole, Eric Trent stated that he punched and/or otherwise struck Terrell with his hands and/or fists, and Carter Phillips struck and/or hit Terrell with a four-foot wooden cross. At the conclusion of the physical assault, Jesse Boyd again aimed and/or pointed a firearm at Terrell. The Defendants claimed to have been acting in self-defense.
6. Deputies seized two handguns from the Defendants' vehicle.
7. Terrell reported to law enforcement that he stopped his vehicle and requested the Defendants move their vehicle as it was impeding access to the driveway of Terrell's business. A verbal altercation ensued and Terrell exited his vehicle and Jesse Boyd aimed and/or pointed a firearm at him. Thereafter, Jesse Boyd passed the firearm to Eric Trent, and Terrell was punched and/or struck in the head. Terrell stated that at that point he fought back and was struck multiple more times with fists, wooden cross, and flagpole while "they were all on top of [him]."
8. Deputy Jurgonski observed injuries to Terrell which included lacerations to his face and/or nose, and bruising on Terrell's side and/or back.

9. Dennis Crabtree (Crabtree) informed law enforcement that he observed the altercation during which “4 men attacked 1 man punching him. The other 3 people proceeded to attack the 1 punching, kicks and hitting him with an American flag.”
10. Thomas Ferguson (Ferguson) informed law enforcement that he observed Terrell get “sucker punched” by one of the individuals involved in the altercation.

II. 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 Boyd, Bethany Boyd, Carter Phillips, and Eric Trent with Assault with a Weapon¹, a felony in violation of §§ 45-5-213(1)(a) and (2)(a), MCA. *MFL* at pp. 1-4 (Ct. Doc. #1²).
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

¹ Eric Trent is charged with accountability for the offense of Assault with a Weapon pursuant to §§ 45-2-301 and 302, MCA.

² All four cases were consolidated on January 4, 2023. *Or.* at p. 1-5 (Ct. Doc. #13). 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.

State's *Information* was filed the same day. *Info.* at pp. 1-2 (Ct. Doc. #3).

3. On January 3, 2023, the Montana Attorney General's Office – Prosecution Services Bureau filed a Notice of Appearance. *NOA* (Ct. Doc. #10).

4. On January 23, 2023, the Defendants appeared before the District Court and plead not guilty to the charged offenses. *Minutes* at p.1 (Ct. Doc. #38).

5. On April 4, 2023, the Defendants filed their *Motion to Dismiss for Selective Prosecution* (Ct. Doc. #71). The Defendants' claim that they are being discriminated against based on religious intolerance and seek an order: (1) dismissing their cases based on selective prosecution/selective enforcement; (2) for an inquiry law enforcement's religious intolerance, and (3) for other relief the District Court deems appropriate." *Mot.* at p. 6.

III. Discussion.

a. The District Court should deny the Defendants request to dismiss the case based on selective prosecution and/or selective enforcement claims.

1. Legal Standard - Selective prosecution.

The Montana Supreme Court has held:

A prosecutor has broad discretion in determining whether or not

to prosecute. Thus, the conscious exercise of some selectivity in the enforcement of criminal laws, without more, does not constitute a violation of constitutional rights. A person asserting that his or her constitutional rights have been violated by selective prosecution must allege and prove that the selection was deliberately based on an unjustifiable standard such as race, religion or other arbitrary classification.

State v. Harris, 1999 MT 115, ¶ 23, 294 Mont. 397, 983 P.2d 881 (Internal citations omitted). United States Supreme Court “cases delineating the necessary elements to prove a claim of selective prosecution have taken great pains to explain that the standard is a demanding one.” *United States v. Armstrong*, 517 U.S. 456, 463, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996). “A selective-prosecution claim asks a court to exercise judicial power over a ‘special province’ of the Executive.” *Id.* at 464. Ordinarily, “so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file...generally rests entirely in his discretion. *Id.* To be sure, “a prosecutor’s discretion is ‘subject to constitutional constraints.’” *Id.* One of which, “imposed by the equal protection component of the Due Process Clause of the Fifth Amendment...is that the decision whether to prosecute may not be based on ‘an unjustifiable standard such as race, religion, or other arbitrary classification.’” *Id.* (Citing *Oyler v. Bolyes*, 368 U.S. 448, 456, 7 L. Ed. 2d 446, 82 S. Ct. 501 (1962) and *Bolling v. Sharpe*, 347 U.S. 497, 500, 98 L. Ed. 884, 74 S. Ct. 693 (1954)).

