

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

FILED
U.S. DISTRICT COURT
BRUNSWICK DIV.
2019 OCT -1 PM 2:47
CLERK C. Asbell
SO. DIST. OF GA.

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 2:18cr22

vs.

STEPHEN KELLY, S.J.,

Defendant.

NOTICE OF INTENT TO RAISE DEFENSE OF NECESSITY

Defendants will raise the defense of necessity in this matter.

First, defendant sincerely believed that he was faced with a choice of evils and he chose the lesser of the two evils. Any use of nuclear weapons by definition cannot discriminate between civilian and military targets. Each of the many Trident nuclear missiles kept at Kings Bay contain many multiples of the destructive power used by the United States in Hiroshima and Nagasaki.

Second, the defendant sincerely believed and acted reasonably to prevent imminent harm. The harm of nuclear weapons is imminent, more imminent at the current moment than at any time recently. According the Bulletin of Atomic Scientists, at no time in history have we been closer to the devastation of the nuclear exchange. The current President of the United States has repeatedly announced that “all options are on the table” and even went so far as to repeatedly threaten the people of North Korea with “fire and fury like the world has never seen...”

Third, the defendant reasonably believed that his action could have an impact on the

harm he wished to avoid. Only by symbolically disarming these nuclear weapons is there any hope for real disarmament.

And fourth, that defendant reasonably believed that there were no other legal alternatives to violating the law. Defendants have each spoken, written, prayed, petitioned, and lobbied for nuclear disarmament and peace for decades. These actions are the only ones left which might make a difference.

Though the Eleventh Circuit case of U.S. V Montgomery, 772 F2d 733 (11 Cir September 27, 1985) (which involved among others, one of the defendants in this current case) ruled that the necessity defense was not available because defendants had legal alternatives to the destruction of government property, that case can be set aside because of later legal developments.

Nuclear policy and nuclear technology are not static realities. In the decades since Montgomery, U.S. nuclear policy has expanded in scope, and the Pentagon has maintained a first-use policy with regard to weapons of mass destruction. According to the 2018 Nuclear Posture Review (NPR),¹ “The United States would only consider the employment of nuclear weapons in extreme circumstances to defend the vital interests of the United States, its allies, and partners.” Specifically, the NPR notes such a defense of U.S. “vital interests” includes the use of nuclear weapons in response to a conventional non-nuclear attack by another party.

Montgomery found that nuclear weapons did not – in 1984 – pose an “imminent threat” to global stability. However, today, according to The Bulletin of the Atomic Scientists, the prospect of the use of nuclear weapons has never been more imminent. The Doomsday Clock,

¹ <https://media.defense.gov/2018/Feb/02/2001872886/-1/-1/1/2018-NUCLEAR-POSTURE-REVIEW-FINAL-REPORT.PDF>

maintained by The Bulletin of the Atomic Scientists, stands at two minutes to midnight.²

Since the 2016 election of Donald Trump, who by the authority vested in him by the Constitution, has sole discretion as to the use of nuclear weapons, nuclear tensions have risen. More than once, President Trump has threatened to use nuclear weapons against North Korea. In addition, the President has pulled the United States out of the 1987 Intermediate-range Nuclear Forces (INF) treaty that was signed by Ronald Reagan and Mikhail Gorbachev. INF led to nearly 2,700 short- and medium-range missiles being eliminated, and an end to a dangerous standoff between U.S. and Soviet nukes in Europe. Should these short- and medium-range nuclear weapons come back on line, "Nuclear missiles will be able to reach Russia in as little as three minutes from launch in Eastern Europe and the Trident can reach Russia in around 15 minutes.

In addition, in July, 2017, an overwhelming majority of the world's nations -- but not the United States -- voted to adopt the Treaty on the Prohibition of Nuclear Weapons -- a landmark international agreement that establishes a pathway to nuclear disarmament. President Trump also pulled the U.S. out of the "nuclear deal" established between the U.S. and Iran, and he is likely to also pull the U.S. out of the New START Treaty, which would leave nuclear weapons free from all legal controls.

Today, nine nation states possess nuclear weapons, with additional Western European states that serve as hosts for U.S./NATO nuclear weapons. At present, the tension between neighbor nuclear states -- India and Pakistan -- has been ramped up by the recent exchange of conventional weapons between the two enemy nations.

Since Montgomery, scientists have concluded that a so-called "Nuclear Winter," which

² <https://thebulletin.org/doomsday-clock/>

can occur when multiple nuclear weapons are detonated, is likely to be more severe than thought in the 1980s, and could result in a nuclear cloud that would literally blot out sunlight for parts of the planet for months or years.

