

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF GEORGIA  
BRUNSWICK DIVISION

UNITED STATES OF AMERICA        )    2:18-CR-22  
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STEPHEN M. KELLY, ET AL.        )

**MOTION IN LIMINE**

The United States of America, by and through Bobby L. Christine, United States Attorney for the Southern District of Georgia, moves the Court for an Order prohibiting the presentation at trial of evidence concerning Defendants’ justification for entering Naval Submarine Base Kings Bay on or about April 5, 2018, unless and until each Defendant proffers (outside of the presence of the jury) evidence sufficient to establish all four prongs of the justification defense.

On August 26, 2019, the Court entered an Order denying each Defendant’s motion to dismiss the indictment based on the Religious Freedom of Restoration Act defense. [Doc. 504.] In doing so, the Court expressly found that the government established that “it has compelling interests in the safety of those on Kings Bay Naval Submarine Base, the security of the government assets housed there, and the smooth operation of the base.” [*Id.* at 12.] The Court further found that the “application of the laws at issue to Defendants for their actions at Kings Bay is the least restrictive means of the furthering the government’s compelling interest with respect to each Defendant.” [*Id.* at 16.]

The United States does not know, but anticipates, that despite the denial of their motions to dismiss, one or more Defendants will raise the affirmative defense of justification or necessity. This defense is available only in “extremely limited” and “extraordinary circumstances.” *United States v. Palma*, 511 F.3d 1311, 1316 n.3 (11th Cir. 2008). A Defendant raising a defense of justification bears the burden to satisfy the following four prongs:

(1) that [he] was under unlawful and present, imminent, and impending threat of death or serious bodily injury; (2) that [he] did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) that [he] had no reasonable legal alternative to violating the law; and (4) that there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

*United States v. Deleveaux*, 205 F.3d 1292, 1297 (11th Cir. 2000). *See also* Eleventh Circuit Pattern Jury Instructions (Criminal Cases) S16 (2016).

The Eleventh Circuit has recognized that “before being permitted to raise a justification defense, the defendant must proffer evidence sufficient to establish” the four prongs outlined in *Deleveaux*. *See United States v. Moss*, 297 F. App'x 839, 841 (11th Cir. 2008) (affirming court’s order excluding defendant’s testimony on justification defense in § 922(g) case where defendant was unable to prove the essential elements of defense). Other courts have similarly recognized a Court’s ability to require a defendant to proffer evidence of an affirmative defense before allowing the jury to hear it. *See United States v. Graham*, 663 F. App'x 622, 625 (10th Cir. 2016) (“The district court did not violate Mr. Graham's constitutional

rights by requiring him to proffer some evidence on each element of duress before allowing that evidence to be presented to the jury.”); *United States v. Posada-Rios*, 158 F.3d 832, 873 (5th Cir. 1998) (“Because duress is an affirmative defense, a defendant must present evidence of each of the elements of the defense before it may be presented to the jury.”); *United States v. Ramirez-Chavez*, No. CR 13-00490 DAE, 2013 WL 3581959, at \*3 (W.D. Tex. July 2, 2013) (collecting cases from Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits and noting that “an overwhelming majority of federal courts of appeals have permitted pretrial review of a defendant's evidence relating to a defense of duress”). There is a good reason for this. “Where the evidence to be presented would be insufficient as a matter of law . . . no proper interest of the defendant would be served by permitting his legally insufficient evidence to be aired at trial, and interests of judicial economy suggest that the jury should not be burdened with the matter.” *United States v. Villegas*, 899 F.2d 1324, 1343 (2d Cir. 1990) (affirming pretrial exclusion of duress defense); *see also United States v. Vasquez-Landaver*, 527 F.3d 798, 802 (9th Cir. 2008) (excluding evidence on duress and noting that “[w]hile the constitutional right to testify permits a defendant to choose whether or not to take the witness stand, it does not authorize a defendant to present irrelevant testimony”).

Judicial review of the justification or necessity defense ensures that the jury is not confused by irrelevant and prejudicial evidence. It also avoids the risk of Defendants putting forth argument justifying their entry onto Naval Submarine

Base Kings Bay and damaging property there that does not meet the four-prong test set out above in the hope of eliciting jury nullification. *See Moss*, 297 F. App'x at 841 (citing *United States v. Funches*, 135 F.3d 1405, 1408–09 (11th Cir. 1998)). The Supreme Court has stated unequivocally that if “testimony supporting one element [of an affirmative defense] is insufficient to sustain it even if believed, the trial court and jury need not be burdened with testimony supporting other elements of the defense.” *United States v. Bailey*, 444 U.S. 394, 416 (1979). Consequently, “[a] judge may, and generally should, block the introduction of evidence supporting a proposed defense unless all of its elements can be established.” *United States v. Haynes*, 143 F.3d 1089, 1090 (7th Cir. 1998).

Accordingly, the United States requests that the Court preclude Defendants from asserting a justification or necessity defense at all phases of the jury trial, including (1) voir dire; (2) opening statements; (3) cross examination; (4) the defendants’ case-in-chief; (5) jury instructions; and (6) closing arguments, unless and until they have proffered sufficient evidence outside the presence of the jury as to each of the required elements under *Deleveaux*.

In addition, pursuant to Federal Rule of Evidence 401, the government moves the Court *in limine* for an Order prohibiting the defendants from presenting evidence or argument relating to the lethality of nuclear weapons and whether such weapons are or are not located on Naval Submarine Base Kings Bay. Such evidence would be relevant only to the Defendants’ defense of justification or necessity. If

that defense were prohibited by the Court, such evidence would not be relevant to any issue before the jury and would present a high likelihood of confusing the jury. Evidence concerning the monitoring of alarm systems, the size and location of security teams, and policy and procedures governing use of force by security teams on the base would also be irrelevant and should be excluded.

Respectfully submitted,

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*/s/ Karl I. Knoche*

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**CERTIFICATE OF SERVICE**

This is to certify that I have on this day served all the parties in this case in accordance with the notice of electronic filing (“NEF”) which was generated as a result of electronic filing in this Court.

This 28<sup>th</sup> day of September 2019.

Respectfully submitted,

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