APPELLATE COURT CASE NO. 77044-6

SUPERIOR COURT CASE NO: 16-1-01001-5

IN THE WASHINGTON STATE COURT OF APPEALS, DIVISION I

State of Washington, Plaintiff-Respondent

vs.

Kenneth Arthur Ward, Defendant-Petitioner

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SKAGIT COUNTY

The Honorable Michael E. Rickert, Judge

Petitioner's Opening Brief

November 9, 2017

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I. ASSIGNMENTS OF ERROR

Climate activist Kenneth Ward was prepared to present significant evidence that his actions at the Kinder Morgan tar sands oil pipeline were borne of the necessity to stabilize the planetary climate system, and that his actions were his only means to effect political change because he had exhausted all reasonable legal alternatives. The trial court erred in denying Ward's affirmative defense of necessity, and in failing to instruct the jury on the defense of necessity.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court violate Petitioner's state and federal constitutional rights to present a complete defense by preventing him from presenting substantial evidence on each element of the necessity defense?
2. Did the trial court err by failing to provide the jury with WPIC 18.02 where Petitioner made a sufficient pre-trial showing of evidence and the ultimate question of fact was one for the jury?

III. STATEMENT OF THE CASE

On October 11, 2016, defendant Mr. Ward entered the Kinder Morgan pipeline facility on Peterson Road in Burlington, Skagit County. CP

00002; CP 00432; RP 112. Mr. Ward intended to peacefully protest the continued use of tar sands crude oil, which significantly contributes to global warming, and the inaction by governments to meaningfully address the crisis of climate change. CP 00117; RP 102; CP 00003; RP 112-115; CP 00019. After Ward's colleague called Kinder Morgan to provide notice of Ward's intent to temporarily halt the flow of oil, CP 00002, the pipeline company voluntarily shut down their own pipeline. RP 63. Mr. Ward then engaged in a public protest of turning the safety block valve on the pipeline, CP 00002; RP 109, while livestreaming on the internet[1], and halted the flow of oil through the pipeline for approximately four hours. RP 64; RP 71.

Mr. Ward took this action simultaneously with others who undertook similar actions at pipelines along the U.S./Canada border. RP 108-09. This group of Valve Turners arranged for Jay O'Hara to call Kinder Morgan and the other pipeline companies prior to Mr. Ward's entrance to the facility to ensure the safety of workers and the community at large. CP 00002; RP 109-10. Then, while operating a live stream via his smartphone, Mr. Ward cut the chain on a gate on Peterson road, entered the Kinder Morgan facility, closed the valve, and placed sunflowers on the

[1] In other words, Mr. Ward filmed his actions on his cellphone and the footage was immediately publicly available online.

valve, CP 0002, "as a symbol of a better, brighter, future." RP 112. Mr. Ward was arrested at the scene and charged with burglary in the second degree and sabotage, and was tried by a 12-person jury, RP 23, 26.

Mr. Ward admitted to this conduct and argued that his actions were privileged by the common law defense of necessity. RP 9. Despite the ruling by the Hon. Judge Rickert that Mr. Ward was precluded from presenting his affirmative defense of necessity, RP 19, Mr. Ward 's first trial ended in a hung jury on February 1, 2017, as to both counts. Mr. Ward was recharged with burglary in the second degree and sabotage on February 8, 2017, CP 00009-10. Ward again argued that the Court should allow him to present his necessity defense to the jury, offer expert testimony, and provide the jury with jury instruction WPIC 18.02. CP 00011-381. The Court denied Mr. Ward's defense, and he was again tried before a jury who again hung on the Sabotage count, but found him guilty of Burglary on June 6th, 2017, CP 00429-431. He was sentenced on January 24, 2017 to 240 hours of community service. CP 00445.

The questions for this appeal are whether Mr. Ward has a right to offer an affirmative defense of necessity to the jury, and whether the trial court erred in failing to give WPIC 18.02.

