SNOHOMISH COUNTY DISTRICT COURT – EVERETT DIVISION

IN AND FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, vs. ABIGAIL BROCKWAY, MICHAEL LAPOINTE, PATRICK MAZZA, JACKIE MINCHEW, and ELIZABETH SPOERRI, Defendants,	Case No.: 5035A-14D; 5039A-14D; 5040A-14D; 5041A-14D 5042A-14D **ORDER DENYING DEFENSE MOTION TO ALLOW AFFIRMATIVE DEFENSE OF NECESSITY AND EXPERT WITNESS TESTIMONY**

I. PROCEDURAL POSTURE

These matters are jointly set for jury trial on Monday, January 11, 2016. Defendants are each charged with one count of Criminal Trespass in the Second Degree (RCW 9A.52.080) and one count of Obstructing or Delaying a Train (RCW 81.48.020). Defendants seek to offer expert testimony to the jury on the issues of climate change and the dangers of transporting hazardous materials on railways to argue the affirmative defense of 'necessity' in WPIC 18.02. This court must decide if the affirmative defense of necessity is available to Defendants in their acts of civil disobedience. The defense seeks to call six expert witnesses to provide relevant testimony as it relates to the necessity defense. These issues were argued in open court on December 30, 2015.

II. FACTS

1. Defendants each have been actively engaged in legal forms of political activism to spur action by state and local governments to address the dangers of human causes of climate change and the urgent issues presented by the oil and coal train corridor in the Pacific Northwest.

2. Defendants intend to testify that they each individually and collectively exhausted all legal effective means to protest and that civil disobedience was the only means by which they could minimize the harms of climate change and unsafe rail transport of dangerous materials.

3. On September 2, 2014, Defendants went onto the private property located within Snohomish County and privately owned by Burlington Northern Santa Fe (BNSF), a property where rail cars are routed to various destinations transporting countless materials – including oil and coal.

4. Defendants did not have permission to be on BNSF property.

5. Defendants assembled a metal tripod on a railroad track intended to block cargo from passing that location on the track.

6. Defendants Lapointe, Mazza, Minchew and Spoerri chained themselves to the three legs of the tripod and Defendant Brockway positioned herself at the top of the tripod approximately 20 feet off of the ground. Defendant Brockway risked falling if any of the other four defendants were removed from the tripod's legs.

7. Defendants were joined by other like-minded protesters.

8. Defendants were not protesting RCWs 9A.52.080 (Criminal Trespass in the Second Degree) or 81.48.020 (Obstructing or Delaying a Train).

9. BNSF Officer Stapleton responded to the area and successfully convinced other protesters to leave the area; Defendants in this action remained attached to the tripod and refused to unchain themselves or leave the area.

10. The Everett Fire Department responded and used machinery that successfully removed Defendants from the tripod without any injury to persons or property.

11. Defendants had peacefully obstructed the rail line for approximately eight hours.

12. BNSF estimates a loss of $10,000+ and there were significant law enforcement and fire department resources dedicated to this incident.

13. The protest drew some media attention and, in fact, a documentary film crew now intends to record this jury trial.

III. ANALYSIS

Civil disobedience is an open and purposeful lawbreaking that is politically motivated, and normally is accompanied by the actors' sense of moral indignation and duty. While not constitutionally protected, civil disobedience plays an important role in the political, social, and legal history of the United States. Direct civil disobedience occurs when a protestor's actions are directed at the specific law being protested, and the action involves breaking that law or attempting to prevent the execution of that law.

Indirect civil disobedience is when protestors violate a law that is not itself the object of protest.

The common law defense of necessity is available when physical forces of nature or the pressure of circumstances cause the defendant to take unlawful action to avoid a harm which social policy deems greater than the harm resulting from violation of law. *State v. Diana,* 24 Wn. App. 908 (1979). In cases where the court finds that the affirmative defense of necessity will be available to the jury, WPIC 18.02 requires the defense to prove by a preponderance of the evidence that:

(1) the defendant reasonably believed the commission of the crime was necessary to avoid or minimize a harm; and

(2) the harm sought to be avoided was greater than the harm resulting from a violation of the law; and

(3) the threatened harm was not brought about by the defendant; and

(4) no reasonable legal alternative existed.

