STATE OF MICHIGAN
IN MACOMB COUNTY CIRCUIT COURT

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| MATTHEW CONNOLLY, *et al.*,<br><br>Appellants/Defendants,<br><br>vs.<br><br>CITY OF STERLING HEIGHTS,<br><br>Appellee/Plaintiff. | Circuit No. 2018-000125-AR |

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# APPELLANTS' BRIEF

**ORAL ARGUMENT REQUESTED**

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## ORDER AND JUDGMENT APPEALED

Appellants/Defendants Matthew Connolly, William Goodman, Abygail McIntyre, and Dr. Monica Miller ("Defendants") appeal from the order and judgment of the 41-A District Court denying Defendants' requests for jury instructions. The lower court's denial of these jury instructions resulted in Defendants' subsequent convictions.

On February 14, 2018, the District Court denied Defendants' requests for jury instructions on the defense of necessity and the defense of others. The jury trial commenced on February 15, 2018.

On February 16, 2018, the jury deliberated and returned guilty verdicts on the single trespass charge for all Defendants. Defendants were sentenced the same day.

On March 1, 2018, Defendants timely filed their Claim of Appeal.

## ALLEGATIONS OF ERROR AND RELIEF SOUGHT

The District Court's failure to give Defendants' requested jury instructions deprived Defendants of their due process right to present a defense. Defendants request a new trial with a properly instructed jury.

## JURISDICTIONAL STATEMENT

The District Court entered final judgment on February 16, 2018. Defendants filed their claim of appeal on March 1, 2018, which was within 21 days of the entry of judgment. This Court has jurisdiction pursuant to MCR 7.103(A) and MCR 7.104(A).

## QUESTIONS PRESENTED

I. Whether the District Court's failure to provide Defendants' requested jury instruction on the defense of necessity deprived Defendants of their due process right to present a defense, thereby warranting a new trial.

District Court's Answer: NO

Defendants' Answer: YES

II. Whether the District Court's failure to provide Defendants' requested jury instruction on the defense of others deprived Defendants of their due process right to present a defense, thereby warranting a new trial.

District Court's Answer: NO

Defendants' Answer: YES

## INTRODUCTION

A criminal defendant has a state and federal constitutional right to present a defense. Const 1963, art 1, § 13; US Const, Ams VI, XIV; *People v Hayes*, 421 Mich 271, 278, 364 NW2d 635 (1984). Instructional errors that directly affect a criminal defendant's theory of defense infringe her due process right to present a defense, warranting a new trial. *See People v Kurr*, 253 Mich App 317, 654 NW2d 651 (2002) (holding that the denial of a defense of others instruction deprived the defendant of her due process right to present a defense, thereby warranting a new trial).

In this case, prior to the commencement of their jury trial for criminal trespass, Defendants filed a motion requesting jury instructions on two related and relevant defenses: necessity and defense of others.

As set forth more fully below, the necessity defense has long been recognized under the common law, and it is particularly applicable in the context of this case in light of Michigan law and Michigan's strong public policy favoring the protection of human life. Related to the defense of necessity is the defense of others, which also has application in the context of this case under Michigan law.

The lower court refused to provide the requested instructions, thereby depriving Defendants of their due process right to present a defense. Consequently, a new trial is warranted.

## STATEMENT OF FACTS

On September 15, 2017, Defendants peacefully entered the waiting room of the Northland Family Planning Center ("Northland"), an abortion center located in the City of Sterling Heights, Michigan, because they had a well-grounded apprehension and reasonable fear that there were women and unborn children in the waiting room who were in imminent harm of serious bodily injury or death. (Trial Tr Vol I at 178-80, 217-18, 225-27).[1]

There is no dispute that abortions were scheduled that day. (Trial Tr Vol I at 144-45, 159-60). In fact, on that day, there was a young woman present who was under duress and who was scheduled to have an abortion. (Ex A, Mot Hr'g Tr at 14-16). Defendants sought to intervene to protect this woman, but they were prevented from doing so. (Ex A, Mot Hr'g Tr at 14-16). Defendants have been helping women who have been the victims of coerced abortions for many years, and in their vast experience coerced abortions are not uncommon. (Trial Tr Vol I at 179-80). This young woman was yet another victim, and Defendants sought to help her. Consequently, Defendants were not acting on a general apprehension of harm; they

[1] The trial transcripts (volumes I and II) have been filed with this Court. The motion hearing transcript is attached to this brief as Exhibit A. Defendants' proposed jury instruction on the defense of necessity is attached as Exhibit B, and Defendants' proposed jury instruction on the defense of others is attached as Exhibit C.

had information of a specific harm. (*See* Ex A, Mot Hr'g Tr at 14-16; *see also* Trial Tr Vol I at 183-85, 225-27).

While inside the abortion center, Defendants did not engage in any acts of violence. Defendants abhor violence. Defendants did not damage any property or engage in acts of vandalism. They were peaceful throughout. (Trial Tr Vol I at 91-94, 106-08, 113, 122, 146, 152, 172-73). And so long as Defendants remained in the abortion center, their presence averted the harm they sought to prevent. (Trial Tr at Vol I at 182, 185-86, 197-98).

The police arrived and directed Defendants to depart the premises. (*See* Trial Tr Vol I at 75-94). Defendants refused because they wanted to prevent imminent harm—the very reason why they entered the waiting room in the first instance. (*See id.* at 182, *see also id.* at 217-18). As a result, Defendants engaged in "passive resistance," a common tactic employed by civil rights advocates and other peaceful protestors from time immemorial. (Trial Tr Vol I at 102-03, 173-74).

Defendants were arrested, transported to the police station, booked, and placed in a detention cell. They were released later that same day.

As a result of their actions, Defendants were charged with trespassing in violation of the City's code of ordinances. (Trial Tr Vol I at 12). No one was charged with engaging in any act of violence or vandalism because no such acts

occurred. Defendants were peaceful throughout. (*See* Trial Tr Vol I at 91-94, 106-08, 113, 122, 146, 152, 172-73).

Prior to their trial, Defendants filed a motion requesting jury instructions on the defense of necessity and the defense of others. (Ex A, Mot Hr'g Tr at 4-16).