Mr. Ward provided proper notice that he intended to present an affirmative necessity defense at trial, RP 6; RP 8-13, to which the state

responded with a motion in limine to preclude that defense. CP 00001-8. Mr. Ward responded, and provided substantial evidence that he has been involved professionally with environmental and climate issues for more than forty years, and during that time, he has pursued many legal avenues to impact environmental issues without success. CP 00002-03; RP 89-106. These measures included drafting legislative bills and testifying before legislative committees, intervening in administrative proceedings on issues of energy efficiency, coordination in electoral efforts, working for the adoption of platform planks at the national level, lobbying, public education, litigation coordination, public advocacy, participation in model communities, and testifying before governmental agencies. *Id.* None of these efforts achieved effective results and the situation with global warming became even more dire and potentially irreversible. *Id.*

At the hearing on the State's motion in limine to exclude the necessity defense, Mr. Ward presented evidence that as years of active participation in the environmental movement passed, Mr. Ward came to understand that the issue of climate change would require other than incremental changes to arrest imminent catastrophic global climate degradation. RP 103-105.

This is not a matter of opinion. Mr. Ward presented voluminous scientific evidence showing that climate change is primarily caused by

greenhouse gas emissions resulting from human activity, and that these emissions need to be drastically limited in order to maintain a planet suitable for human habitation. CP 00019-00028. As the Washington State Department of Ecology stated in its report on greenhouse gas emissions, there is "strong scientific consensus" that greenhouse gas emissions cause global temperature increase at "rates that have the potential to cause economic disruption, environmental damage, and a public health crisis." CP 00354. The report also cited findings that there is a 90% or greater probability that human activity is the main driver of global temperature rise. *Id.*

Mr. Ward also cited numerous scientific authorities discussing the impacts of climate change, including: record high temperatures; more frequent and severe flooding, wildfires, and other extreme weather events; decrease in water quality and increased risk of waterborne disease; insect infestations of forests; increased air pollution; diminishment and possible extinction of species; reduced crop yields; and possible socio-economic shocks. CP 00027-00028.

Mr. Ward outlined the mathematical impossibility of both maintaining a safe limit of emissions and burning the existing fossil fuel reserves, quoting former NASA head climate scientist Dr. James Hansen's finding that burning these existing reserves "would produce a different,

practically uninhabitable, planet." CP 00026 (James Hansen, et al., *Climate Sensitivity, Sea Level and Atmospheric CO2*, Philosophical Transactions of the Royal Society (2013) at 24). Mr. Ward also noted Dr. Hansen's warning of a "profound and mounting risks of ecological, economic and social collapse" if emissions continue at the current level. CP 00026. Dr. Hansen, perhaps one of the leading world-renowned climate scientists, was also one of Mr. Ward's proposed expert witnesses who was denied the opportunity to testify before the jury.

Ultimately, as a result of his many years and many unsuccessful efforts, Mr. Ward realized that other avenues were necessary to save future generations and publicize the threats posed by global climate change. *Id.* He concluded that nonviolent direct action was necessary to accomplish these goals within the time parameters imposed by this crisis. *Id.* In support of this position, Mr. Ward cited research by Princeton political scientist Martin Gilens finding that industry interests have far more influence over government decisions than do average citizens. CP 00033 (Martin Gilens and Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens,* Perspectives on Politics 12, 564-581 (2014)). Significantly, he also noted that the Washington State Department of Ecology has testified in court that it would be "futile" to recommend that the Legislature update existing

greenhouse gas emission limits, even though the Department was statutorily obligated to do so. CP 00034.

Mr. Ward testified that he became aware that tar sands oil represented an elevated level of risk to global climate catastrophe. RP 102. Mr. Ward's action at the Kinder Morgan pipeline in Burlington on October 11, 2016 was undertaken because tar sands oil from Alberta was arriving in Burlington via the pipeline, and "I was attempting to take the most effective measure that I could think of to address this problem to avoid cataclysmic climate change." RP 114. Mr. Ward clearly provided substantial evidence on each and every element required for the necessity defense under Washington law.

At the close of the pre-trial hearing, the Court granted the State's motion to exclude the necessity defense and foreclosed Mr. Ward from providing the jury with this substantial evidence and argument; and at the close of trial also denied Mr. Ward's requested jury instruction, WPIC 18.02, thus denying Mr. Ward the right to assert his defense in front of the jury. RP 130; CP 396 (Defendant's WPIC 18.02); 00407 (Instructions of the Court). Prior to the second trial, Mr. Ward again motioned the court for reconsideration of the defense in light of evidence that had been presented during the first trial, including clarification of the imminence

issue, and made an extensive offer of proof on the proven scientific facts of climate change. CP 00011; CP 0019-30, 0115-0381.

