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MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

STATE OF MONTANA, Plaintiff, -vs.- MARKUS HENDRIK KAARMA, Defendant.	Dept. No. 1 Cause No. DC-14-252 **DEFENDANT'S REPLY TO STATE'S RESPONSE TO DEFENDANT'S MOTION FOR A NEW TRIAL**

COMES NOW Defendant, Markus Hendrik Kaarma, by and through his undersigned counsel, Nate S. Holloway, of Paul Ryan & Associates, PLLC, and hereby respectfully submits his Reply to the State's Response (hereafter State's "Response") to Defendant's Motion for a New Trial (hereafter Defendant's "Motion").

ARGUMENT

A. DEFENDANT MAINTAINS THAT HE WAS DEPRIVED OF A FAIR TRIAL DUE TO PREJUDICIAL, INFLAMMATORY MEDIA COVERAGE.

In its Response, the State argues that Defendant seeks a new trial because media coverage of the case made it "impossible to seat an impartial jury[.]" (State's Resp. p. 1.) Conversely, Defendant did not argue the actual impossibility of seating an impartial jury; rather, the argument is that inflammatory and prejudicial media coverage warrants a presumption of inherent prejudice, and a reasonable apprehension that a fair trial was not possible. *See State v. Kingman*, 2011 MT 269, ¶ 21, 362 Mont. 330, 264 P.3d 1104 (Providing that prejudice can be presumed where pretrial publicity is so pervasive and prejudicial that it cannot be expected to find an unbiased jury pool in the community).

The State, without addressing the numerous examples detailed in

Defendant's Motion, plainly states that the "media coverage was not 'prejudicial' or 'inflammatory[.]'" (Resp. at 2.) Moreover, that Defendant "simply regurgitates the reasons he used in his first motion to change venue." (Id. at 3-4.) This is unequivocally false; Defendant cited numerous examples of prejudicial, inflammatory publicity disseminated throughout proceedings.

"Prejudice is presumed where 'pretrial publicity is so pervasive and prejudicial that we cannot expect to find an unbiased jury pool in the community.'" *Kingman*, 2011 MT at ¶ 21 (quoting *House v. Hatch*, 527 F.3d 1010, 1023 (10th Cir. 2008)). "To justify a presumption of prejudice under this standard, the publicity must be both extensive *and* sensational in nature." *Kingman*, 2011 MT at ¶ 21. Thus, the issue is whether the publicity was prejudicial, extensive, and inflammatory in nature.

The Montana Supreme Court has addressed the question of whether media coverage is inflammatory. Publication of statements by county attorneys and law enforcement can be inflammatory. *See State ex rel. Coburn v. Bennett* (1982), 202 Mont. 20, 31, 655 P.2d 502. In *Coburn*, an article in the Helena *Independent Record* was headlined "Help from Young Victim Amazed Helena's Police." *Id.* The County Attorney was quoted

saying "[i]t's the best statement from a rape victim I have seen in five years[.]" *Id.* at 23. A deputy county attorney stated, "[h]e picked the wrong little girl[.] "She's the kind that when you say, 'describe the vehicle,' she just does it." *Id.* The Court held that the newspaper went beyond an objective dissemination of information. "Instead of calming an enraged community . . . the [newspaper] inflamed an already angry populace." *Id.* at 31-32.

Other examples of inflammatory publicity include repeatedly broadcasting a defendant's videotaped confession to authorities to a relatively small community resulting in a "kangaroo court" derailing due process. *Rideau v. Louisiana*, 373 U.S. 723, 83 (1963). Virulent publicity about a defendant, the alleged murder, and accusations unrelated to the trial. *Sheppard v. Maxwell*, 384 U.S. 333 (1966). Also, publication of a defendant's picture with "Killer" over his picture while detailing the crime and prior trial proceedings. *State v. Dryman* (1954), 127 Mont. 579, 269 P.2d 796. While other factors were also considered in these cases, the media coverage was nevertheless inflammatory.