Defendants proposed the following instruction for the defense of necessity—an instruction modeled after an instruction approved by the U.S. Court of Appeals for the Ninth Circuit:

> In some situations, necessity may excuse a person's committing what would otherwise be a criminal offense. A person is allowed to commit what would otherwise be a criminal offense if the person acts out of necessity. The rule of necessity exists because it would be unjust and contrary to public policy to impose criminal liability on a person if the harm that results from his breaking the law is significantly less than the harm that would result from his complying with the law in that particular situation.
>
> The defendant contends that [he] [she] acted out of necessity. As I stated, necessity legally excuses the crime charged.
>
> The defendant must prove necessity by a preponderance of the evidence. A preponderance of the evidence means that you must be persuaded that the things the defendant seeks to prove are more probably true than not true. This is a lesser burden of proof than the government's burden to prove beyond a reasonable doubt each element of [*specify crime charged*].
>
> A defendant acts out of necessity only if at the time of the crime charged:
>
> 1. The defendant was faced with a choice of evils and chose the lesser evil;
> 2. The defendant *honestly and reasonably believed* [he] [she] acted to prevent imminent harm;

3. The defendant *reasonably* anticipated [his] [her] conduct would prevent such harm; and

4. There were no other legal alternatives to violating the law.[2]

If you find that each of these things has been proved by a preponderance of the evidence, you must find the defendant not guilty.

(*See* Ex B, Ninth Circuit Necessity Defense Instruction).

Defendants proposed the following instruction for the defense of others, which was modeled after the Michigan pattern jury instruction:

7.21 Defense of Others

(1) The defendants claim that they acted lawfully to prevent serious harm to others. A person has the right to use force or even take a life to defend someone else under certain circumstances. If a person acts in lawful defense of another, his or her actions are justified and he or she is not guilty of the criminal offense.

(2) You should consider all the evidence and use the following rules to decide whether the defendants acted in lawful defense of another. Remember to judge the defendants' conduct according to how the circumstances appeared to them at the time of their acts.

(3) First, at the time they acted, the defendants must not have been engaged in the commission of a crime.

(4) Second, when they acted, the defendants must have honestly and reasonably believed that another was in danger of being killed or

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[2] As the evidence in this case demonstrates, because the entrance to Northland is behind the building, there was no access from the public sidewalks to the women who entered the building for an abortion. (Trial Tr Vol I at 150). Consequently, it would not have been possible to reach out to these women from that location. (*Id.*). The only way to reach them was to enter the waiting room. Additionally, law enforcement did nothing to investigate nor stop the harm Defendants sought to prevent by trespassing. (Trial Tr Vol I at 121-22, 128, 220). Consequently, there were no other legal alternatives available to them.

seriously injured. *If their belief was honest and reasonable, they could act at once to prevent the harm, even if it turns out later that they were wrong about how much danger anyone was in.*

(5) Third, if the defendants only feared a minor injury, then they were not justified. The defendants must have been afraid that someone would be killed or seriously injured. When you decide whether they were so afraid, you should consider all the circumstances: the conditions of the people involved, including their relative strength, whether anyone was armed with a dangerous weapon or had some other means of injuring another, the nature of the other person's attack or threat, and whether the defendants knew about any previous violent acts or threats made by the attacker.

(6) Fourth, at the time the defendants acted, they must have *honestly and reasonably believed* that what they did was immediately necessary. Under the law, a person may only use as much force as he or she thinks is needed at the time to protect the other person. When you decide whether the force used appeared to be necessary, you may consider whether the defendants knew about any other ways of preventing the harm, and you may also consider how the excitement of the moment affected the choice the defendants made.

(7) *The defendants do not have to prove that they acted in defense of others. Instead, the prosecutor must prove beyond a reasonable doubt that the defendants did not act in defense of others.*

(Ex C, Defs' Proposed Defense of Others Instruction) (emphasis added).

On February 14, 2018, the presiding judge denied the motion as a matter of law, thereby denying the requested instructions.[3] (Ex A, Mot Hr'g Tr at 13-14).

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[3] Because the judge denied Defendants' requested defenses, he also denied Defendants' request to present the expert testimony of Dr. Paul Byrne, a neonatologist and pediatrician. Dr. Byrne's testimony would have established, *inter alia*, the gestational development of an unborn child; the gestational age at which an unborn child is a unique and distinct human life; the gestational age at which an unborn child can survive outside of his mother's womb; the gestational age at which

During the hearing on the motion, Defendants proffered evidence demonstrating that the defenses were appropriate.[4] Defendants' counsel stated as follows:

> MR. MUISE: Thank you, Your Honor. And can I, just for purposes of the record, just make a brief proffer?
>
> THE COURT: Yeah, by all means.
>
> MR. MUISE: As I stated previously, but just to put a fine point on it, the expert's testimony would be to assist the jury to understand the weighing of the social values, because necessity is a weighing of -- of, as they put it, a weighing of evils of sorts. There would be testimony, I proffer, from one of the -- one of the rescuers in this case, Dr. Monica Miller, that she observed a woman who was present in the waiting

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an unborn child has a detectable heartbeat; and the gestational age at which an unborn child can feel and experience pain. This testimony would have been based upon scientific fact and not religious opinion. Moreover, it would have assisted the jury to better understand Defendants' motive and purpose for entering the abortion center on the date in question, in addition to supporting their necessity defense. In sum, Dr. Byrne's testimony would have assisted the jury with "weigh[ing] the loss of the life of the developing fetus against the property rights the trespass statute protects, and the social order values the arrest statute supports. And if the jury [found] that the value of these fetal lives clearly outweigh[ed] the competing values of private property and social order, then the court [should have] instruct[ed] the jury . . . that they may acquit the defendants." *People v Archer*, 143 Misc 2d 390, 401, 537 NYS2d 726, 732-33 (City Ct 1988).

[4] Defendants' counsel made the proffer because the judge would not permit the evidence at trial. (*See* Ex A, Mot Hr'g Tr at 13 ["THE COURT: Mr. DeNault, are you -- what is your thought about my making a decision later on? MR. DENAULT: Your Honor, I think that invites all kinds of problems relating to -- to mistrials. THE COURT: That's letting the horse out of the stable, so to speak? MR. DENAULT: Yeah. Because it -- THE COURT: It's -- it's all been out by then. MR. DENAULT: It gives too much free rein for the Defense to start throwing things at the jury that are going to ask the jury to make decisions that have already been made in our society. So I don't -- I don't believe that would be a way to go here. THE COURT: All right."]; *see also id.* at 14-15 [setting forth proffer of evidence in light of ruling]).