IV. ARGUMENT

A. The Trial Court Violated Petitioner's State and Constitutional Rights to Present a Complete Defense by Preventing Him From Presenting Necessity Evidence

The central problem presented in this appeal is the trial court's denial of Mr. Ward's right to present a complete defense. By barring expert testimony, exhibits, and other evidence of necessity at trial — despite Mr. Ward's thorough pre-trial showing of support for each of the defense's elements — the court effectively eliminated the defense's main theory of the case, thereby preventing Mr. Ward from responding to the state's accusations.

The right to a fair trial includes the right to present a defense. The Sixth and Fourteenth Amendments of the Federal Constitution, as well as article 1, § 21 and 22 of the Washington Constitution, guarantee the right to trial by jury and to defend against the State's allegations. These guarantees provide criminal defendants a meaningful opportunity to present a complete defense, a fundamental element of due process. *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *State v. Burri*, 87 Wn.2d 175, 181, 550 P.2d 507 (1976). As

the state Supreme Court noted in *State v. Jones*, 168 Wash.2d 713, 720, 230 P.3d 576 (2010):

> A defendant's right to an opportunity to be heard in his defense, including the rights to examine witnesses against him and to offer testimony, is basic in our system of jurisprudence . . . We must remember that "the integrity of the truthfinding process and [a] defendant's right to a fair trial" are important considerations. *State v. Hudlow*, 99 Wn.2d 1, 14, 659 P.2d 514 (1983). We have therefore noted that for evidence of *high* probative value "it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22." *Id.* at 16 [659 P.2d 514].

(alterations in original). The Court of Appeals reviews claims of a denial of Sixth Amendment rights de novo. *Id.* at 719.

Mr. Ward sought to present a defense of necessity, which is a common-law defense in Washington. According to WPIC 18.02, necessity exists where "(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." *See also* CP 00396. The defendant must prove these four elements by a mere preponderance of the evidence. *State v. Jeffrey*, 77 Wash. App. 222, 225, 889 P.2d 956, 957-58 (1995).

The determination of whether a defendant has met this evidentiary burden is a question of fact. *State v. Diana*, 24 Wash. App. 908, 916, 604 P.2d 1312, 1317 (1979). Therefore, it is the role of the jury as the trier of fact to test a defendant's proffered evidence. The Court of Appeals recently noted the strong presumption in favor of admitting evidence that supports an affirmative defense:

> [I]f the evidence is weak or false, cross-examination will reveal this, and any sting caused by the admission of false evidence will not only be removed, but will invite prejudice to the defendant who introduced such evidence. For these reasons, the trial court should admit probative evidence, even if suspect, and allow it to be tested by cross-examination. In this manner, the jury will retain its role as the trier of fact, and it will determine whether the evidence is weak or false.

State v. Duarte Vela, No. 33299-3-III, 2017 WL 3864628, at *7 (Wash. Ct. App. Sept. 5, 2017).

Mr. Ward made a strong preliminary preponderance showing of evidence that would support his necessity defense at trial and thus this Court committed reversible error in denying said defense. *State v. May*, 100 Wash. App. 478, 482-83, 997 P.2d 956, 959 *review denied*, 142 Wash.2d 1004, 11 P.3d 825 (2000). Specifically, in his responses to the State's motion to exclude the necessity defense, on January 13, 2017 and again on April 30, 2017, Mr. Ward submitted curricula vitae for four expert witnesses who would testify to elements (2) and (3) regarding the

harms of climate change, CP 0048-0087, and four expert witnesses who would testify to elements (1) and (4) regarding the effectiveness of civil disobedience and the lack of reasonable legal alternatives to address climate change, particularly given the current political realities in Washington, DC. CP 0089-0113. Next, in his first response to the state's motion in limine to exclude the defense, Mr. Ward summarized the necessity that compelled him to act on October 11, 2016, detailed his personal experience trying alternative methods of action, and reiterated his offer of proof through the testimony of expert witnesses. CP 2-4. At the pretrial hearing, counsel for Mr. Ward again pointed to the wealth of evidence that Mr. Ward planned to present at trial and reiterated that the sufficiency of the proof was a question for the jury. RP 11, 12, 16, 17. This showing was sufficient to present a prima facie case of necessity.

Nevertheless, the trial court went against precedent and abrogated the role of the jury by determining factual questions against Mr. Ward prior to the presentation of any evidence at trial. The court described Mr. Ward's targeted harm as a question of belief rather than fact, casting doubt on

> this particular threatened harm, which is climatic change, global warming, whatever. I don't know what everybody's beliefs are on that. But I know there's tremendous controversy over the fact whether it even exists and even if people believe that it does or

> doesn't, the extent of what we are doing to ourselves, our climate, and our planet.