Analyzing the significant burden of proof that a defendant must show in a selective prosecution claim, the Montana Supreme Court has held that the reviewing court “must presume the regularity of prosecutorial decisions.” *In re Himes*, 2013 Mont. LEXIS 299 (2013), 8-14³ (Citing *United States v. Armstrong*, 517 U.S. 456, 458-470, 116 S. Ct. 1480, 1483-89, 134 L.Ed. 2d 687 (1996) and *Unites States v. Venable*, 666 F.3d 893-904 (4th Cir. 2012)). “In order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present ‘clear evidence to the contrary.’” *Armstrong* at 465. Further, “[t]he claimant must demonstrate that the...prosecution policy ‘had a discriminatory effect and that it was motivated by a discriminatory purpose.’” *Id.*

To establish a discriminatory effect the defendant must show that the government declined to prosecute similarly situated suspects. *Id.* “[D]efendants are similarly situated when their circumstances present no distinguishable prosecutorial factors that might justify making different prosecutorial decisions with respect to them.” *Id.* “The vast majority of Courts of Appeals require the defendant to produce some evidence that similarly situated defendants of other race [or religion] could have been prosecuted, but were not, and this requirement is consistent with the [U.S. Supreme Court’s]

³ Before the Montana Supreme Court on a *Writ of Supervisory Control*.

equal protection case law.” *Armstrong* at 469. “Recounted hearsay, and reported personal conclusions based on anecdotal evidence” is insufficient to satisfy a defendant’s burden of proof. *In re Himes* at 8-14.

A defendant also must show that the prosecution was motivated by a discriminatory purpose. *Armstrong* at 465 (Emphasis supplied). “‘Discriminatory purpose’...implies more than...intent as awareness of consequences. It implies that the decisionmaker...selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” *Wayte v. United States*, 470 U.S. 598, 610, 105 S. Ct. 1524, 84 L. Ed. 2d 547 (1984).

2. Legal Standard - Selective Enforcement.

The term “selective enforcement” is defined as:

The practice of law enforcement officers who use wide or even unfettered discretion about when and where to carry out certain laws; esp., the practice of singling a person out for prosecution or punishment under a statute or regulation because the person is a member of a protected group or because the person has exercised or is planning to exercise a constitutionally protected right.

Black’s Law Dictionary 1390 (Bryan A. Garner, ed., 8th ed. 1999).

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

[T]he selective enforcement of a criminal law, without more, does not constitute a constitutional violation...The conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation absent an allegation and showing that the

selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification such as sex, or the exercise of the First Amendment right to free speech.

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

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

3. Legal Analysis - Discriminatory Effect.

The Defendants argue that “[t]he State’s prosecutorial policies have ‘had a discriminatory effect’ on the Defendants” because Terrell, Crabtree, and Ferguson are similarly situated and are not being prosecuted by the State. *Mot.* at pp. 10-12. However, to prevail on a selective prosecution or selective enforcement claim the Defendants must demonstrate that there are “no distinguishable prosecutorial factors that might justify making different prosecutorial decisions with respect to them.” *Armstrong* at 465. The

Defendants have failed to meet their burden and completely ignore the sequence of events that gave rise to their prosecution.

Here, the Defendants explained to law enforcement:

[T]hat they were parked on the shoulder of U.S. Highway 287 and were outside of their vehicle; Terrell stopped his vehicle and a verbal altercation ensued; Terrell exited his vehicle at which point Jesse Boyd aimed and/or pointed and/or threatened Terrell with a firearm. The Defendants further reported that Terrell thereafter pushed and/or chest bumped Jesse Boyd and the altercation became physical. Bethany Boyd stated that she struck and/or hit Terrell with a flagpole, Eric Trent stated that he punched and/or otherwise stuck Terrell with his hands and/or fists, and Carter Phillips struck and/or hit Terrell with a four-foot wooden cross. At the conclusion of the physical assault, Jesse Boyd again aimed and/or pointed a firearm at Terrell.

MFL at pp. 1-3.