> room, on the date in question, September 15, 2017, who, by all her accounts, or observations with her, or communications with her, that she was there for an abortion, that she was under duress at the time, that she was -- she was willing to get up and walk out with her at the moment. And then, when she was in the process of walking out with her, an employee from the Northland Family Planning Center came -- rushed out, grabbed her by the arm, and drug -- brought her back into the back room where she could no longer have any contact with her. And we believe that that, at a minimum, is an evidence of duress, of unlawful conduct, that she could have intervened with, and her actions were intended to intervene with and prevent. Also, there was another -- there was a gentleman in the waiting room who was very abusive and belligerent to one of the young ladies who was there, one of the defendants, Abigail McIntyre. Again, that is some evidence that there was a likely and abusive relationship there and evidence of coercion. And we would proffer that as -- by way of evidence that we would be showing during the trial, Your Honor.
>
> THE COURT: Okay; thank you.

(Ex A, Mot Hr'g Tr at 14-16).

Defendants' jury trial commenced on February 15, 2018, and it concluded on February 16, 2018, with the jury returning guilty verdicts for all Defendants. Defendants were sentenced that same day. The judge sentenced each Defendant to non-reporting probation for two years with the conditions that Defendants not commit another offense and that they not enter the premises of Northland. Defendants were also assessed statutory costs. (Trial Tr Vol II at 21-25, 34-36).

During the trial, Defendants testified as to their experiences with women who were subjected to coerced abortions and the prevalence of such abortions. (Trial Tr Vol I at 179-80, 227-28). Evidence adduced during trial also showed that

Defendants told the officers present that they were arresting the wrong people, but the officers did nothing to investigate nor stop the harm Defendants were seeking to prevent that day. (Trial Tr Vol I at 121-22, 128, 185-86, 220).

On March 1, 2018, Defendants filed their Claim of Appeal. This appeal follows.

## STANDARD OF REVIEW

Claims of instructional error are reviewed by this Court *de novo*. *People v Kurr*, 253 Mich App 317, 327, 654 NW2d 651, 656 (2002). This Court also reviews *de novo* the constitutional question of whether a defendant was denied her constitutional right to present a defense as a result of a trial court's refusal to provide a requested instruction. *Id.*

## ARGUMENT

### I. The District Court Committed Reversible Error when It Denied Defendants' Theory of the Case and Requests for Specific Jury Instructions.

#### A. A District Court Must Instruct on a Proposed Defense Supported by Evidence.

A trial court must "properly instruct the jury so that it may correctly and intelligently decide the case." *People v Clark*, 453 Mich 572, 583, 556 NW2d 820 (1996). "The instructions must include all elements of the charged offense[s] and *must not exclude* material issues, *defenses*, and *theories*, if there is evidence to

support them." *People v McIntire*, 232 Mich App 71, 115, 591 NW2d 231 (1998), *rev'd on other grounds* 461 Mich 147, 599 NW2d 102 (1999) (emphasis added).

As stated by the Michigan Supreme Court:

> The court's obligation to instruct on a proposed defense was described in *People v Mills*, 450 Mich 61, 80-81; 537 NW2d 909 (1995):
>
> > A criminal defendant has the right to have a properly instructed jury consider the evidence against him. *People v Vaughn*, 447 Mich 217; 524 NW2d 217 (1994); *People v Lewis*, 91 Mich App 542; 283 NW2d 790 (1979). However, a trial court is not required to present an instruction of the defendant's theory to the jury unless the defendant makes such a request. *People v Wilson*, 122 Mich App 1, 3; 329 NW2d 513 (1982). Further, *when a jury instruction is requested on any theories or defenses and is supported by evidence, it must be given to the jury by the trial judge*. *People v Rone (On Remand)*, 101 Mich App 811; 300 NW2d 705 (1980). A *trial court is required to give a requested instruction*, except where the theory is not supported by evidence. *People v Stubbs*, 99 Mich. App. 643; 298 N.W.2d 612 (1980); *People v Stapf*, 155 Mich. App. 491; 400 N.W.2d 656 (1986).

*People v Rodriguez*, 463 Mich 466, 472-73, 620 NW2d 13, 16 (2000) (emphasis added).

Here, Defendants requested jury instructions that they would have supported with evidence. Indeed, the proffered evidence, at a minimum, raised the appropriate inference to permit the requested defense instructions and thus permit the jury to find in favor of Defendants.[5] As set forth below, the trial court's refusal to give the

[5] Following the close of the trial, counsel for the parties were permitted to discuss the case with the jury, and it was evident during this discussion that had the jury

instructions was error as a matter of law, and this error violated Defendants' right to due process. Therefore, a new trial with a properly instructed jury is warranted.

### B. The Defense of Necessity Is Recognized under Michigan Law, and It Was Appropriate in this Case.

In Michigan,[6] the defense of necessity is, in an appropriate factual situation, a valid defense to a criminal trespass. As stated by the Michigan Court of Appeals:

> [I]n an *appropriate factual situation*, a defense of necessity may be interposed to a criminal trespass action. However, there must be *some* evidence from which each element of such defense may be *inferred* before the defense may be considered by a trier of fact.

*People v Hubbard*, 115 Mich App 73, 77-78, 320 NW2d 294, 296-97 (1982) (emphasis added). Thus, in the appropriate factual situation, necessity is a valid defense to a criminal trespass so long as the defense presents *some* evidence from

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been equipped with the requested instructions, there would have been a different outcome.

[6] It is true that a majority of courts have rejected a defense of necessity in the abortion context in general. *See, e.g., Allison v Birmingham*, 580 So 2d 1377, 1381-82 (Ala Crim App 1991) (collecting cases); *but see People v Archer*, 143 Misc 2d 390, 401, 537 NYS2d 726, 732-33 (City Ct 1988) (denying motion to preclude necessity defense in the abortion context and stating that "[t]he jury may weigh the loss of the life of the developing fetus against the property rights the trespass statute protects, and the social order values the arrest statute supports. And if the jury finds that the value of these fetal lives clearly outweighs the competing values of private property and social order, then the court shall instruct the jury, under section 35.05 of the Penal Law, that they may acquit the defendants"). However, none of the cases rejecting the defense arise in states with such a strong public policy of protecting the unborn as in Michigan. *See supra.* And, more importantly, none of these cases present the factual situation that is present here—evidence of a coerced abortion. Consequently, they are not controlling nor persuasive. Indeed, this case is *sui generis*.

which each element of the defense may be *inferred* by the jury. Defendants met that standard in this case.