The State simply concludes that the media coverage in this case was neither prejudicial, nor inflammatory, without addressing exhibits cited by Defendant. Indeed, the State fails in its Response to address how

publishing the following information was not inflammatory: (1) Defendant's criminal history; (2) baiting allegations; (3) Gary Marbut's statements; (4) the road rage incidents; (5) government representatives' prejudicial statements against Defendant, in conjunction with their support of Decedent's family; (6) significant community outreach in support of Decedent's family; (7) biased articles and headlines; (9) the number of articles increasing throughout proceedings; and (10) the overwhelming theme of articles portraying Decedent positively, garnering sympathy, while disparaging Defendant.

Publication of Defendant's criminal history and the "road rage" incidents was undeniably prejudicial. The Court expressly ordered that this evidence was not admissible at trial. The States cites no basis for arguing that it was not inflammatory publicity.

The State filed a twenty-page *Affidavit* providing detailed accounts of the alleged "road rage" incidents. (State's Aff. p. 17-18.) The *Affidavit* also alleged that Defendant set out a bait purse to lure Decedent into the garage. (Aff. at 15.) At trial, Robby Pazmino's testimony established that this was simply not true; instead, Pazmino testified that they were not able to see inside of the garage. In short, there was no evidence presented at trial that Decedent was "lured" into the garage. To hold otherwise, means that any

person who leaves their garage door open is baiting burglars to enter their home.

The *Affidavit* went on to disparage Defendant's character stating he was violent, irrational, and alleged drug use. (Id. at 17-18.) On the other hand, with respect to Decedent's actions, the State asserted that he was simply garage hopping without reference to the likelihood that a burglary was in progress. (Id. at 19.) Publication of this information did not stop after Defendant's first motion to change venue was filed, it was repeatedly published throughout proceedings.

The State references *State v. St. Dennis,* Fourth Judicial District Court, DC-07-503, opining that the *St. Dennis* is distinguishable from the instant case because all parties agreed that an impartial jury could not be seated based on jury questionnaires. (Resp. at 5.) The State does not, however, provide percentages corresponding to the questionnaires that were submitted to the court. Thus, the only discernible difference is that, here, the State did not agree with Defendant's request to move the trial. It is, however, highly unlikely that over 450 local news items were published locally in *St. Dennis*.

The State cites *Rideau*, *Sheppard*, *Spotted Hawk*, *Dryman*, and

Coburn (citations omitted), stating that presumed prejudice exists only in analogous situations; namely, circumstances amounting to a circus atmosphere or lynch mob mentality. *See Kingman*, 2011 MT at ¶ 32. It should be noted, however, that *Kingman* also states that presumed prejudice exists if the defendant demonstrates that publicity has effectively displaced the judicial process and dictated the community's opinion as to Defendant's guilt or innocence. *Id.*

Coburn, decided in 1982, was the most recent of the five cases cited above. The nature of today's media, including social media, is vastly different than it was over thirty years ago. Where demonstrations previously took place on courthouse lawns, today, a community's lynch mob mentality is measurable online. Almost 90% of the jury pool that returned questionnaires knew about the instant case through the media. Further, 56% had formed an opinion on Defendant's innocence or guilt. Comments previously submitted to the Court in Defendant's motions to change venue indicate that there was a widespread belief in Missoula County that Defendant was guilty of Deliberate Homicide.

Many articles had hundreds of comments, respectively, and the vast majority of them condemned Defendant's actions. Moreover, every time an

article was published it was shared on social media, providing additional forums for commentary. The Court previously noted in its August 21, 2014, Order denying Defendant's motion to change venue, that criticisms of Defendant by politicians "could actually reflect favorably on Kaarma[;]" however, to date, Defendant has yet to see a single article quoting public figures voicing support for Defendant. (Order p. 4 (August 21, 2014)).

There was a significant media contingency in the courtroom that was placed very close the jury box. The media was cautioned not to disseminate photographs of the jury, but published them just the same. Each and every time the jury was excused, they walked within feet of Decedent's emotional family, friends, and the media. The State admits that those in the courtroom were largely supporters of Decedent and his family. (Resp. at 8.) When Decedent's parents made their victim impact statements, the media was, symbolically, placed in the jury box to accommodate the crowded courtroom.

Defendant received death threats. "Fuck you Asshole" was painted on the outside defense counsel's building. (Exhibit A; Ryan Affidavit). Defense attorney, Paul Ryan, had to call the police when he discovered someone shot a window at his home. The round was large enough to put a hole in his window. Since conclusion of the trial, three of Defendant's

attorneys have received harassing voicemails from anonymous members in the community.