RP 15. Apparently, based on a conclusion that the politics of climate change are controversial, the court surmised that the science of climate change could not be established at trial. This factual determination not only failed to interpret the evidence most strongly in Mr. Ward's favor, but also contradicted the many courts, including the United States Supreme Court, that have taken judicial notice of the reality and harms of climate change.[2]

The trial court similarly reached factual conclusions with no basis in the evidence in order to determine that Mr. Ward had reasonable legal alternatives available at the time of his action: "A person may feel hamstrung and bound because there's no reasonable legal alternative because the voting process didn't work. Someone I guess could surmise

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[2] In *Massachusetts v. E.P.A.*, 549 U.S. 497, 521 (2007), the Supreme Court found that the EPA's refusal to regulate greenhouse gas emissions was an "imminent" harm to Massachusetts as a consequence of the wealth of negative effects, including sea level rise, that resulted from climate change. Other notable cases in which courts took judicial notice of climate change include *Connecticut v. American Electric Power Co., Inc.*, 582 F.3d 309, 342 (2nd Cir. 2009), *rev'd on other grounds*, 564 U.S. 410 (2011), and *Foster v. Wash. Dep't. of Ecology*, No. 14-2-25295-1, at *1 (Wash. Super. Ct., Nov. 19, 2015). *See* Brenda Heelan Powell and Josephine Yam, *Judicial Notice of Climate Change*, Symposium on Environment in the Courtroom: Evidentiary Issues in Environmental Prosecutions and Hearings (Mar. 6-7, 2015), http://www.cirl.ca/files/cirl/brenda_heelan_powell_and_josephine_yam-en.pdf.

they need to take action into their own hands and break the law in order to fix a mighty wrong being perpetrated by one of our leaders somewhere." RP 15. The court went on to note that experts might disagree about the availability of legal alternatives: "Nonetheless I think that is subject to great debate because I'm sure that there are for every person you can bring in to testify as such you could bring in another person to testify that in this particular case there are a lot of legal alternatives out there." RP 16. As Mr. Ward's counsel pointed out, the fact that the availability of alternatives was in controversy made it a paradigmatic question for the jury, rather than providing a reason to dismiss Mr. Ward's proffered evidence. RP 17.

The trial court also concluded that Mr. Ward's actions had no effect on his targeted harms:

> the turning of that valve in the general scheme of climactic change would be, I don't know if you could mathematically quantify it, but it would have to be so astronomically small that the turning of any particular valve on any particular oil field is going to change the disaster to our environment and would be incalculable; it would be so infinitesimal and so small. So the actual harm to be avoided is not avoided at all. All that happens is a valve is turned and the problem being, because it's worldwide, maybe galaxy wide, it continues on. RP 16.

The factual questions decided by the court at the pretrial hearing were precisely those about which Mr. Ward and his expert witnesses planned to testify. It was wholly inappropriate for the court to insert its

own conclusions about not only the strength but also the substance of that evidence.

Mr. Ward gave the court a chance to cure its error by filing a motion for reconsideration prior to his second trial. Specifically, Mr. Ward gave a detailed offer of proof on each element of the necessity defense:

- *Element 1: The defendant reasonably believed the commission of the crime was necessary to avoid or minimize a harm.*

  Mr. Ward presented evidence that acts of civil disobedience can minimize the harms flowing from fossil fuel infrastructure such as the tar sands pipeline he targeted. CP 37-40. This preliminary evidence included historical examples of the efficacy of civil disobedience as well as Mr. Ward's own experience as a successful climate defender. *Id.* Furthermore, Mr. Ward presented the qualifications of three experts on the effectiveness of civil disobedience —renowned professors Bill McKibben and Tom Hastings and researcher Mollie Pepper — who would testify that the commission of a crime may be necessary to minimize harms such as climate change. CP 89, 91, 110-113.

- *Element 2: The harm sought to be avoided was greater than the harm resulting from a violation of the law.*

  The Motion to Reconsider presented voluminous scientific evidence of the harms of climate change, including sea level rise in Skagit County. CP 20-28. Mr. Ward's offer of proof specifically described the

harms caused by tar sands oil. CP 29-30. Mr. Ward also presented the qualifications of climate scientists Dr. James Hansen, Dr. Richard Gammon, and Dr. Cecilia Bitz, who would have developed this evidence at trial. CP 48-85, and attached as exhibits several studies and visual aids describing in depth the science of climate change, CP 115-266.