In *Hubbard*, the court did not permit the defense in a trespass case where protestors targeted the Big Rock nuclear power plant. The court denied the defense for two principal reasons. First, the court stated the following:

> The necessity defense is unavailable in an area where there has been exhaustive legislative debate and legislation. The law, by allowing the application of a necessity defense, cannot permit an individual to substitute his own convictions for those of a reasoned and democratic decision-making process. To do so would subvert the very process by which a democracy functions.

*Id.* at 79, 320 NW2d at 297. Accordingly, the court concluded:

> Defendants have not alleged that the Big Rock Plant at the time of defendants' trespass harbored any *unique condition* that would pose a greater or more imminent threat to life or property *than that commonly incident* to nuclear power facilities in general. The facts as considered for this appeal include *no evidence of a special defect or unique danger* at the Big Rock site sufficient to support a "reasonable" or "well-founded" apprehension of particular harm distinguishable from a general apprehension which might be precipitated by contemplation of any nuclear facility. In view of the decisions by our state Legislature and Congress to facilitate the controlled development of nuclear power, we conclude that such *general apprehension* of harm from a nuclear power facility will not support a defense of necessity to a charge of criminal trespass.

*Id.* at 79-80, 320 NW2d at 297-98 (emphasis added).

In this case, the Michigan legislature has concluded as a matter of policy that the protection of human life, despite the court-created right to abortion in *Roe v Wade*, 410 US 113 (1973), remains a priority. The Michigan legislature has made

clear that not all abortions are "legal" and thus protected under *Roe*. For example, Michigan law prohibits, with a narrow exception for medical emergencies, any physician from performing an abortion without "*informed* written consent, given freely and without coercion." *See* MCL § 333.17015 ("[A] physician shall not perform an abortion otherwise permitted by law without the patient's informed written consent, given freely and without coercion to abort.") (emphasis added). Michigan law also proscribes coerced abortions, providing, *inter alia*, "information that a pregnant female does not want to obtain an abortion includes *any fact* that would clearly demonstrate to a reasonable person that she is unwilling to comply with a request or demand to have an abortion." *See* MCL § 750.213a (emphasis added).

Michigan courts similarly recognize that not all abortions are beyond *criminal* prosecution. Indeed, Michigan is unique in that, as a matter of constitutional interpretation, its law criminalizing abortion is still valid following *Roe v Wade*. *See People v Bricker*, 389 Mich 524 (1973). Consequently, not all abortions performed by medical doctors are lawful in this state.

In *People v Higuera*, 244 Mich App 429, 431, 625 NW2d 444, 446 (2001), for example, the defendant, a medical doctor, sought dismissal of charges brought under Michigan's criminal abortion statute, MCL § 750.14, for allegedly inducing the abortion of a fetus of approximately 28 weeks. The defendant's argument that

the statute was repealed by implication was rejected, and his constitutional arguments similarly could not insulate him from prosecution because the statute, as construed, clearly reached the conduct involved in the prosecution. As a result, the dismissal of the charge was reversed. *See Higuera*, 244 Mich App at 449-50.

In sum, nuclear power and abortion are not comparable. Unlike a situation where a private individual who seeks to substitute his own convictions for those of a reasoned and democratic decision-making process by trying to halt nuclear power *contrary* to that legislative process, an individual (Defendants in this case) who seeks to halt what they honestly and reasonably believe is a coerced abortion in Michigan is acting *consistent* with the reasoned and democratic decision-making process.

Thus, unlike the situation in *Hubbard*, Defendants have "alleged that the [Northland Family Planning Center] at the time of defendants' trespass harbored [a] unique condition that would pose a greater or more imminent threat to life or property than that commonly incident to [abortion] facilities in general. The facts as considered for this appeal include . . . evidence of a special defect or unique danger at the [Northland] site sufficient to support a 'reasonable' or 'well-founded' apprehension of particular harm distinguishable from a general apprehension which might be precipitated by contemplation of any [abortion] facility." *Hubbard*, 115 Mich App at 79-80, 320 NW2d at 297-98.

The second reason *Hubbard* denied the defense was described as follows:

> [D]efendants have acknowledged that the purpose of their trespass was to inform the company and others of their perceived danger attendant to nuclear power. In order to raise the defense of necessity, defendants' criminal act must *support an inference* that the criminal act would *alleviate the impending harm*. We conclude that defendants' *act of criminal trespass alone could not reasonably be presumed to have any effect in halting* the production of nuclear power at Big Rock.

*Id.* at 80, 320 NW2d at 298 (emphasis added).

Here, unlike the futile attempt to halt the production of nuclear power at a power plant by simply trespassing on the property to protest, Defendants' actions could "reasonably be presumed" to have the effect of halting the harm caused to the women and their unborn children who were present in the abortion center on the day in question. Unlike halting a nuclear power plant, Defendants' presence inside the waiting room of an abortion center places them in a position to provide direct assistance to those who are in imminent harm. Indeed, so long as Defendants were "trespassing," the coerced abortion could be halted. Certainly, Defendants' acts "support an inference" that they would alleviate the impending harm, thereby distinguishing further this case from *Hubbard*.

In sum, Defendants met all of the requirements for a jury instruction on the defense of necessity. The trial court's failure to give the requested instruction deprived Defendants of their right to due process, thereby warranting a new trial before a properly instructed jury.

### C. The Defense of Others Is Recognized under Michigan Law, and It Was Appropriate in this Case.

In addition to an instruction on the defense of necessity, Defendants requested that the court instruct the jury on the defense of others. This request was similarly denied, depriving Defendants of their due process right to present a defense.

In *People v Kurr*, 253 Mich App 317, 321, 654 NW2d 651, 654 (2002), the defendant, who was pregnant at the time with quadruplets, claimed that she stabbed the victim, her boyfriend, killing him in defense of her unborn children. The trial court disallowed a defense of others instruction, noting that the fetuses were not viable. The defendant argued that she was denied her right to present a defense, and the appellate court agreed, reversing and remanding the case for a new trial.