The State argues that Defendant was free to move about the community at will after he posted bail. This is simply untrue. Defendant felt like a captive in his own home. His entire neighborhood was filled with memorials for Decedent and German flags attached to homes and mailboxes.

There is no way to possibly catalogue the breadth of anti-Defendant community sentiment; however, the State does not point to a single article where community members came out in support of Defendant, as many did for Decedent, his family, and the State.

Ultimately, *Kingman* emphasized that the publicity must be extensive and pervasive. Defendant is unaware of any case in Montana that has ever reached the level of publicity present in the instant case. Thus, the question has to be asked, if a new trial due to inflammatory media coverage is not proper in this case, when is it appropriate? If the Court finds that the publicity was inflammatory and prejudicial, there is little doubt that it was so pervasive that community sentiment effectively displaced the judicial process.

The State argues in its Response that actual prejudice cannot be established because, prior to jury selection, "the parties culled all of the jurors that who had formed an opinion about the case." (Resp. at 6.) Also, that the jury selection panel was reduced to about 46 potential jurors on day one. Defendant's argument, conversely, is based on presumed prejudice, not actual prejudice. In particular, that prejudicial publicity had so saturated the community that a prospective juror's ability to be impartial was indiscernible even to himself.

Nevertheless, Defendant disagrees that all jurors who had formed an opinion were excused and that only 46 potential jurors remained in the courtroom on day one. In fact, it is not possible that all jurors were excused who stated that they had formed an opinion about the guilt or innocence of Defendant when two of the selected jurors and alternates answered "Yes" to the same question. One of the two jurors explained that "[m]edia coverage strongly implied intent of bodily harm by Kaarma w/next intruder." (Exhibit B, redacted). Eleven of the fifteen jurors and alternates selected, admitted in their questionnaires they knew about the case from media coverage. If inflammatory publicity was widely disseminated, eleven of the fifteen jurors were exposed to the same.

The State also argues that Defendant is insulting the jury by implying that the jurors were untruthful and broke their oaths. (Resp. at 4.) In contrast, Defendant is arguing that the courtroom can exert a unique pressure upon a juror which may render a juror's degree of impartiality indiscernible even to her or herself. *See Kingman*, 2011 MT at ¶ 11 (quoting *Coburn* (citation omitted)). In such cases, the presumption of prejudice is proper even if actual prejudice cannot be established. Defendant's Motion is well-reasoned and necessary to protect Defendant's due process rights. The State's argument that Defendant accused jurors of lying or being untruthful is emblematic of the inflammatory information that was disseminated throughout proceedings.

B. DEFENDANT MAINTAINS THAT INSTRUCTING THE JURY ON JUSTIFIABLE USE OF PERSON OVER DEFENDANT'S OBJECTION VIOLATED HIS SIXTH AMENDMENT RIGHTS.

The State opines that because Defendant exited his front door to confront Decedent—an unknown intruder then in the occupied structure—that JUOF in defense of an occupied structure is inapplicable. (Resp. at 10 (stating "Montana law did not provide Defendant with additional protections because he was not 'in the occupied structure' at the time he used deadly force[.]")) Indeed, the State was improperly allowed to argue that Defendant

was not in his home, despite the fact that he was: (1) sitting in his living room when Decedent entered the occupied structure; and (2) standing at the entrance to his garage, an occupied structure, when Decedent was shot. This is illogical and sets a bad precedent for victimized homeowners.

Under the State's theory, a homeowner arriving home to a burglary in progress would have to confront the intruder from inside the home, not through an open garage door, to be justified in using force to defend an occupied structure. Likewise, regardless of a burglar's location in any occupied structure, a homeowner could never step outside of his home to confront the intruder at the risk of losing the right to assert JUOF in defense of an occupied structure. In the instant case, it should also be noted that Defendant's partner and infant child remained in the home when Decedent neared the access door to the house through the garage.

While the jury could have lawfully found Defendant was not justified under JUOF in defense of an occupied structure, it was improper for the jury to find Defendant was not justified pursuant to JUOF in defense of a person. The State sought to make its case easier by taking Defendant out of his own home and raising his burden to establish reasonable doubt. Homeowners are afforded more protections by the Montana legislature.