Once again, the United States is also leading a new global arms race, provoked by the decision made under former President Barack Obama to upgrade and refurbish the entire U.S. nuclear arsenal at a projected 30-year cost of \$1.7 trillion. This upgrade, which represents U.S. non-compliance with the Nuclear Non-Proliferation Treaty, is already viewed by Russia and China – also nuclear powers – as a provocative and destabilizing policy shift. Included in U.S. upgrades is an expansion of so-called “missile defense systems,” that the U.S. says it will deploy to prevent nuclear-armed missile attacks. Fears of Russia and China include the fact that the missiles used in the system could in fact be nuclear weapons, and that the U.S. stated purpose to prevent a nuclear attack would actually be for the purpose of giving the U.S. a nuclear first-strike capability.

The defense argues that the world is at a “historical moment” in which U.S. nuclear policy is making the use of nuclear weapons more imminent, and that the 1984 application of the lack of an “imminent” threat raised in Montgomery, is outdated and no longer applicable. Because of the constantly changing landscape surrounding the global nuclear arms race, the U.S. has failed to accurately measure or give definition to the term “imminence” with regard to the use of nuclear weapons. Yet, it is an important indicator of the peril humanity is facing.

Several state courts have approved the defense of necessity recently. See State of Washington v. Kenneth Ward, April 8, 2019, decision of the Court of Appeals of the State of Washington which found the denial of a trial court to allow the defendant to raise the necessity

defense of climate change to his actions in turning off a pipeline valve to interfere with his constitutional right to raise defenses, reversed the conviction and were grounds for a new trial, a decision affirmed September 4, 2019 by the Supreme Court of Washington.³

And, as subsequent federal cases have observed, the fact of whether the defendant had exhausted all legal alternatives or that all such efforts might be futile might well be matters for the jury to decide. U.S. v. Hill, 893 F. Supp. 1044, 1047 (N.D. FL September 28, 1994).

That is precisely what defendants ask. Let the jury hear the evidence and let the jury decide if defendants have met their burden under the necessity defense.

U.S. v. Perdomo-Espana, 522 F.3d 983, 987 (CA 9, April 14, 2008), which stated: “[T]he defense of necessity, or choice of evils, traditionally covered the situation where physical forces beyond [an] actor's control rendered illegal conduct the lesser of two evils.” United States v. Bailey, 444 U.S. 394, 410, 100 S.Ct. 624, 62 L.Ed.2d 575 (1980). In recent years, our case law has expanded the scope of the defense. We have held that a defendant may present a defense of necessity to the jury as long as the defendant “establish[es] that a reasonable jury could conclude: (1) that he was faced with a choice of evils and chose the lesser evil; (2) that he acted to prevent imminent harm; (3) that he reasonably anticipated a causal relation between his conduct and the harm to be avoided; and (4) that there were no other legal alternatives to violating the law.” Arellano-Rivera, 244 F.3d at 1125-26 (internal quotation marks omitted). A defendant must prove each of these elements to present a viable necessity defense.”...

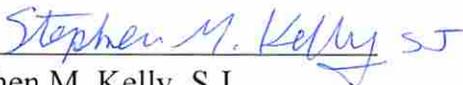
“We therefore hold that the test for entitlement to a defense of necessity is objective. The

³ Court of Appeal decision can be found at: <https://climatedefenseproject.org/wp-content/uploads/2019/04/040819-WA-Opinion-Recognizing-Right-to-Present-Necessity-Defense.pdf> The decision of the Washington Supreme Court to deny further review can be found at: <https://climatedefenseproject.org/wp-content/uploads/2019/09/Order-Terminating-Review-9-4-2019.pdf>

defendant must establish that a reasonable jury could conclude that (1) he was faced with a choice of evils and reasonably chose the lesser evil; (2) he reasonably acted to prevent imminent harm; (3) he reasonably anticipated a causal relation between his conduct and the harm to be avoided; and (4) he reasonably believed there were no other legal alternatives to violating the law.” At 988.

Again, that is precisely what defendants ask. Let the jury hear the evidence and let the jury decide if defendants have met their burden under the necessity defense.

Respectfully submitted this 2nd day of October, 2019.

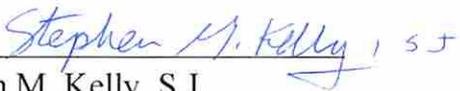

Stephen M. Kelly, S.J.
Pro Se Defendant

Glynn County Detention Center
100 Sulphur Springs,
Brunswick, GA 31520

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of October 2019, I served upon all parties a copy of the foregoing **NOTICE OF INTENT TO RAISE DEFENSE OF NECESSITY** by having said notice delivered to the clerk of the Court and once stamped and accepted, scanned by the clerk after which a notice of electronic filing (NEF) will be generated and sent to all parties.

Dated this 2nd day of October 2019.



Stephen M. Kelly, S.J.
Pro Se Defendant

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