In its opinion, the appellate court reviewed Michigan law and noted that Michigan allows a person to use deadly force in defense of another and that "*fetuses are worthy of protection as living entities as a matter of public policy.*" *Id.* at 320-22, 654 NW2d at 653-54. Accordingly, the court held that "in this state, the defense [of others] *should also extend to the protection of a fetus*, viable or nonviable, from an assault against the mother, and we base this conclusion primarily on the fetal protection act adopted by the Legislature in 1998." *Id.* at 321, 654 NW2d at 654 (emphasis added).

The court "conclude[d] that the failure to give a defense of others jury instruction deprived the defendant of her due process right to present a defense. . . .

Because the jury instructions essentially excluded consideration of defendant's viable defense of others theory, a new trial is warranted." *Id.* at 327-28; 654 N W2d at 657.

In its decision, the court further stated that "[t]he defense of others theory is available only if a person acts to prevent *unlawful* bodily harm against another," and "[b]ecause clinics that perform abortions are engaging in lawful activity, the defense of others theory does not apply," concluding that "[o]ur holding today does not apply to what the United States Supreme Court has held to constitute *lawful* abortions." *Id.* at 326, 654 NW2d at 656 (emphasis added).

As noted above, not all abortions in Michigan are lawful, and Michigan law *expressly* prohibits coerced abortions, and evidence of a coerced abortion includes "*any fact* that would clearly demonstrate to a reasonable person that she is unwilling to comply with a request or demand to have an abortion." *See* MCL § 750.213a (emphasis added). A coerced abortion is thus unlawful, and *it is an assault against the mother* that involves force resulting in the death of a fetus. Consequently, based on the reasoning in *Kurr*, if the "defense of others" justifies the commission of a homicide, a defendant should be permitted to raise this defense in a case involving a simple trespass. Indeed, this defense should be available to a defendant under circumstances similar to those where the necessity defense is available. In other words, this defense should have been available to Defendants in this case.

Accordingly, the trial courts failure to give a defense of others jury instruction deprived Defendants of their due process right to present a defense. Because the jury instructions essentially excluded consideration of Defendants' viable defense of others theory, a new trial is warranted. *Id.* at 327-28; 654 NW2d at 657.

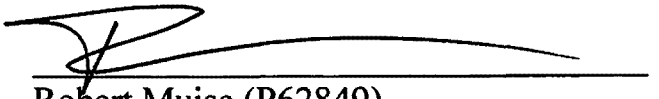
## CONCLUSION

The District Court's failure to properly instruct the jury deprived Defendants of their due process right to present a defense. Therefore, the jury verdicts must be reversed and this case remanded for a new trial before a properly instructed jury.

Dated: April 12, 2018.

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER



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# EXHIBIT A

STATE OF MICHIGAN

IN THE 41-A JUDICIAL DISTRICT COURT

FOR THE CITY OF STERLING HEIGHTS

THE PEOPLE OF THE
CITY OF STERLING HEIGHTS,

v. D.C. Case No. SH142000

WILLIAM LOUIS GOODMAN,
Defendant. /

THE PEOPLE OF THE
CITY OF STERLING HEIGHTS,

v. D.C. Case No. SH142034

ABIGAIL CASEY MCINTYRE,
Defendant. /

THE PEOPLE OF THE
CITY OF STERLING HEIGHTS,

v. D.C. Case No. SH142104

MONICA MARIE MILLER,
Defendant. /

THE PEOPLE OF THE
CITY OF STERLING HEIGHTS,

v. D.C. Case No. SH142151

MATTHEW JOSEPH CONNOLLY,
Defendant. /

MOTION HEARING

BEFORE THE HONORABLE MATTHEW R. RUMORA, VISITING JUDGE

STERLING HEIGHTS, MICHIGAN - WEDNESDAY, FEBRUARY 14, 2018



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NONE

Sterling Heights, Michigan

Wednesday, February 14, 2018 - 11:07 a.m.

THE COURT: Abigail McIntyre, Monica Miller, William Goodman and Matthew Connolly.

Appearances for the record?

MR. DENAULT: Thank you. Judge, on behalf of the People, Donald DeNault and Melissa Cohen.

MR. MUISE: Good morning, Your Honor; Robert Muise, on behalf of all the defendants.

THE COURT: Okay; all right. And today was the date and time set -- the Court's reviewed the motion filed by the defendants for special jury instruction regarding necessity and defense of others and also regarding production of a expert witness.

And, Mr. Muise, would you -- is there something else you'd like to add, to summarize your position for the record?

MR. MUISE: Well, a couple of points more in reply to the -- to the opposition filed by the -- by the Prosecutor, which we received yesterday.

THE COURT: Okay.

MR. MUISE: There's -- there will be testimony in this case that -- that there were abortions occurring on that day. They made some statement to the effect that there's -- there's no evidence that they -- there were

actual abortions being performed that day. And we do -- we -- there will be evidence to that effect from likely more than one source. The other thing is that we will proffer that there will be testimony from one of the witnesses that they observed behavior inside the -- the waiting room that they were in that was indicative of there being a potential for a coerced abortion, which is not lawful under Michigan law. So there will be testimony regarding what actually transpired within that -- that waiting room.

The question with the expert, and this is the point that the Archer Court made, is that there is, in the necessity defense, a weighing of sorts of social values. And what the expert, who is a well-qualified neonatologist and pediatrician, will present testimony on the scale in favor of the -- the protection of human life, which is -- is, at the end of the day, the jury is going to have to balance that question, because that's one of the -- the balance of the -- of the evils. And it's not true to say that every abortion is constitutionally protected. And, number one, the right to abortion, under Roe versus Wade, adheres to the individual seeking the abortion, not the abortion center nor the physicians. They made a comment in their brief about Archer at the time did permit the instruction, but excluded the only legal abortions, which

is first trimester, after Roe. And that's just not true. I mean, after Roe, abortion was -- was lawful through all three trimesters. The fact is that there becomes, again, a balancing of the social harms the further you get to the question of liability.