- *Element 3: The threatened harm was not brought about by the defendant.*

  Although not a point in controversy, the fact that Mr. Ward was not responsible for the harms of climate change was clearly established by his offer of proof on the causes of global warming. CP 19-30.

- *Element 4: No reasonable legal alternative existed.*

  The Motion to Reconsider made a strong preliminary showing that the window for action on climate change has narrowed to the point where immediate, emergency action is necessary. CP 26-30. The Motion reiterated Mr. Ward's decades of experience pursuing legal alternatives with little success, and noted that Washington State's own Department of Ecology has testified that, given existing political realities, it would be "futile" to ask the Legislature to abide by a statutory mandate to strengthen existing greenhouse gas emission limits. CP 24. The Motion also previewed testimony by pipeline industry expert Eric de Place, professor and climate campaigner Bill McKibben (co-founder of 350.org), and professor of political science Martin Gilens to the effect that the fossil

fuel industry's influence over political institutions renders traditional legal avenues unreasonable as a means of addressing the climate emergency. CP 33-35, 87, 89, 101-108, 269-286.

In assessing a preliminary offer of proof on the availability of reasonable alternatives, it is inappropriate for a court to simply conclude that hypothetical courses of action exist without inquiring into their viability. This inquiry requires the testing of evidence at trial. The one Washington case which discussed the phrase "no reasonable alternative" supports this argument. *State v. Parker*, 127 Wash. App. 352, 110 P.3d 1152 (2005). Parker was charged with felon in possession of a gun. Parker said that he carried the gun because he had been shot the previous July and his assailants were still at large. The Court of Appeals said that in order to show he had no reasonable alternative, Parker had to demonstrate "that he had actually tried the alternative or had no time to try it, or that a history of futile attempts revealed the illusionary benefits of the alternative." *Id.* at 355. *See also Commonwealth v. Magadini*, 474 Mass. 593, 601 (2016) ("Our cases do not require a defendant to rebut every alterative that is conceivable; rather, a defendant is required to rebut alternatives that likely would have been considered by a reasonable person in a similar situation.").

By ignoring Mr. Ward's evidence and by introducing speculation as to additional facts that might contradict Mr. Ward's proof, the trial court both deprived Mr. Ward of the opportunity to present the central theory of his case and denied the jury the opportunity to act as trier of fact and to assess the weight and credibility of Mr. Ward's evidence. This denial of Mr. Ward's constitutional rights appears to have been premised on an irrelevant concern for the controversial nature of Mr. Ward's case:

> It would be like the Scopes monkey trial . . . But I don't see bringing in a jury for a matter of weeks to debate a Burglary case and a Sabotage case, because the thing that they would have to get to is they would have to come to a conclusion in order to prevail on this necessity defense that, in fact, global warming is out there, and global warming is harmful, and that Mr. Ward is the frontline warrior and is going to take care of it. So the trial would become whether or not -- the trial would focus on the existence and the severity of the climatic change, and that's not what we are here to do. That's not what superior court is here to do. That's for the legislative arena, not for the judicial arena to debate that. RP 17-18.

Here, the trial court again took a factual controversy — the existence of climate change — as grounds for dismissing Mr. Ward's proffered evidence, rather than as a reason to present the evidence to a jury. Furthermore, the court appears to have denied Mr. Ward's constitutional right to present a defense because of the politically contentious nature of his case, a concern clearly outside the bounds of an evidentiary ruling. While respect for the political branches is important,

the mere fact that Mr. Ward's case involves climate change — whose causes and effects are established by scientific consensus and whose reality has been noted by numerous courts as well as the State of Washington, as discussed above — provides no reason to deprive Mr. Ward of his constitutional rights.

