

Sam Martin  
 Delli Bovi, Martin & Reed LLC  
 34 W. 6<sup>th</sup> Ave. Ste 2E  
 Helena, MT 59601  
 406-438-6143  
 sam@sammartinlaw.com

Attorney for Defendant

**MONTANA FIFTH JUDICIAL DISTRICT COURT  
 MADISON COUNTY**

STATE OF MONTANA,  Plaintiff,  v.  CARTER NORMAN PHILLIPS,  Defendant.	Cause No. DC-29-2022-22 <b>DEFENDANT'S BRIEF IN SUPPORT OF          MOTION IN LIMINE CLARIFICATION</b>
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COMES NOW, the Defendant, by and through his counsel of record, Samuel Martin, and files this brief in Support for Clarification on Orders in Limine:

**I. The Defendant should be allowed to assert the defense of Justifiable Use of Force Without Testimony.**

All relevant evidence is admissible, except as otherwise provided by constitution, statute, the Montana rules, or other rules applicable in the courts of this state. Evidence is relevant if it has any tendency to make a fact that is of consequence in determining the matter more or less probable. Mont. R. Evid. 401. Evidence which is not relevant is not admissible. Mont. R. Evid. 402. If there is evidence presented at trial to support any theory, a court must instruct the jury on that theory. *State v. Thomas*, 147 Mont. 325, 331 (1966). This only requires that “any evidence exists in the record” to support the theory. *State v. Buckley*, 171 Mont. 238, 242 (1976).

In the Court’s previous ruling on the issue of a JUOF defense, a defendant cannot assert the defense unless they testify because, without personal testimony, there would be no foundation laid for the defendants to admit to the crime. We disagree with this standard and present the alternative as an offer of proof for why the instruction may apply in this matter

without the necessity of specific defendant testimony. Additionally, the appropriate standard is whether any evidence exists in the record to support a theory of JUOF. In discovery, which the State has access to and intends to enter as evidence, Defendant speaks with law enforcement after he has been his rights per *Miranda*. The State intends to call law enforcement officers to testify to the statements that the Defendant made regarding this altercation. The State intends to include these statements because they are testimonial evidence supporting a prosecution. They would not be able to be suppressed or excluded as Carter was read his rights per *Miranda* and willingly spoke with law enforcement about the event and what he observed. All the relevant statements were made after the Defendant had been mirandized and given an opportunity to remain silent. As such, any statements made after that point are testimonial in nature. These testimonial statements should be taken as sufficient evidence required to authorize an instruction of Justifiable use of force, in defense of others as codified under MCA 45-3-102. The Court should treat the statements that surely will be offered by the State as sufficient evidence to lay a foundation for the Defendant to assert a JUOF defense even in the absence of him testifying at trial.

When the Montana Supreme Court explains that evidence needs to be presented, it does not give guidelines of the form that evidence needs to take, only that any evidence must be provided sufficient to support the theory before a jury instruction can be given. While the commonly used means of evidence has been the testimony of the Defendant, this is not the only medium available to us in the present case that would provide the required admission to support a theory of JUOF. The admissions made in the audio and law enforcement testimony evidence that the state intends to use should be sufficient evidence to support the JUOF theory. Because the state will be calling law enforcement officers to testify to statements made directly by the

Defendant himself, evidence of admissions that he made regarding the altercation will already be on record. That evidence is enough to support a theory of JUOF. This approach preserves both the Defendant's constitutional rights pursuant to the 5<sup>th</sup> amendment against any further self-incrimination and the Defendant's rights to mount a defense. Therefore, the Defendant should be allowed to assert a defense of JUOF and receive a corresponding jury instruction.

In the event that State does not offer any of this evidence, then it would be grounds for a mistrial under MCA 45-3-112 regarding an investigation of an alleged offense involving a claim of justifiable use of force. That law requires an officer to conduct an investigation "so as to disclose all evidence, including testimony concerning the alleged offense and that might support the apparent or alleged justifiable use of force." *Id.* Non disclosure at trial of this information would be in violation of the statutory requirement of investigation and a disingenuous presentation of the State's case. The appropriate remedy for this exclusion of facts from the State's case would be a mistrial.

As such, these statements would lay the appropriate foundation that the Court would rely on to issue the appropriate Justifiable Use of Force Instruction.

### **Conclusion**

We request the Court to provide Clarification to its order issued on August 8, 2023 regarding this matter, specifically as it pertains to Carter Phillips.

RESPECTFULLY SUBMITTED this \_\_27\_\_ day of February, 2024.

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Samuel L. Martin, III



## **CERTIFICATE OF SERVICE**

I, Samuel Loveridge Martin, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Brief In Support of Motion to the following on 02-27-2024:

Thorin Aidan Geist (Govt Attorney)  
Montana Department of Justice  
Prosecution Services Bureau  
215 N. Sanders  
P.O. Box 201401  
Helena MT 59620  
Representing: State of Montana  
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

Electronically Signed By: Samuel Loveridge Martin  
Dated: 02-27-2024