So, with the evidence that will be presented -- and that's why we -- at the conclusion, we cited that -- that opinion from the Michigan Appellate Court -- I mean, excuse me, the Massachusetts Court of Appeals, which makes the point that, you know, the proper role for the Court would be to wait until all the evidence comes in to see if there's evidence that's sufficient to meet the standard to get the instruction to the jury. And what we set out in our brief was to show, one, the necessity defense is a defense to trespass, recognized by the Michigan Courts, under the Hubbard case. Granted the Court ultimately did not apply it there, but it is not precluded as a matter of law. Number two, the Archer case makes clear that it's within the context of an abortion that that defense can be provided. And Higuera makes clear, as well as all the Michigan statutes, that there is a strong public policy in Michigan, probably more so than any other state. In fact, I would challenge anyone to find another decision like Higuera, as late as it was in the 2000's, where they were prosecuting a physician for performing an abortion after 28

weeks, 'cause Michigan has a very, very strong public policy of protecting life. And that was brought up in the Kurr case when they were doing the defense of others, where it was available to even a nonviable fetus in that particular case. So --

THE COURT: What is the -- Roe versus Wade puts no restrictions, right, on abortion?

MR. MUISE: Roe versus Wade used the trimester framework.

THE COURT: Okay.

MR. MUISE: And it said that the governments essentially had little interest, to almost no interest, in the first trimester. As you move to the second trimester, the government's interest became more prominent, and the government's interest was the greatest in the third trimester. Now, in 1992, in the Casey case, the Court got rid of the trimester framework, per se, because it was somewhat unworkable, because what you end up having is, as medical science improves, so does the -- you know, the age of viability reduces, so they came up with the substantial burden test, which they've applied. And we know that, you know, the court has upheld restrictions on partial birth abortion. There's nothing that permits any coerced abortion; there's nothing that permits an uninformed abortion. There is -- there are circumstances where, just

because it's an abortion, doesn't mean it's beyond the pale in terms of being able to be proscribed.

THE COURT: What about Michigan law then?

MR. MUISE: Well, Michigan has to follow what the Supreme Court said. And what's very interesting -- and we cited the case, the Bricker case. And that's why the Higuera case is so important. Michigan's law proscribing abortion, which is in place prior to Roe, the Michigan Supreme Court has said, is still standing. They did not repeal it, and it has not been repealed by implication. And that was the -- by the other statutory provisions they put in place. That was the Higuera decision. So you can still prosecute. And what's interesting about Higuera, because it wasn't the elements necessary to show it was necessary for the woman's life and health, this 28 week abortion, so the government could prosecute the abortionist for performing an abortion after the 28th week.

So, again, when you look at the Michigan -- we set the statutes in place. If you look, from a public policy perspective, which is really what Archer looked at, in Michigan, necessity and defense of others should be applicable in this particular context. And, again, I think the proper approach would be to let the evidence come in. The expert's evidence is to -- again, to show the weight of the protection of human life in that calculus, of the

weighing of the calculus. And then the -- see how the evidence comes in. And then we can make an argument after the close of evidence whether or not we've presented evidence to each of the elements of the defense. And the Court can make its ultimate ruling at that time.

THE COURT: Mr. DeNault?

MR. DENAULT: Thank you, Judge.

I think Counsel's argument sort of makes our point that this is a trespass case. And now it's become -- or he's trying to turn it into a constitutional debate about abortion, when life begins, when it doesn't, are we defending the lives of others or aren't we, will there be evidence to show that we are or we aren't. This is -- this is -- the facts are going to show, Judge, and there's no dispute here, at least, that these people were in a facility that's private. It's open to the public in the lobby. They came in with no business there, other than their belief that they were protecting someone or something from harm. And they were asked to leave; they refused. The police were invited out, asked them to leave; they refused. They went limp, they resisted, and did everything they could to not have to leave until they were carried away. That's all this is about. They were not actively protecting anyone from anything. These people were in a lobby. They were not actively stopping a shooter from

firing a gun, or a doctor from cutting someone open, or any active behavior at all. It was all purely speculative on the part of the folks who decided that day that they wanted to go in and make a national effort, and coordinate their efforts, to stop these places from doing the things that they don't agree with.

But that's what the court -- the case law tells you, Judge, that's what our brief tells you, is that it's not about whether they agree or disagree with it, it's about what the legislatures and the courts have already decided. And they've already decided, through our system of government, our three branches, that the procedures, the protocols, the operation, of that facility, itself, is lawful. You cannot take it upon yourself, in an organized society, to deem it to be unlawful, or to attempt to intervene, physically, when there are other options. If you believe something illegal is happening, you have the Attorney General, you have the police, you have civil recourse in civil court. But, to take it upon yourself to interrupt the operations of a lawful business goes well beyond any rights that the defendants had in this case. So, to come in here and then argue, or try to convince a jury, that this is about life, and abortions, and protection of others, and necessity, all of that is just trying to mislead the jury into trying to make a

constitutional determination, or a determination that's already been made by Roe versus Wade, and by our courts, and by our legislatures.

So, we believe, Judge, this case needs to be just what it is, a trespassing case, with the trespassing elements. And, if they believe that there's reasonable doubt that they were allowed to be there, or they weren't asked to leave, those are the elements. And, with that, Your Honor, we believe the motion should be denied.

MR. MUISE: And if I can just add one thing, Your Honor?

THE COURT: Yes.

MR. MUISE: I mean, the point of a necessity defense is -- and Michigan courts recognize it, it is a defense to trespass. So, yeah, you might have a simple trespass. Certainly I understand the Prosecutor wants to try to make this as sterile as -- as possible. But there's facts that go around the nature and basis for -- for why they were doing what they were doing that morning. They weren't -- they didn't go to that Northland Family Planning Center because they were, you know, doing early Christmas shopping. They were there because there was human life in risk, grave risk, imminent risk, of serious bodily harm and death. And that's what's required under the necessity defense. And, just because you put it an abortion label on

it, does not necessarily mean that it is lawful, particularly when there is -- there will be testimony that at least one of the individuals in there appeared to under duress and coercion, and she was going to walk out at that -- with one of the -- one of the pro-life rescuers, but for the fact that the clinic grabbed her and rushed her back into the -- into the center. That's -- that's evidence. That is some evidence. You look at the statutes -- and we talk about public policies, and we should be debating public policy here and constitutional claims, look at Michigan's public policy as reflected through their statutes. Look at Michigan's public policy through the Bricker decision. There is probably no other state in the country that has a stronger public policy to do everything it can to protect innocent human life. And, as the statute that prohibits coerced abortion says, any fact, any fact, that might lead a reasonable person to believe that there was some coercion is sufficient. And so we're -- we're saying this applies in this case because of the strong Michigan public policy. It applies -- even in a simple trespass case. In fact, that's when necessity defenses apply quite often more times than not. And so we would -- we would ask the Court that you consider and permit the Defense to go forward and particularly -- and certainly wait until after the close of evidence and see if

we've provided evidence on each of those elements, and then whether or not the jury will get that instruction.