When considering the applicability of an affirmative defense, a defendant must offer sufficient admissible evidence to justify giving the instruction on the defense. *State v. Janes*, 121 Wn.2d 220, 237, 850 P.2d 495 (1993). In evaluating the sufficiency of evidence supporting an affirmative defense jury instruction, the court must interpret the evidence in a light most favorable to the defendant. *State v. Otis*, 151 Wn.App. 572, 578, 213 P.3d 613 (2009). In addition, the trial court must avoid weighing the proof or evaluating the credibility of evidence so as to prevent invading the province of the jury. *State v. Birdwell*, 6 Wn.App. 284, 297, 492 P.2d 249 (1972). However, every defendant does not have unmitigated access to the necessity defense jury instruction.

Washington courts have routinely limited the use of the necessity defense. In *State v. Niemczyk*, 31 Wn. App. 803 (1982), a defendant charged with escape was not entitled to a necessity defense instruction where he did not make a bona fide effort to return to custody or surrender as soon as he reached a position of safety. In *State v. Gallegos*, 73 Wn.App. 644, 650-51 (1994), a defendant charged with felony flight was properly denied a necessity defense instruction where he claimed it was necessary to flee in order to help a friend who was being harassed. In *State v. Bailey*, 77 Wn.App. 732 (1995), a defendant charged with killing wildlife was not entitled to a necessity instruction in a mercy killing context. In *State v. Parker*, 127 Wn.App. 352 (2005), a felon in possession of a firearm case, defendant was not entitled to a necessity instruction even though he testified that he had been shot nine months prior, the shooter was not apprehended, and he needed to carry a gun for self-defense.

Washington state appellate courts have not recognized the affirmative defense of necessity in civil disobedience cases (direct or indirect) other than *State v. Aver*, 109 Wn.2d 303 (1987), which presents a nearly identical factual scenario to Defendants here. Defendants in *Aver* were convicted of Obstructing or Delaying a Train in violation of RCW 81.48.020. The train which Defendants were convicted of obstructing was referred to as a "White Train" or "Death Train" and was believed to have been carrying nuclear warheads to the naval submarine base at Bangor, Washington. Approximately 200 to 250 people were protesting the train's passage. A number of protesters impeded the train's passage by getting onto the train tracks. Defendants asked for a jury instruction on the necessity defense at trial and it was denied. The Washington

Supreme court found that the trial court did not abuse its discretion when it declined to give necessity defense jury instruction.

A. Legally Cognizable Harm

The necessity defense instruction requires the jury to determine if a defendant proved by a preponderance of the evidence that "the harm sought to be avoided was greater than the harm resulting from a violation of the law." WPIC 18.02(2). In the classic necessity defense trial, the jury could easily weigh the harm minimized versus the harm caused by the defendant: a mountain climber lost in a storm breaks into another's house for shelter and food to save his life; a druggist dispenses a drug without a prescription in an emergency to save a life; a good Samaritan breaks into a home to save a child from a fire; a prisoner escapes a burning jail to save his life; or a crew commits mutiny where their ship was unseaworthy. The harms to be weighed are obvious in these cases.

The harms to be weighed here, however, are more amorphous; it is unfeasible to link the defendants' criminal acts with the quality and degree of harm prevented by those acts. It is not possible to quantify/weigh the harm averted by Defendants in this case. How much did their crimes spur political action, decrease global climate change or impact rail regulations? Other than pure speculation, there is no way to measure the impact of Defendants' civil disobedience on the issues they are protesting. Therefore, Defendants fail to establish a legally cognizable harm necessary for a jury to analyze WPIC 18.02(2). *See United States v. Schoon*, 971 F.2d 193, 197 (1992). General harms by global warming are obvious – and potentially catastrophic – if government and individuals fail to act. But such generalized harm, even though it is extreme, cannot be

legally cognizable because it is impossible to quantify the societal benefit of defendants' illegal acts as they relate to the harm averted. Therefore, necessity is unavailable as a defense.