Here, **none** of the Defendants reported Terrell reaching for or possessing a weapon. With respect to the use of a deadly weapon, Montana law 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.

“If a person reasonably believes that the person or another person is threatened with bodily harm, the person may warn or threaten the use of force,

including deadly force, against the aggressor, including drawing or presenting a weapon.” § 45-3-111(2), MCA. When read in the context of § 45-3-102, the plain language of § 45-3-111(2), MCA, is clear. The terms “drawing or presenting” contained in § 45-3-111(2) do not afford an individual the right to point a firearm at a person until there exists an “imminent threat of death or serious bodily injury” in accord with § 45-3-102, MCA.

In fact, 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).

Rejecting the argument that justifiable use of force 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.

It is the State's position, based on the factual basis and relevant law, that the Defendants are not similarly situated with Terrell, Crabtree, and Ferguson. In this case the Defendants were never presented with an "imminent threat of death or serious bodily injury" as is required by § 45-3-102, MCA, and therefore could not employ deadly force. As such, "distinguishable prosecutorial factors" exist which "justify making different prosecutorial decisions with respect to" the Defendants and Terrell, Crabtree, and Ferguson. *In re Himes* at 9. The Defendants' have failed to meet their burden and their *Motion* should be denied.

4. Legal Analysis - Discriminatory Purpose.

The Defendants' also claim that the State has a discriminatory purpose and alleges that the State based its prosecution of the Defendants on its "intolerance of Christian Missionaries." *Mot.* at p. 12. However, the

Defendants rely on conjecture and blatant misrepresentations of fact to support their argument. The State addresses each misrepresentation in turn:

A. Pertinent Case Law.

The Defendants argue that this case “is the first prosecution in Montana” in which the State has argued that “no one can ever claim justifiable use of force unless they take the witness stand in their own defense” and that they must take the stand and “confess their crime.” *Mot.* at p.5. However, the State has already briefed this issue and has provided the District Court with authority for these settled aspects of Montana law. See *State’s First Motion in Limine* at pp. 1-20 (Ct. Doc. #22).

B. The Madison County Attorney’s Office.

The Defendants argue that when they were arraigned the State suggested that “the very nature of defendants’ traveling Christian missionary work made them dangerous transients.” *Mot.* at p.4. However, the Defendants’ allegation is entirely false. The State argued that setting bond at \$50,000 for each Defendant was reasonable and appropriate given the Defendants’ lack of ties to the community and the nature of the charges. The State also argued that bail of \$50,000 was sufficient to ensure the presence of the Defendants at future proceedings, was sufficient to protect the public, and was reasonable in consideration of all of the statutory factors that a court **must** consider pursuant to § 46-9-301, MCA. The State made no mention and in no way

considered or addressed the Defendants' religious affiliation when it argued bail.

C. The Montana Attorney General's Office.

i. Involvement.

The Defendants argue that the involvement of the Montana Attorney General's Office – Prosecution Services Bureau's (PSB) is "extremely unusual" and assert that "most noncapital felonies are prosecuted regionally, by Montana's respective county attorneys." *Mot.* at p.4. It seems that the Defendants misapprehended PSB's function and interactions with county attorneys. While PSB primarily assists local county attorneys in the prosecution of complex criminal cases, it also assists in conflict cases, high profile cases, and in situations where county attorney offices are understaffed.⁴

At the time these consolidated cases were filed in District Court, the Madison County Attorney's Office was without a deputy county attorney and had only one attorney to fulfill the duties of the office. Furthermore, the Madison County Attorney's Office and the Montana Attorney General's Office received numerous communications from individuals requesting the Attorney General's involvement and/or intervention in the case.

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⁴ <https://leg.mt.gov/lfd/state-agency-profiles/departments-justice/>.

ii. Assistant Attorney General.

The petitioner/defendant in *In re Himes*, 2013 Mont. LEXIS 299 (2013), alleged “that he had been prosecuted for criminal felonies at the behest of certain individuals in the Montana State Auditor’s Office...because he [was] an ‘outspoken Christian conservative’.” *Id.* at 1-2. Himes “identified four persons whom he believed to be similarly situated suspects who were *not* outspoken Christian conservatives and who were *not* prosecuted by the Auditor’s office ...” *Id.* Additionally, Himes cited “the deposition testimony of two long-term employees of the Auditor’s office who referenced use of anti-Christian epithets by persons within that office.” *Id.* While Himes “unveiled some evidence that certain persons within the Auditor’s office have made negative comments about ‘right wing Christians’ ... [that] evidence does not meet the *Armstrong* ‘rigorous standard’ requiring a requisite level of threshold evidence” to prevail. *Id.* at 13-14.