THE COURT: Mr. DeNault, are you -- what is your thought about my making a decision later on?

MR. DENAULT: Your Honor, I think that invites all kinds of problems relating to -- to mistrials.

THE COURT: That's letting the horse out of the stable, so to speak?

MR. DENAULT: Yeah. Because it --

THE COURT: It's -- it's all been out by then.

MR. DENAULT: It gives too much free rein for the Defense to start throwing things at the jury that are going to ask the jury to make decisions that have already been made in our society. So I don't -- I don't believe that would be a way to go here.

THE COURT: All right.

Well, the Court's read the briefs and listened to arguments of Counsel, and, you know, defendants has done a very good job in presenting their position regarding these defenses. And, you know, I mean -- you know -- but I can't -- I guess I could say I kind of sympathize with their position. But it's -- I can't make my rulings based on -- on sympathy. And, you know, to me, the abortion clinics are, as indicated in the brief by the Prosecution, are heavily regulated by statute. And, if there's some

illegal activity going on there, by all means, that should be brought to the attention of the authorities. But I think for the defendants -- to me, it's too remote for them to say that they had to act right away when this is something that could have been brought to the attention of the authorities. And, granted, maybe there would have been an abortion that took place on that day had they not acted. But, obviously, the fact that they were arrested for trespassing apparently and probably did not prevent whatever was going to take place, take place anyways on that day. So, you know, I don't see where the defense of necessity is -- applies in this case.

And the defense of other person, again, the abortions are engaging in -- the clinics are -- whether you agree with it or not, I mean, perform abortions. If they're involved in lawful activity defense of others doesn't apply. And, again, if they were acting illegally, to me, there's a forum to be -- to be used to bring that to the attention of the authorities. But, for them to act on their own, I just think it is not allow them to raise that -- either one of those defenses. And, for that reason, also the expert witness testimony would not be helpful in this case. So I'm going to respectfully deny your motion, Counsel.

MR. MUISE: Thank you, Your Honor. And can I,

just for purposes of the record, just make a brief proffer?

THE COURT: Yeah, by all means.

MR. MUISE: As I stated previously, but just to put a fine point on it, the expert's testimony would be to assist the jury to understand the weighing of the social values, because necessity is a weighing of -- of, as they put it, a weighing of evils of sorts. There would be testimony, I proffer, from one of the -- one of the rescuers in this case, Dr. Monica Miller, that she observed a woman who was present in the waiting room, on the date in question, September 15, 2017, who, by all her accounts, or observations with her, or communications with her, that she was there for an abortion, that she was under duress at the time, that she was -- she was willing to get up and walk out with her at the moment. And then, when she was in the process of walking out with her, an employee from the Northland Family Planning Center came -- rushed out, grabbed her by the arm, and drug -- brought her back into the back room where she could no longer have any contact with her. And we believe that that, at a minimum, is an evidence of duress, of unlawful conduct, that she could have intervened with, and her actions were intended to intervene with and prevent. Also, there was another -- there was a gentleman in the waiting room who was very abusive and belligerent to one of the young ladies who was

there, one of the defendants, Abigail McIntyre. Again, that is some evidence that there was a likely and abusive relationship there and evidence of coercion. And we would proffer that as -- by way of evidence that we would be showing during the trial, Your Honor.

THE COURT: Okay; thank you.

Anything further on the subject, Mr. DeNault?

MR. DENAULT: No, thank you, Judge. We'll await the witness testimony and see where it goes.

THE COURT: Okay. Now there's also a media request for access from churchmilton.com. And I believe I can represent what both attorneys have told me, that they both agree that I should not grant their request. Is that correct?

MR. MUISE: Your Honor, my (indiscernible) practice in courts is that they should not be -- should not be videotaped. They're certainly available to the public, but not -- not videotaped.

MR. DENAULT: I agree, Your Honor. It's -- all the ways to try to tape everything these days and broadcast things out of context. We have a record being made by this Court and certainly everyone is welcome to be here and view it. So, with that, we also don't think it's appropriate.

THE COURT: People are welcome to sit in the courtroom and watch.

MR. DENAULT: Absolutely. Yep, absolutely.

MR. MUISE: And one of the -- one of the issues that often comes up, too, is -- because I know, I was involved in another case that they were allowed to tape, is potential privacy of witnesses, but certainly the jurors. And so you have to deal with the -- the way the projectors and the cameras are going to be trained, what they're going to pick up, what they're not going to pick up, and it just -- it creates a whole host of issues that -- that are unnecessary.

THE COURT: Okay. I agree with both Counsel and I'm going to deny their request.

All right, so we'll start promptly at 8:30 tomorrow.

MR. DENAULT: Well, I think we talked in chambers about starting about nine o'clock because people have to get in the building.

THE COURT: Yeah, well, I mean the lawyers should be here at 8:30, and the clients, and the witnesses.

MR. DENAULT: Absolutely.

THE COURT: Get everybody here on a timely basis; okay?

MR. MUISE: I'll get a helicopter to fly in from Ann Arbor so I can avoid 696, I guess. I'll be leaving at zero dark thirty tomorrow morning, Your Honor.

THE COURT: Yeah. There's potholes everywhere; they're everywhere.

MR. MUISE: Well, I don't mind driving through potholes, but, when they block it down to one lane, there's not much you can do.

MR. DENAULT: And, Judge, I think, ultimately tomorrow, with jurors who are in line to get through security, I don't think it's appropriate for any parties to mingle.

THE COURT: Now, Jim, is it possible to let the clients in early, before the court opens up?

