IN SNOHOMISH COUNTY DISTRICT COURT AT EVERETT

STATE OF WASHINGTON, Plaintiff, vs. ABIGAIL CASTLE BROCKWAY, et al Defendants	No. 5035A-14D SNO CN JOINT DEFENSE MOTION TO RECONSIDER ORDER ON EXPERT WITNESSES

MOTION TO RECONSIDER

We move this Court to reconsider (1) its ruling precluding any expert witnesses as it is premature to eliminate defense testimony as to a potential necessity defense; and (2) to clarify that the Order does not preclude expert testimony relevant to other defenses such as the right to freely speak and assemble, and whether the trespass was 'unlawful' or the train obstruction was 'willfull or intentional'.

FACTS

On December 10, 2015, the defendants jointly moved this Court to allow the Affirmative Defense of Necessity and to Call Expert Witnesses. This pleading included a proffer of what the experts were expected to testify to, but it did not include what the defendants' testimony might be. The State filed an opposing pleading on December 16, 2015. On December 17, 2015, at the scheduled pretrial

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hearing, the parties were prepared to go forward on these arguments. However, the Judge presiding over the trial set for January 11, 2016, was unavailable and it was re-set for December 30, 2015. Prior to that date, the defendants filed a joint reply brief. On December 30, 2015, the Court heard arguments and took the issues under advisement. On January 5, 2016, the parties were notified of the Court's "Order Denying Defense Motion to Allow Affirmative Defense of Necessity and Expert Witness Testimony." Essentially this Court ruled that the defendants were not entitled to put on a necessity defense nor would they be allowed to call any expert witnesses. The ruling as to the expert witnesses essentially eliminated the defendants' theory of the case before any witness was sworn or a word of testimony was heard.

ARGUMENT

A. THE COURT'S RULING DENIES DEFENDANTS A CHANCE TO PUT ON A DEFENSE.

As we argued, we believe a ruling on whether a necessity instruction is appropriate should not be decided until the evidence is heard. In ruling that the defendants had not made out a prima facie case for necessity, the Court analyzed the issue of 'legally cognizable harm.' In doing so, this Court engaged in a factfinding without the benefit of testimony from experts, lay witnesses or the defendants. Instead it concluded that the harm was "amorphous." The legal basis for the Court's decision was supported by citations to *United States v. Schoon*, 971 F.2d 193 (9th Cir. 1992) and *State v. Aver*, 109 Wn.2d 303 (1987). Unlike the case at bar, neither of these cases appears to have involved expert testimony in support of proving the harms. We assert that the proferred experts will explain the nature of the harms, so that the jury could weigh them against the harm of trespassing and blocking a train for about 8 hours. To be sure, the State will be introducing as much evidence of the 'harm' of the two alleged crimes as this Court will allow. To preclude the defense from calling witnesses to prove the other side of the harm

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question is neither fair nor Constitutional. After all, the Sixth Amendment guarantees the accused the "right to have compulsory process for witnesses in his favor." *Also see*, Wash. Const. art 1, § 22.

In addition, the Court also held that the 'no reasonable legal alternative' prong of necessity could never be met since "This court cannot imagine a scenario of indirect civil disobedience where a prima facie showing that ALL reasonable legal alternatives have been exhausted." (Order at p. 9.) To begin with, the WPIC does not say "ALL reasonable legal alternatives have been exhausted." As WPIC 18.02 reads, "No reasonable legal alternative existed" is different. It hinges on 'reasonable,' which is eminently a jury question. What is more, the Court presumed that the defendants have "not attempted" some legal means, and therefore, ruled they could never prove that prong—without hearing a word from the defendants on that. Under our State Constitution, article 4, section 16, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." The trial court should not make decisions based on what the Court believes is reasonable. That is what the Order wrongly did, and we believe we should be able to present some expert witnesses.

If the Court grants us the right to call expert witnesses, we will only call three of them in the interests of efficiency.

B. OUR EXPERT WITNESSES ARE RELEVANT TO OTHER DEFENSES.

Another defense we will raise is that the defendants were exercising their right to speak freely and to assemble. (""Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." "The right of petition and of the people peaceably to assemble for the common good shall never be abridged." Const. art 1, §§ 4 and 5.) The right to speak freely under the Washington Constitution is not limited, like the First Amendment is, to actions of Congress. Although the protest here took place in the rail yard of BNSF, and not on open, public property, it should be noted that the railroads are quasi-public utilities. Historically, the predecessor railroads to BNSF, Northern

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Pacific Railway for one, were approved by Congress in 1864 and given nearly 40 million acres of land grants. (https://en.wikipedia.org/wiki/Northern_Pacific_Railway.) In other words, BNSF, though a corporation, was given its land by the federal government. That is the people. It would violate the Washington Constitution not to permit the defendants to raise this defense in this unique setting. Our experts lend support and background to explain the purpose of that protest.

A second defense is traditional: defendants can defend by attacking the proof of the elements of the charges. One element of trespassing in the second degree as charged here is: "That the defendant knew that the entry or remaining was **unlawful**." WPIC 60.18 (emphasis added.) Similarly, one element of the train blocking charge is: "each defendant **willfully** obstructed, hindered or delayed the passage of any car." RCW 81.48.020 (emphasis added.) We intend to propose instructions that equate willfully with intentionally. *State v. Snapp*, 119 Wn.App. 614, 622, 82 P.3d 252 (2004) ("intentionally" is the functional equivalent of "willfully.") And then use WPIC 10.01 to define "intentionally," which defines it as: "A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime." We believe that three of our experts can testify directly about whether the defendants' actions were unlawful and also that their actions were not aimed at a result that constitutes a crime. Rather, the experts will testify that raising the issue of the harms from trains bearing oil and coal is not unlawful but responsible and important.

Respectfully submitted, Dated: 6 January 2015

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