The Defendants identify two Twitter posts from the Assistant Attorney General assigned to prosecute their case and argue that the posts are religiously intolerant and demonstrate a discriminatory purpose. *Mot.* at pp. 12-15. First, the posts relied on by the Defendants are from 2013 and are almost ten years old.⁵ Second, neither post demonstrates religious intolerance

⁵ The Assistant Attorney General did not begin working for the Attorney General’s Office until 2022.

of any kind. Even assuming that the use of the term “Jewish” in the Twitter handle was religiously⁶ intended – which the Defendants have failed to demonstrate – the Defendants’ have failed to meet their burden.

D. “Harassment and intimidation” of the Defendants.

The Defendants argue that “[t]he State’s prosecution has engendered Christian-hating cheerleaders; who are publicly supporting the prosecution with more religious intolerance.” *Mot.* at. p.15. In support thereof, the Defendants discuss an incident in which an unidentified individual sent a “death threat” to JPL client advocate EL (“Lambert”) and Roger Roots, and the activities of Robert Baty.

To be clear, the State in no way condones or supports acts of violence, harassment, or intolerance of lawful activities. The State neither has knowledge of the identity of the person that transmitted the messages to EL and Roger Roots, nor does the State have any involvement or relationship with Robert Baty.

As the State has addressed in prior briefing, Robert Baty is not a witness for the State and was instead identified as a defense witness. If the Defendants have an issue with one of their own witnesses, they should pursue whatever

⁶ As opposed to being racially Jewish.

legal remedy they feel is appropriate in whatever jurisdiction has authority over that person.

The Defendants also accuse the State of being “complicit or acting in concert with Mr. Baty in wrongly persecuting the defendants.” *Mot.* p.17. The Defendants base their claim on the fact that the State is not prosecuting Robert Baty for his activities. It is the State’s understanding that neither the sender nor recipients of any of the communications were within Madison County or even the State of Montana at the time of the communications. The State is also unaware of any reports to the Madison County Sheriff’s Office in response to allegations of criminal activity by Robert Baty. Again, if the Defendants believe that a crime has been committed, they should report it to the appropriate law enforcement agency.

Moreover, the Defendants fail to cite and the State not aware of any authority relating to selective prosecution or enforcement that would make actions of individuals completely unrelated and unaffiliated with the State relevant to the District Court’s analysis of the issues.

5. Request for hearing.

The Defendants have failed to meet their burden and are not entitled to a hearing. Uniform District Court Rule 2(d). The Defendants request for a hearing on their *Motion* should be denied.

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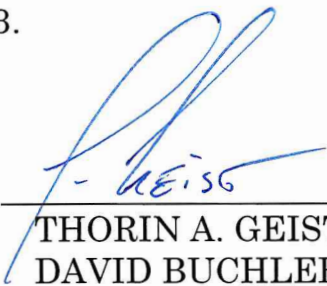
IV. Conclusion

In this case, the Defendants have failed to demonstrate that the State's prosecution had a discriminatory effect or that the State acted with discriminatory purpose. The facts of this case established the requisite probable cause to charge the Defendants with the crime of Assault with a Weapon. The State chose to prosecute the Defendants solely based on the facts of the case without any regard to their religious affiliation or activities. Exercising one's First Amendment rights does not have the effect of providing immunity to unlawful acts committed in the course thereof.

Accordingly, the Defendants' request for the issuance of Orders dismissing the charges based on claims of selective prosecution and selective enforcement based on religion should be DENIED. The State would respectfully suggest that the Court is without authority to conduct "an inquiry into the extent of religious intolerance among Madison County, State Fish, Wildlife & Parks, Ennis City police investigators and the State Department of Justice ..." *Mot.* p.18.

DATED this 24 day of April, 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 - Response to the following on 04-24-2023:

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Dated: 04-24-2023