COURT OFFICER ADAMO: Yes; I'd have to discuss that with Magistrate Piatek, but --

THE COURT: Like 8:15, if his clients got here, they'd let them in through the --

COURT OFFICER ADAMO: If you clients are here -- I'd have to discuss it with -- before you leave, let me talk to the Magistrate, and we'll find that out; okay?

MR. MUISE: We can rally --

THE COURT: Yeah, they don't want them mingling with the jurors if the jurors come in. I guess the jurors come in through that door, too?

COURT OFFICER ADAMO: It's the same door; yeah, everybody comes through the same door.

THE COURT: What time do the jurors come; 8:30?

COURT OFFICER ADAMO: They're told to be here at 8:30, and usually they're not let in prior to 8:30.

THE COURT: Yeah, it's open for everybody at 8:30.

MR. DENAULT: Well, Judge, we do have them in the building, I believe, because there are other cases happening. Could -- could somebody, perhaps yourself, counsel them to be here at 8:00 tomorrow and let them in early, or maybe have --

THE COURT: That's up -- that's to the Court Administrator. We'll check with --

COURT OFFICER ADAMO: We'll check.

THE COURT: We'll have to check with the Court Administrator, Mike Piatek. And he'll -- he's a reasonable person. He'll figure something out.

MR. MUISE: And perhaps a third option is I just have the clients meet me in the parking lot at 8:15. And can I just keep us together as a group and just walk right up front and get right through and not --

THE COURT: Sure. You're an officer of the court; fine, yeah.

MR. MUISE: And tell them, look, don't talk to anybody, just eyes straight ahead, let's march in. We'll get up front, we'll walk in, and come to the court- --

THE COURT: That's -- that's a better idea.

MR. MUISE: And that way we don't have to get too many other people involved.

THE COURT: Okay; very well.

MR. DENAULT: We'll clear that with security so they know it's coming tomorrow morning, yep. That's great; thank you.

THE COURT: All right.

(At 11:23 a.m., proceedings concluded.)

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STATE OF MICHIGAN )
)
COUNTY OF MACOMB )

I certify that this transcript, consisting of 21 pages, is a complete, true, and correct transcript, to the best of my ability, of the proceedings and testimony taken in this case by Donna Guitar, CEO-6998, Certified Electronic Operator. on Wednesday, February 14, 2018.

March 12, 2018

/s/ Sandra F. Sirovey
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# EXHIBIT B

# 6.6 Necessity (Legal Excuse)

**6.6 NECESSITY (LEGAL EXCUSE)**

The defendant contends that [he] [she] acted out of necessity. Necessity legally excuses the crime charged.

The defendant must prove necessity by a preponderance of the evidence. A preponderance of the evidence means that you must be persuaded that the things the defendant seeks to prove are more probably true than not true. This is a lesser burden of proof than the government's burden to prove beyond a reasonable doubt each element of [*specify crime charged*].

A defendant acts out of necessity only if at the time of the crime charged:

1. the defendant was faced with a choice of evils and chose the lesser evil;
2. the defendant acted to prevent imminent harm;
3. the defendant reasonably anticipated [his] [her] conduct would prevent such harm; [and]
4. there were no other legal alternatives to violating the law[.] [; and]

[5. the defendant surrendered to authorities as soon as it was safe to do so.]

If you find that each of these things has been proved by a preponderance of the evidence, you must find the defendant not guilty.

**Comment**

To be entitled to an instruction on necessity as a defense to the crime charged, an escapee must first offer evidence justifying his continued absence from custody. *See United States v. Bailey*, 444 U.S. 394, 413 (1980). The bracketed fifth element should be used in cases of escape only.

This defense traditionally covers situations "where physical forces beyond [an] actor's control rendered illegal conduct as the less of two evils." *United States v. Perdomo-Espana*, 522 F.3d 983, 987 (9th Cir.2008) (*quoting Bailey*, 444 U.S. at 409-10). The defense of necessity is usually invoked when the defendant acted in the interest of the general welfare. *United States v. Contento-Pachon*, 723 F.2d 691, 695 (9th Cir.1984). The defendant is not entitled to submit the defense of necessity to the jury unless the proffered evidence, construed most favorably to the defendant, establishes all the elements of the defense. *United States v. Cervantes-Flores*, 421 F.3d 825, 829 (9th Cir.2005); *see also United States v. Chao Fan Xu*, 706 F.3d 965, 988 (9th Cir. 2013) ("Fear of prosecution for crimes committed is not an appropriate reason to claim necessity."). The defendant's proffered necessity defense is analyzed through an objective framework. *Perdomo-Espana*, 522 F.3d at 987.

*Approved 4/2013*

**File:**
6.6_criminal-revised.wpd [1]

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# EXHIBIT C

7.21 Defense of Others

(1) The defendants claim that they acted lawfully to prevent serious harm to others. A person has the right to use force or even take a life to defend someone else under certain circumstances. If a person acts in lawful defense of another, his or her actions are justified and he or she is not guilty of the criminal offense.

(2) You should consider all the evidence and use the following rules to decide whether the defendants acted in lawful defense of another. Remember to judge the defendants' conduct according to how the circumstances appeared to them at the time of their acts.

(3) First, at the time they acted, the defendants must not have been engaged in the commission of a crime.

(4) Second, when they acted, the defendants must have honestly and reasonably believed that another was in danger of being killed or seriously injured. If their belief was honest and reasonable, they could act at once to prevent the harm, even if it turns out later that they were wrong about how much danger anyone was in.

(5) Third, if the defendants only feared a minor injury, then they were not justified. The defendants must have been afraid that someone would be killed or seriously injured. When you decide whether they were so afraid, you should consider all the circumstances: the conditions of the people involved, including their relative strength, whether anyone was armed with a dangerous weapon or had some other means of injuring another, the nature of the other person's attack or threat, and whether the defendants knew about any previous violent acts or threats made by the attacker.

(6) Fourth, at the time the defendants acted, they must have honestly and reasonably believed that what they did was immediately necessary. Under the law, a person may only use as much force as he or she thinks is needed at the time to protect the other person. When you decide whether the force used appeared to be necessary, you may consider whether the defendants knew about any other ways of preventing the harm, and you may also consider how the excitement of the moment affected the choice the defendants made.

(7) The defendants do not have to prove that they acted in defense of others. Instead, the prosecutor must prove beyond a reasonable doubt that the defendants did not act in defense of others.