These protections are not waived by stepping outside of the doorway to confront an intruder then in the occupied structure.

JUOF in defense of a person and justifiable use of force in defense of an occupied structure are *distinct* affirmative defenses. In *State v. Daniels*, the Supreme Court of Montana analyzed both defenses separately; stating that because the victim in the case did not enter the house unlawfully, it would be improper to instruct the jury on JUOF in defense of an occupied structure even where JUOF in defense of a person was raised. 2011 MT 278, ¶ 44, 362 Mont. 426, 265 P.3d 623. Accordingly, the affirmative defenses are distinct, and it was unlawful to instruct on JUOF in defense of a person simply because JUOF in defense of an occupied structure was raised.

The State asserts that the JUOF in defense of a person instruction was appropriate because Defendant stated he feared for his life on his recorded interview. (Resp. at 2.) In turn, the State says that because "Defendant's own statement revealed . . . that he was fearful for his own safety, [it] provides a factual basis for the instruction regarding justifiable use of force in defense of a person." (Id.) This is incorrect for two reasons.

First, the State played the video of Defendant's recorded interview in

its case-in-chief. Thus, the State presented this evidence to the jury, not Defendant. The State cannot play Defendant's recorded interview in its case-in-chief and then argue Defendant raised the issue on his own. This clearly undermines Defendant's ability to control his own defense. Defendant did not testify in this case, and Dr. Douglas Johnson did not testify to Defendant's subjective state of mind at the time of the offense. Accordingly, the State raised an affirmative defense for Defendant, over his objection, based on its own case-in-chief.

Second, even if Defendant argued that he feared for his safety at the time of the offense, the evidence similarly supports JUOF in defense of an occupied structure. Force is justified in defense of an occupied structure when a person reasonably believes that deadly force is necessary to prevent assault or the commission of a forcible felony. Mont. Code Ann. § 45-3-103(2). Assault and Forcible felonies undeniably concern evidence that Defendant feared for his own safety; namely, assault, burglary, robbery, aggravated assault, homicide, etc.

Ultimately, the State argues that raising JUOF in defense of a person was appropriate based on three flawed rationales. First, the State assumes that because Defendant asserted JUOF in defense of an occupied structure,

it was proper for them to raise the additional affirmative defense of JUOF in defense of a person, treating them as mutually inclusive. Second, that Defendant's recorded interview, despite being offered in the State's case-in-chief, could be used to raise an affirmative defense on Defendant's behalf. Third, that when Defendant stated he feared for his safety, the evidence provided a factual basis for the State to raise the affirmative defense, despite the fact that the evidence likewise went to establish JUOF in defense of an occupied structure.

These arguments are without merit. To hold otherwise, permits the State to unconstitutionally take away a defendant's ability to control his own defense. Moreover, it would allow the State to strategically introduce evidence in its own case-in-chief to raise an affirmative defense for a defendant.

The State also asserts that Defendant "waived" his right to object to the State's argument that Defendant was not protected by JUOF in defense of an occupied structure when he exited his home because he did not object during closing arguments. Defendant strenuously objected to any argument that Defendant was not protected by JUOF in defense of an occupied structure during the jury instruction conference. Defendant's objection is

very clearly stated on the record.

The State also argues that the definition of occupied structure does not include Defendant's position when he exited his home and confronted Defendant at the entrance of his open garage. In particular, the State argues that "[h]ad the Montana legislature intended for additional protections to apply outside of an occupied structure or at the curtilage of an occupied structure it would have stated so." (Resp. at 11.) In contrast, Defendant contends that Montana's occupied structure definition is broad, and even includes buildings in close proximity to an occupied structure habitually used for personal use. Mont. Code Ann. § 45-2-101(47). Occupied structure certainly includes any route a homeowner takes to confront an intruder that remains therein, if outbuildings in close proximity to a home are protected as well. The State's position broadens an intruder's protections based on a homeowner's location, despite the fact that an intruder may remain in the home.