Neither does the fact that Mr. Ward's necessity case involves political protest serve as a basis for denying his right to present his evidence to a jury. The use of the necessity defense by protesters is long-established and has often been successful, including in cases in Washington.[3] *See* William P. Quigley, *The Necessity Defense in Civil*

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[3] Despite the large number of successful necessity defenses, there are few reported decisions upholding the right to present the defense to the jury for the simple reason that courts are usually not called upon to issue an opinion in such cases, and acquittals are not appealable. The following is only a selection of successful political necessity defenses: *State v. Mouer* (Columbia Co. Dist. Ct., Dec. 12-16, 1977) (protesters acquitted of trespass at nuclear site after instruction on necessity); *People v. Block* (Galt Judicial Dist., Sacramento Co. Mun. Ct., Aug. 14, 1979) (one defendant acquitted of charges from protest at nuclear plant after necessity instruction, other defendants received split verdict and charges dropped); *California v. Lemnitzer*, No. 27106E (Pleasanton-Livermore Mun. Ct. Feb. 1, 1982) (hung jury for protester at nuclear research facility after instruction on necessity, at retrial no necessity instruction but instruction on malice); *Vermont v. Keller*, No. 1372-4-84-CNCR (Vt. Dist. Ct. Nov. 17, 1984) (defendants acquitted of trespass in congressman's office to protest policy in Central America after extensive testimony and necessity instruction); *Michigan v. Jones et al.,* Nos. 83-101194-101228 (Oakland County Dist. Ct. 1984) (defendants acquitted of charges related to blockade of cruise missile site after necessity instruction); *People v. Jarka*, Nos. 002170, 002196-002212, 00214, 00236, 00238 (Ill. Cir. Ct. Apr. 15,

Disobedience Cases: Bring it to the Jury, 38 New England L. Rev 3, 47 (2003) (discussing the long history of and strong doctrinal case for political necessity defense). Neither the legislature nor any Washington

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1985) (protesters acquitted after sit-in at naval training center to protest Central American policy when court gave necessity instruction that noted illegality of nuclear war); *Chicago v. Streeter*, Nos. 85-108644, 48, 49, 51, 52, 120323, 26, 27 (Cir. Ct., Cook County 11, May 1985) (defendants acquitted of trespass at office of South African consul after necessity instruction); *Colorado v. Bock* (Denver County Ct. June 12, 1985) (protesters acquitted of trespass at senator's office to protest policy in Central America after necessity instruction); *Michigan v. Lagrou*, Nos. 85-000098, 99, 100, 102 (Oakland County Dist. Ct. 1985) (defendants acquitted of charges related to blockade of cruise missile site, court noting absence of malice and absence of alternative methods); ***Washington v. Heller*** (Seattle Mun. Ct. 1985) (protesters acquitted of trespassing at the home of South African consul after necessity on instruction); ***Washington v. Bass,*** Nos. 4750-038, -395 to -400 (Thurston County Dist. Ct. April 8, 1987) (protesters acquitted of charges from occupation of state capitol in anti-apartheid protest after necessity instruction); *Illinois v. Fish* (Skokie Cir. Ct. Aug. 1987) (protesters acquitted of trespass at an army recruiting center after necessity instruction); *State v. McMillan*, No. D 00518 (San Luis Obispo Jud. Dist. Mun. Ct., Cal. Oct. 13, 1987) (bench trial acquitted protesters at nuclear plant on theory of necessity); *Massachusetts v. Carter,* No. 86-45 CR 7475 (Hampshire Dist. Ct. 1987) (defendants, including President Carter's daughter, acquitted of trespass and disorderly conduct in protest against CIA recruitment after necessity instruction); *Massachusetts v. Schaeffer-Duffy* (Worcester Dist. Ct. 1989) (protesters acquitted of trespass at a nuclear facility after necessity instruction); *West Valley City v. Hirshi*, No. 891003031-3 MC (Salt Lake County, Ut. Cir. Ct., W. Valley Dept. 1990) (protesters at nuclear missile plant acquitted after necessity instruction); *California v. Halem*, No. 135842 (Berkeley Mun. Ct. 1991) (defendant acquitted of distributing clean needles in response to AIDS crisis after necessity instruction); *People v. Bordowitz*, 155 Misc.2d 128 (N.Y.C. Crim. Ct. 1991) (defendants acquitted of distributing clean needles in response to AIDS crisis on necessity defense); *People v. Gray*, 150 Misc.2d 852 (N.Y.C. Crim. Ct. 1991) (defendants acquitted on necessity defense in bench trial after protest against pollution and safety effects of new vehicular lanes).

court has held that the necessity defense is unavailable in cases of protest, an omission that is significant in light of the legislature's specific prohibition of the defense in cases of bail jumping, RCW 9A.76.170(2), escape, RCW 9A.76.110(2), and eluding, RCW 46.61.024(2)(a).

