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**IN THE MUNICIPAL COURT OF THE CITY OF BELLINGHAM
IN AND FOR THE COUNTY OF WHATCOM**

CITY OF BELLINGHAM,

Plaintiff,

vs.

IAN ALEXANDER, BONNIE BARKER,
ROBERT BURR, MICHAEL CRAGAN,
ALEXIS-GARCIA-SILVA, HERBERT
GOODWIN, ANDREW INGRAM,
TAMARA LEE KING, JORDAN QUINN,
ZACHARY ROBERTSON, JOSHUA
SMITH, GERALD WARREN

Defendant.

Nos. CB0075354, CB0075352,
CB0075353, CB0075362,
CB0075361, CB0075356,
CB0075359, CB0075357,
CB0075355, CB0075360,
CB0075351, CB0075358

**DEFENDANTS' REPLY IN
SUPPORT OF THE NECESSITY
DEFENSE**

Defendants hereby REPLY BRIEFLY IN SUPPORT of NOTICE OF INTENT TO
BRING THE NECESSITY DEFENSE in trial in this matter.

1 1) The court⁵ is correct that the caselaw has evolved in regards to the circumstances
2 under which the defense may be brought. There is no longer a requirement that the
3 Defense only be available when the circumstance⁴s involve an act of nature. Even
4 though Defendants can argue that Climate Change is an act of nature, albeit brought
5 about by human actions, in fact the caselaw since at least *State v., Diana* is that the
6 requirement is merely that the circumstances not have been created by Defendants
7 and must be beyond their direct control.

8 In Washington State, the necessity defense is available “when the physical forces of
9 nature or the pressure of circumstances cause the accused to take unlawful action to
10 avoid a harm which social policy deems greater than the harm resulting from a
11 violation of the law.” State v. Parker 127 Wn. App. 352 quoting *State v. Diana*

12
13
14 Generally, necessity is available as a defense when the physical forces of nature or
15 the pressure of circumstances cause the accused to take unlawful action to avoid a
16 harm which social policy deems greater than the harm resulting from a violation of the
17 law. State v. Diana. 24 Wn. App. 908 (1979)

18
19
20 The Diana Court quotes the Model Penal Code, which offers the Defense as follows.

1 Section 3.02 of the Model Penal Code (Proposed Official Draft 1962) formulates the
2 elements of necessity as follows:

3 Justification Generally: Choice of Evils:

4

5 (1) Conduct which the actor believes to be necessary to avoid a harm or evil to
6 himself or to another is justifiable, provided that:

7 (a) the harm or evil sought to be avoided by such conduct is greater than
8 that sought to be prevented by the law defining the offense charged; and

9 (b) neither the Code nor other law defining the offense provides
10 exceptions or defenses dealing with the specific situation involved; and

11 c) a legislative purpose to exclude the justification claimed does not
12 otherwise plainly appear.

13 (2) When the actor was reckless or negligent in bringing about the situation
14 requiring a choice of harms or evils or in appraising the necessity for his conduct, the
15 justification afforded by this Section is unavailable in a prosecution for any offense for
16 which recklessness or negligence, as the case may be, suffices to establish culpability.

17

18 Here, as discussed The Defendants did not bring about climate change or coal
19 as a precipitating factor, had no control over it, all parties conceded that the current
20 and ongoing harm of climate change is greater any caused by Defendants remaining
21 on the tracks, there is no specific other defense to trespass based on Defendants

1 actions except necessity, no legislative intent to prevent this use of this defense, and
2 neither recklessness and/or negligence by Defendants is a factor or issue.

3

4 2) As discussed at some length in oral argument, State v. Ayer 109 Wash 2d 303
5 (1987) does not apply as, in Ayer necessity was denied because Defendants were
6 found to have failed to meet the imminence prong of the Defense as the use of nuclear
7 weapons at that time (1987) was a theoretical possible harm, not an immediate (and in
8 fact ongoing one) as here. There is little dispute that the climate crisis is an immediate
9 and ongoing harm.