Furthermore, Defendant was in his living room when Decedent entered the occupied structure. Defendant's partner and infant child remained in the home at the time Decedent was shot. Also, Defendant was standing at the entrance of his open garage establishing his presence in the

occupied structure.

Defendant maintains that it was not proper to instruct the jury that Defendant, the homeowner, could be the initial aggressor when he confronted an unknown intruder in his occupied structure. The State argues that Defendant was the initial aggressor because § 45-3-103, M.C.A., "specifically states its application extends to '§ 45-3-102 through 45-3-103,' and thus applying to both defense of an occupied structure and defense of a person."

This argument is misguided, subsections (2)(a) and (2)(b) "outline cases in which the aggressor's right of self-defense is reinstated." Section 45-3-105 (Official Comments). Likewise, § 45-3-103, M.C.A., assumes "that the person using force in defense has not committed an unlawful act which has inspired the use or threat of force against him, and not otherwise provoked such force." *Id.* The statute *may* be applicable to JUOF in defense of an occupied structure; however, it is not proper in this case where the predicate unlawful act was committed by Decedent.

The jury was instructed that:

> "[t]he use of force in defense of an occupied structure is not available to a person who purposely or knowingly provokes the use of force against himself unless such force is so great that he reasonably believes that he is in imminent

> danger of death or seriously bodily harm and that he has exhausted every reasonable means to escape such danger other than the use of force with is likely to cause death or serious bodily harm to the assailant."

Thus, the jury could infer that Defendant was the initial aggressor, despite the fact that an intruder entered his occupied structure at night. Furthermore, that if he was the initial aggressor, Defendant had a duty to exhaust every reasonable means to escape the danger unless he reasonably believed that he was in imminent danger of death or serious bodily harm. Once again, this heightened the burden on Defendant to establish reasonable doubt. It is illogical to argue that Defendant, the homeowner, was the initial aggressor and Decedent, the intruder, did not provoke the confrontation.

C. DEFENDANT MAINTAINS THAT DEFENDANT'S DELIBERATE HOMICIDE VERDICT SHOULD BE MODIFIED TO MITIGATED DELIBERATE HOMICIDE.

The State argues that mitigating factors warranting a modified verdict to mitigated deliberate homicide "must arise from some sort of provocation, not simply the buildup of stress and anger." (Resp. at 13. (citing *Hans v. State* (1997), 283 Mont. 379, 399, 942 P.2d 674, 686.)) In turn, Defendant contends that a perceived burglary in progress at his home certainly qualifies as "some sort of provocation." Defendant had reason to believe

that Decedent was burglarizing his home because he was twice burglarized in the weeks immediately preceding the offense. Seemingly, a nighttime burglary while Defendant was home with his partner and infant son is precisely the sort of applicable provocation cited by the State.

Evidence at trial established that Decedent was not "lured" into the garage by a bait purse. Instead, a third burglary in a short period of time clearly supports Defendant's belief that his home was being targeted. Defendant is not asking the Court to ignore the Jury's verdict. Defendant was also not required to offer a lesser included offense at trial. Pursuant to § 46-16-702(3), M.C.A., the Court is expressly permitted to modify or change the verdict by finding Defendant guilty of a lesser included offense.

The State argues that Defendant is ignoring the evidence at trial that Defendant "shot Diren in the arm, first, continued to fire his shotgun at Diren, paused and as Diren surrendered saying, 'No, no, no, no, please!" the Defendant shot him in the head with a 12-guage shotgun loaded with 00 buckshot." (Resp. at 14.) In contrast, Defendant contends that evidence at trial established that Defendant was provoked and under extreme emotional stress at the time of the offense.

Robby Pazmino testified that he did not hear Decedent say anything

and heard consecutive shotgun blasts. Other neighbors also stated that they did not hear a "gap" in the shots. Janelle Pflager's statement that she heard "no, no, no, please!" was the only evidence that Decedent said those words. This account was one of several conflicting statements she made to officers almost immediately after the traumatic event. Dr. Ron Martinelli testified to auditory occlusion stating that Defendant may not have heard what was said due to the intense stress he was under at the time of the shooting. Similarly, in Defendant's first interview with Detectives, prior to ever meeting with a lawyer, he stated he was unsure of what he heard.