Significantly, two courts have recently permitted protesters engaged in civil disobedience in defense of the climate to present evidence of necessity at trial. Judge Debra Hayes of the Spokane County District Court, after reviewing an offer of evidence similar to Mr. Ward's, allowed the Reverend George Taylor to mount a necessity defense against charges of trespass and obstructing or delaying a train stemming from a 2016 blockade of coal and oil trains. *See* Mitch Ryals, *Spokane judge OK's necessity defense for climate change lawbreaker*, Inlander.Com (Oct. 13, 2017), available at https://www.inlander.com/Bloglander/archives/2017/10/18/spokane-judge-oks-necessity-defense-for-climate-change-lawbreaker. In Minnesota, four activists involved in the Valve Turners action of which Mr. Ward was a part were recently permitted to present evidence of necessity at trial. Noting that the state's standard for the defendant's pre-trial evidentiary burden is "high," that defendants must prove "that the harm that would have resulted from obeying the law would have significantly exceeded the harm actually caused by breaking the law, there

was no legal alternative to breaking the law, the defendant was in danger of imminent physical harm, and there was a direct causal connection between breaking the law and preventing the harm," and that the law requires the existence of an "emergency situation," the court found that the protesters had met their burden and would be allowed to present the defense at trial. Order and Memorandum, *Minnesota v. Klapstein,* No. 15-CR-16-413 (Ninth Jud. Dist. Ct., Minn., Oct. 11, 2017) at *5.

In the one reported Washington case that discusses political necessity, *State v. Aver*, 109 Wn.2d 303, 311 745 P.2d 479, 483 (1987), the Supreme Court upheld a pretrial denial of the necessity defense because the pro se defendant's offer of proof had failed to satisfy a "minimum standard." Here, on the contrary, Mr. Ward has provided extensive evidence to support each element of the defense. Whether or not civil disobedience is in fact necessary to address specific threats is the very question that is to be decided by a jury trial. Speculation as to the political wisdom of protest is irrelevant to the constitutional guarantee of the right to present a complete defense and to have one's case heard by a jury.

B. The Trial Erred in Failing to Instruct the Jury on the Necessity Defense Because Petitioner Made a Sufficient Pre-Trial Showing of Evidence and The Ultimate Question of Fact Was One for The Jury.

1. Mr. Ward provided substantial evidence to support each element of the necessity defense, making the existence of necessity a fact question for the jury.

A trial court must instruct on a party's theory of the case if failing to do so is reversible error. *State v. May,* 100 Wash. App. At 482 (*citing State v. Birdwell*, 6 Wn. App. 284, 297, 492 P.2d 249, *review denied*, 80 Wn.2d 1009 (1972)).[4] "Only the trier of fact weighs the evidence and judges the credibility of witnesses." *State v. Williams*, 199 Wash. App. 99, 104, 398 P.3d 1150, 1152 (2017). In evaluating whether the evidence will support a jury instruction, the trial court must interpret the evidence most strongly for the defendant. *May*, 100 Wash. App. at 482 (*citing State v. Williams,* 93 Wash. App. 340, 348, 968 P.2d 26 (1998), *review denied,* 138 Wn.2d 1002, 984 P.2d 1034 (1999)).

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[4] "Here, the charge is mere possession. The court's instructions on the offense of unlawful possession of a firearm advised the jury that the State had to prove Mr. May had a firearm in his possession or control and that he had been previously convicted of a serious offense. The court further instructed that possession may be actual or constructive and that constructive possession "occurs when there is no actual physical possession but there is dominion and control over the item." These instructions permitted the jury to convict Mr. May even if it believed he was unaware of the gun's presence in the residence after his mother left. The jury could find that he had dominion and control over the items in the house, or at least those in the areas of the house he used, such as the office. In these circumstances, the court's refusal to give an unwitting possession instruction was reversible error." *Id.*

As described above, Mr. Ward provided substantial evidence to the trial court of the existence of necessity. He developed the factual basis for each element of the necessity defense in his January 13, 2017 response to the State's motion in limine to exclude the defense, CP 1-8, at the pretrial hearing, RP 11, 12, 16, 17, and most extensively in his Motion for Reconsideration, CP 11-381. Rather than interpreting this evidence in Mr. Ward's favor, the trial court dismissed it wholesale. These errors were compounded at trial, where the court further limited Mr. Ward's ability to defend himself by denying the presentation of several pieces of evidence at trial. In upholding prosecutorial objections to questions posed to Patrick Davis, the Kinder Morgan pipeline expert, about the harms posed by the pipeline company's operations and planned expansions, the court excluded relevant evidence of the harms targeted by Mr. Ward's action. RP 66, 68, 69. In barring a proffered chart presenting data on greenhouse gas emissions, the court similarly prevented Mr. Ward from describing the threat of climate change that motivated his action and created a situation of necessity. RP 101. The court also upheld several prosecutorial relevance objections to Mr. Ward's testimony about his past successful protest activity: his participation in a civil disobedience action at the Brayton Point Power Plant in Massachusetts in 2013, RP 105, the anticipated effect of that action (closed the facility shortly afterward), RP