10

11 3) US v. Schoon 971 F. 2d 193 (9th Circuit, 1991). There are several reasons
12 why Schoon is not and should not be applicable here:

13 1) This was a demonstration specifically targeting the coal trains that
14 Defendants blocked and the mining, shipment, and burning of this coal by the
15 companies directly involved, and the harm that was directly causing to the environment,
16 and the climate, right here and now, not 2,900 miles away, as in the case of the
17 Schoon Defendants, but right at the location where they were demonstrating and got
18 arrested, very much like the Defendants in the lunch counter sit-ins pointed out by the
19 Schoon court. Here, as in the lunch counter sit-ins, Defendants were attempting to
20 symbolically interfere with precisely the injustice that was being committed by the entity
21 they were protesting at.

1 2) The Schoon opinion is not binding authority on this court, as it only discusses
2 and applies to Federal Courts as state courts can axiomatically allow more, though not
3 fewer rights. There is not a single Washington Appellate opinion that cites Schoon.

4 In fact, there doesn't appear to be a single Federal case ever cited in any
5 Washington opinion. There are only two state court decisions (plus a dissent in Alaska)
6 from anywhere mentioning Schoon. One of these two is State v. Roselle 1997 Montana
7 District Lexis 774. In that case the Montana District Court specifically excluded Schoon
8 as having any bearing whatsoever in state courts.

9 "The Ninth Circuit's decision in United States v. Schoon, 971 F.2d 193 (9th Cir.
10 1991) is inapplicable as that case does not arise out of an interpretation of Montana
11 law. Montana is entitled to define its own crimes and defenses, as long as those
12 definitions don't conflict with the United States Constitution, and there is no suggestion
13 that the compulsion defense is constitutionally flawed." Roselle at page 3. The only
14 other state case that even mentions Schoon is a Virginia case that cites it on a
15 somewhat different point and then goes on to explain why it doesn't apply anyway.

16 The Prosecutor presents no caselaw that makes this narrow decision about
17 Federal Court standards and doctrine applicable in the state courts of Washington or
18 any other state, and clearly state courts even within the 9th Circuit have not felt so
19 bound, and the court, therefore should not even consider Schoon. It is not on point,
20 and is not binding, or even persuasive authority. Furthermore the prosecutor has

1 offered no Washington State case that makes a distinction between direct and indirect
2 civil disobedience, and not such case appears to exist based on exhaustive research
3 by counsel for Defendants.

4 This case cites heavily and exclusively to Federal Jurisprudence and the US
5 Constitution, whereas The Washington Constitution, allows significantly greater rights in
6 criminal defense and in political expression. Therefore, this standard is not applicable
7 here, and so applying it would be an error of law.

8 3) There are fundamental flaws in Schoon that render it bad law to use in any
9 case where not bound to do so. The distinction between direct and indirect protest is a
10 specious one, including in the examples of direct civil disobedience given by the
11 Schoon Court. The actual facts of the Schoon case are far different from the instant
12 case: the Schoon Defendants engaged in a sit-in at an IRS office in Tucson, AZ to
13 protest the use of tax money in general to protest US government policies carried out
14 by the State and Defense Departments and the White House against the people and
15 governments of Central America. If there is such a thing as indirect civil disobedience,
16 that would be it, involving neither the specific policy nor the policy-makers, in marked
17 contrast to Thoreau refusing to pay a specific war tax, and these Defendants protesting
18 actions and policies directly devised and/or implemented by the Naval facility carrying
19 them out, at which defendants were specifically protesting.

1 But Schoon, in its dicta goes on to make a general distinction that is not well
2 founded in historical fact or law. It cites the lunch counter sit-ins as the example of
3 direct civil disobedience carried out for necessity, but the participants, in fact, in some
4 cases were protesting a policy, by a private entity, and were arrested for trespass, not
5 the law they were protesting, or in most of the cases, were protesting a Jim Crow LAW,
6 not at the city, county, or state entity that had created the law and was directly involved,
7 but at a private entity that, arguably was required to follow them, thus making these
8 brave acts of civil disobedience just as direct or indirect as any other principled acts of
9 objection or refusal.