Ultimately, there is sufficient evidence on the record that Decedent was not lured into the garage, a burglary was in progress at his home, and Defendant was under significant stress at the time of the offense. A homeowner being burglarized is precisely the type of provocation that warrants modifying the verdict from Deliberate Homicide to Mitigated Deliberate Homicide.

CONCLUSION

Defendant had a constitutional right to a fair trial and impartial jury. In this case, prejudice should be presumed. The State failed to address how the media coverage cited by Defendant was not inflammatory or prejudicial.

Likewise, the extensive and sensational nature of the media coverage warrants a finding that there was a high likelihood that the publicity displaced the jurors' role in the trial process. Defendant was clearly in his home at the time of the instant offense. The State's rationales for offering JUOF in defense of a person are inconsistent with Montana law. Defendant's Sixth Amendment Right to control his own defense was violated when the State offered evidence in its case-in-chief to offer an affirmative defense over Defendant's objection. For all of the foregoing reasons, Defendant respectfully maintains that his Motion should be granted in the interest of justice.

Alternatively, the Deliberate Homicide verdict against Defendant should be modified because Defendant was under the provocation of a burglary in progress at his home. Decedent was not "lured" into the garage as the State initially averred. Likewise, there is sufficient evidence on the record to establish Defendant was under extreme duress at the time of the offense.

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Dated this 6th day of February, 2015.

PAUL RYAN & ASSOCIATES, PLLC

By _____
Nate S. Holloway,
Attorney for Defendant, Markus Kaarma

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this 6th day of February, 2015, to:

Andrew Paul
Missoula County Attorney's Office
200 West Broadway
Missoula, MT 59802

By _____

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MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

STATE OF MONTANA, Plaintiff, -vs.- MARKUS HENDRIK KAARMA, Defendant.	Dept. No. 1 Cause No. DC-14-252 **AFFIDAVIT OF PAUL T. RYAN**

//

EXHIBIT
A

STATE OF MONTANA)
:ss
County of Missoula)

I, Paul T. Ryan, being first duly sworn upon his oath, depose and states as follows:

1. I am Counsel for the Defendant, Markus H. Kaarma, in the above-entitled matter.

2. I was retained by Defendant on May 12, 2014.

3. During the summer months of 2014, our office building was vandalized. I arrived at the office, and learned from the building owner that the phrase "Fuck You Asshole" had been painted on the building front.

4. In the early morning hours of January 1, 2014, I received a disparaging voicemail regarding my representation of the Defendant. Two of my colleagues also received similar messages regarding their association with the above-entitled case.

5. On November 16, 2014, I had to call police because someone shot a window at my home. The round was large enough to put a hole in the window.

//

Dated this 6th day of February, 2015.

Paul T. Ryan

This instrument was acknowledged before me on the 6th day of February, 2015, by Paul T. Ryan.

LORIE KLAUDT
NOTARY PUBLIC for the
State of Montana
Residing at Missoula, MT
My Commission Expires
April 20, 2018.
(SEAL)

Notary Public for the State of Montana
Printed Name of Notary: Lorie Klaudt
Residing at Missoula, MT
My commission expires: 4-20-2018

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the foregoing was mailed, this 6th day of February, 2015, to:

Andrew Paul
Missoula County Attorney's Office
200 West Broadway
Missoula, MT 59802

By

6. Based on either the media coverage or your discussions with others, have you formed an opinion about the guilt or innocence of Markus Kaarma? Yes/No

If yes, please explain your opinion: _____

Media coverage strongly implied intent of bodily harm by Kaarma w/ next intruder.

7. If your answer to the previous question was "yes," do you believe you can set this opinion aside and listen to all the evidence and from that evidence alone render a fair and impartial verdict? Yes/No

Regardless of your answer, please explain: _____

I believe in the judicial system more than the media to reach the truth about this case.

8. Have you or any immediate member of your family ever been employed by a law enforcement agency? Yes/No (please circle)

If yes, what agency, rank, and dates of service? _____

_____

9. Do you own rifles, shotguns, or handguns? Yes/No

If yes, please list what firearms you own: _____

_____

10. Have you, any member of your family, or someone you are close to been a victim of a violent crime? Yes/No

If yes, please explain: _____

_____

_____

_____

EXHIBIT

tabbies

B