106, and whether Mr. Ward had been arrested or convicted. RP 107. These rulings prevented Mr. Ward from presenting facts regarding the demonstrated effectiveness of civil disobedience to minimize the harms of the climate change and the lack of reasonable alternatives. In addition to violating Mr. Ward's constitutional right to present a defense, these rulings also violated the requirement that trial courts interpret the evidence in favor of the defendant. *May*, 100 Wash. App. at 482.

The defendant proposed uniform jury instruction 18.02 pertaining to the necessity defense, CP 396. The court did not give this instruction, CP 407-430, a decision to which the defense took exception, RP 135. By failing to allow the jury to weigh the factual evidence amply proffered by Mr. Ward, the trial court committed reversible error.

2. The trial court imposed an additional element of "immediacy" without basis in precedent, for which Mr. Ward nonetheless provided an initial offer of proof.

The trial court's failure to allow this evidence to be tested at trial and its denial of a requested instruction on necessity, RP 135, were compounded by improperly adding a fifth element to Washington's necessity defense. On the prosecution's request at the pretrial hearing, the court added an element of "immediacy" to the defense, saying that the defense "does need to have some immediacy, some evidence more so than this particular threatened harm, which is climatic change, global warming,

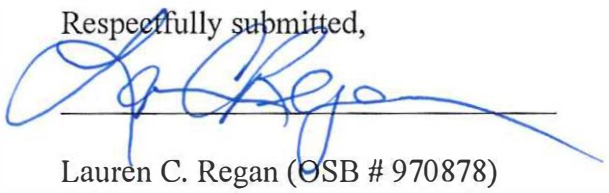
whatever." RP 15. While it is unclear why the court concluded that evidence of immediacy was needed in addition to the evidence of the harms of climate change, Mr. Ward's Motion to Reconsider made clear that climate change is, in fact, an immediate, ongoing harm. CP 15-30. The Supreme Court has defined the harms of climate change as "imminent," *Massachusetts,* 549 U.S. at 521, while the state Department of Ecology has noted that they are "happening now and the impacts are worse than previously predicted," Dep't of Ecology, Washington Greenhouse Gas Emission Reduction Limits, Prepared Under R.C.W. 70.235.040 (Dec. 2014), CP 288-341 — a temporal immediacy even greater than imminence. Mr. Ward's proffer of scientific proof, and the planned testimony of his experts, left no doubt that, even with the trial court's unwarranted addition of an imminence element, he was prepared to present sufficient evidence to make the existence of necessity a factual question for the jury.

The propriety of politics in the courtroom is not at issue in this appeal. Rather, Mr. Ward asks this court to cure the error committed when the trial court abrogated the constitutional function of the jury and decided questions of fact — against the evidence on record — in order to deny presentation of evidence at trial.

B. Conclusion

The trial court's denial of Mr. Ward's necessity defense: the denial of evidence, testimony, and argument relevant to said defense, as well as the failure of the court to provide the jurors with WPIC 18.02, violated his constitutional rights to due process and was reversible error. For all of the foregoing reasons, this Court should reverse the Superior Court and remand to the Skagit County Superior Court to grant Mr. Ward a new trial with instructions to the trial court to permit the necessity defense and the requisite jury instruction.

Respectfully submitted,



Date: November 8, 2017

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,
Respondent,

v.

KENNETH ARTHUR WARD,
Petitioner.

CAUSE NO: 770446-1

CERTIFICATE OF SERVICE

I, Lauren Regan, certify and declare that on the 9th day of November 2017, I served the attached Petitioner's Opening Brief by email and by depositing copies into the U.S. Mail with proper first-class postage prepaid in envelopes addressed to:

Erik Pedersen
Skagit County Prosecuting Attorney's Office
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Mount Vernon, WA 98273

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Date & Place: November 9, 2017, Eugene, Oregon

Lauren C. Regan, Attorney