B. Reasonable Legal Alternatives

A necessity defense instruction will not be given unless Defendants make a *prima facie* showing that "no reasonable legal alternative existed." WPIC 18.02. As Washington cases are relatively silent on civil disobedience cases and the applicability of the necessity defense, federal cases provide some guidance to this court as this prong of the analysis appears to be universally required throughout the country. For example, in *United States v. Quilty*, the Seventh Circuit relied on the legal alternatives prong (similar to WPIC 18.02(4) in WA) to reject defendants' claim of necessity in a trespass on military property to protest nuclear proliferation. The *Quilty* court reasoned that Defendants could not resort to illegal behavior so long as a "'reasonable legal alternative to violating the law'" existed, noting, "There are thousands of opportunities for the propagation of the anti-nuclear message: in the nation's electoral process; by speech on public streets, in parks, in auditoriums, in churches and lecture halls; and by the release of information to the media, to name only a few." 741 F.2d 1031 (7th Cir. 1984). In its holding, the *Quilty* court reiterated that the availability of these alternative means of expression precluded a successful necessity defense, regardless of the practicality or viability of resorting to these options. Id. at 1033-34.

In *United States v. Montgomery*, the Eleventh Circuit upheld the district court's refusal to submit a necessity defense to the jury and rejected claims that "'the normal

political processes have been rendered ineffective to meet the dangers created by nuclear arms build-up.'" 772 F.2d 733, 736 (11th Cir. 1985). Similarly, in *United States v. Dorrell*, the Ninth Circuit rejected an antinuclear protestor's claim of necessity, reasoning that because Defendant had "recourse to the political process to redress his concerns regarding nuclear war," his trespass on a missile base could not be excused by necessity. 758 F.2d 427, 432 (9th Circ. 1985).

In *United States v. Aguilar*, the Ninth Circuit relied primarily on the availability of alternatives in the judicial system to reject a necessity defense brought by civil disobedients who violated immigration laws, claiming that their actions were necessary to protect refugees from war in Central America. 883 F.2d 662, 667 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 751 (1991). The court upheld the district court's refusal to place necessity before the jury, finding that the defendants had failed to show the absence of other legal alternatives. Id. at 693. Defendants argued that they had, in fact, used existing methods, including appeals and petitions to the Immigration and Naturalization Service to the extent that such means were viable. Id. at 693-94. The court rejected these claims, noting that the defendants had not exhausted available legal alternatives since they did not "appeal to the judiciary to correct any alleged improprieties by the INS and the immigration courts." Id. at 693.

This line of cases culminated at the Ninth Circuit in *United States v. Schoon*, 971 F.2d 193, *cert. denied*, 112 S. Ct. 2980 (1992), where the court created a *per se* rule barring the application of the necessity defense to cases of indirect civil disobedience. The court determined that "legal alternatives will never be deemed exhausted when the harm can be mitigated by congressional action... [t]he harm indirect civil disobedience

aims to prevent is the continued existence of a law or policy. Because congressional action can *always* mitigate this "harm," lawful political activity to spur such action will always be a legal alternative." Id. at 198.

Defendants cite to *People v. Gray*, 571 N.Y.S.2d 851 (1991) for the proposition that the legal alternative requirement does not preclude the necessity defense in civil disobedience cases altogether simply because there will always be a logical possibility of future legal protest and, therefore, the court should not in hindsight circumvent the purpose of the defense. However, this court will not eliminate the requirement of WPIC 18.02(4) simply because Defendants here were engaged in indirect civil disobedience.

In addition, inherent in this analysis is the likelihood that the harm caused by political inaction on climate change and rail safety will be abated by trespassing and obstructing train traffic. Defendants intend to testify about all of the other legal means of achieving their goals that have been ineffective. This court has no doubt that Defendants have worked very hard to achieve their goals through legal means, but there are countless legal means, some of which Defendants here have attempted and some which they have undoubtedly not attempted, by which to protest the inaction by local government and BNSF.

This court cannot imagine a scenario of indirect civil disobedience where a prima facie showing that ALL reasonable legal alternatives have been exhausted. This court adopts the logic of *Schoon, infra,* and finds that the affirmative defense of necessity is unavailable in indirect civil disobedient cases. WPIC 18.02 is not available to defendants as a matter of law.

IV. CONCLUSIONS

For the foregoing reasons, it is hereby ordered that:

1. Defendants' indirect civil disobedience fails to establish a legally cognizable harm required for a necessity defense jury instruction;
2. Defendants fail to offer prima facie evidence that no reasonable legal alternative existed;
3. The affirmative defense of necessity is not available to Defendants as a matter of law; and
4. Defendants' expert witnesses were proffered exclusively for the necessity defense; therefore, their testimony is excluded as not relevant to the issues before the jury.

IT IS SO ORDERED this 6 day of January, 2016

Judge Anthony E. Howard