10 This is true of the attempts to make the eventual Selma to Montgomery march
11 during which participants were severely beaten and arrested on the Edmund Pettis
12 Bridge to protest segregation and with the knowledge and intent of committing civil
13 disobedience, which by the prosecutor's and Schoon's logic would be indirect civil
14 disobedience and not worthy of a necessity argument.

15 Early in the last century members of the Industrial Workers of the World were
16 arrested in Spokane, Everett, Centralia, and around the State of Washington for
17 violating an ordinance against public speaking, not because they were merely
18 protesting for the right to speak, but because of the content of what they were saying,
19 and they were arrested for the same. Under the logic of the court, this too could be
20 considered indirect civil disobedience. All of these would be miscarriages of justice,
21 and the court is not required to and should not follow suit.

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DEFENSE
Bellingham Municipal Court,
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1 4) The trial court, according to the caselaw has the discretion to rule on the
2 evidence and allow the necessity defense. Even the Schoon case, more than once
3 states that “(t)he court may preclude the invocation of the defense of necessity if the
4 proof is insufficient.” The word may, clearly means that the court is not required to do
5 so, and the context clearly so indicates. There have been untold opinions and volumes
6 written on the difference between “May” and “Shall or “Must.” May is always
7 discretionary. If the intent of the court was to outright bar the trial court from allowing
8 the defense, they would have said so. If allowing or excluding the defense is within the
9 discretion of the trial court, even within the cases cited by the prosecutor, then, absent
10 some showing of clear bias, which the Prosecutor has not even suggested, let alone
11 argued, it is also within the court’s discretion, by definition to allow it. For that reason,
12 as well as the fact that the Prosecutor has not argued that the State will be prejudiced
13 by allowing the defense of necessity to be presented in the evidentiary trial phase of
14 this case, the prosecutor’s motion in limine should be denied as the decision is within
15 the discretion of the court, and as otherwise discussed above.

16

17 **III. CONCLUSION**

18 For all of the above reasons, the prosecutor’s motion in limine should be
19 denied, and defendants should be allowed to argue the defense of necessity to the jury
20 in this matter.

1 Respectfully Submitted:

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3 Dated this 21st Day of July, 2012,

4

5 LAWRENCE A. HILDES WSBA #35035
6 Attorney for Defendants
7

DEFENDANTS' REPLY IN SUPPORT OF NECESSITY
DEFENSE

Bellingham Municipal Court,

CB0075354, CB0075352, CB0075362, CB0075361, CB0075356,
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1 **PROOF OF SERVICE**

2
3 Lawrence A. Hildes certifies as follows:

4
5 I am over the age of 18 years, and not a party to this action. I am a citizen of the United States. My
6 business address is P.O. Box 5405, Bellingham, WA 98227
7

8 On December 21, 2012 I served the following documents(s) described as follows:

9 DEFENDANTS' REPLY IN SUPPORT OF NECESSITY DEFENSE on the following persons(s) in this
10 action at the following addresses:

11 Bellingham City Prosecutor
12 Bellingham Municipal Courthouse
13 2014 C Street
14 Bellingham, WA 98225
15

16 [X] (BY MAIL) by placing a true copy of the above documents in a sealed envelope with postage fully
17 prepaid in the mail at Bellingham, WA, addressed to the person(s) above at the above address
18

19 [] (BY PERSONAL SERVICE) by personal delivery to the addresses listed above.
20

21 [] BY FACSIMILE) by causing such document(s) to be faxed to the person(s) listed above by
22 transmitting said document(s) from facsimile machine no. (360) 714-1791 to facsimile machine no.
23

24 _____

25 [X] (STATE) I declare under penalty of perjury under the laws of the State of Washington that the
26 above is true and correct.
27

28 Executed on December 21, 2012 at Bellingham, WA.
29
30
31

32 _____
33 Lawrence A. Hildes
34