STATE OF MICHIGAN
IN THE COURT OF APPEALS

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| CITY OF STERLING HEIGHTS,<br><br>Plaintiff/Appellee,<br><br>vs.<br><br>MATTHEW CONNOLLY, WILLIAM GOODMAN, ABYGAIL MCINTYRE, and MONICA MILLER,<br><br>Defendants/Appellants. | COA No. _____<br><br>Circuit No. 2018-000125-AR<br><br>District Court Nos. SH142151, SH142000, SH142034, SH142104 |

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**DEFENDANTS' APPLICATION FOR LEAVE TO APPEAL AND BRIEF IN SUPPORT**

## TABLE OF CONTENTS

## INDEX OF AUTHORITIES

**Cases**

**Constitutions**



**Rules/Statutes**

Appellants/Defendants Matthew Connolly, William Goodman, Abygail McIntyre, and Monica Miller seek leave to appeal from the Macomb County Circuit Court's Amended Opinion and Order affirming the ruling of the 41-A District Court's denial of Defendants' proposed defense instructions and thus affirming Defendants' convictions and sentences. (Amended Op & Order at Ex 1). Review and reversal by this Court is necessary to preserve and protect Defendants' fundamental right to due process.

## 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. The Circuit Court affirmed.

## RULINGS, ORDER, AND JUDGMENT APPEALED

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.[1]

On March 1, 2018, Defendants timely filed their Claim of Appeal, seeking review of the District Court's denial of the requested jury instructions.

On December 3, 2018, the Circuit Court issued an Amended Opinion and Order affirming the ruling of the District Court and Defendants' convictions and sentences. (Amended Op & Order at Ex 1). Defendants timely filed a motion for clarification and reconsideration (Defs' Mot at Ex 3), which the Circuit Court granted in part and denied in part on January 9, 2019, affirming its Amended Opinion and Order. (Op & Order Denying Defs' Mot at Ex 4).

This application for leave to appeal follows.

## 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. The Circuit Court had jurisdiction pursuant to MCR 7.103(A) and MCR 7.104(A). The Circuit Court entered

[1] Defendants' Registers of Actions are attached at Exhibit 2.

its Amended Opinion and Order on December 3, 2018, and it denied Defendants' motion for reconsideration on January 9, 2019. Defendants now seek review in this Court by way of this application, filed within 21 days of the entry of the Circuit Court's order denying Defendants' timely motion for reconsideration. *See* MCR 7.105(A)(2).

## 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

## 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 at Ex 5).[2]

[2] Relevant portions of the trial transcripts (Volumes I and II) are attached at Exhibits 5 (Vol I) and 9 (Vol II). The motion hearing transcript is attached to this brief as Exhibit 6. Defendants' proposed jury instruction on the defense of necessity is attached as Exhibit 7, and Defendants'

There is no dispute that abortions were scheduled that day. (Trial Tr Vol I at 144-45, 159-60 at Ex 5). In fact, on that day, there was a young woman present who was under duress and who was scheduled to have an abortion. (Mot Hr'g Tr at 14-16 at Ex 6). Defendants sought to intervene to protect this woman, but they were prevented from doing so. (Mot Hr'g Tr at 14-16 at Ex 6). 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 at Ex 5). 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 had information of a specific harm. (*See* Mot Hr'g Tr at 14-16 at Ex 6; *see also* Trial Tr Vol I at 183-85, 225-27 at Ex 5).

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 at Ex 5). 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 at Ex 5).

The police arrived and directed Defendants to depart the premises. (*See* Trial Tr Vol I at 75-94 at Ex 5). 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 at Ex 5). 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 at Ex 5).

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proposed jury instruction on the defense of others is attached as Exhibit 8.

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 at Ex 5). No one was charged with engaging in any act of violence or vandalism because no such acts occurred. Defendants acted peacefully. (*See* Trial Tr Vol I at 91-94, 106-08, 113, 122, 146, 152, 172-73 at Ex 5).

Prior to their trial, Defendants filed a motion requesting jury instructions on the defense of necessity and the defense of others. (Mot Hr'g Tr at 4-16 at Ex 6).

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.[3]

[3] As the evidence in this case demonstrates, because the entrance to Northland is behind the

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* Defs' Proposed Necessity Def Instruction at Ex 7).

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 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.

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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 at Ex 5). 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 at Ex 5). Consequently, *there were no other legal alternatives available* to Defendants to prevent the imminent harm they sought to prevent. *See also infra*.

> (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.

(Defs' Proposed Def of Others Instruction at Ex 8).

On February 14, 2018, the presiding judge denied the motion as a matter of law, thereby denying the requested instructions. (Mot Hr'g Tr at 13-14 at Ex 6).

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 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

[4] Defendants' counsel made the proffer because the judge would not permit the evidence at trial. (*See* Mot Hr'g Tr at 13 at Ex 6 ["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]).

> 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.

(Mot Hr'g Tr at 14-16 at Ex 6).

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 at Ex 9).

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 at Ex 5). 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 at Ex 5).

**CIRCUIT COURT AMENDED OPINION AND ORDER**

The Circuit Court rejected Defendants' request for an instruction on the defense of others based on *People v Kurr*, 253 Mich App 317, 654 NW2d 651 (2002), stating, "While coerced

abortions are illegal under Michigan law (see MCL 750.213a and discussion *infra),* the *Kurr* Court's explicit ruling that 'defense of others' cannot apply to actions against abortion clinics would seem to preclude this defense. Accordingly, this Court is not persuaded that the lower court erred in disallowing this defense." (Amended Op & Order at 4 at Ex 1).

Regarding Defendants' request for an instruction on the defense of necessity, the Circuit Court concluded as follows:

> The proffered evidence could *arguably* be construed as supporting the first three elements of the necessity defense. See *supra.* To wit, that appellants were faced with the choice of trespassing or allowing a violation of MCL 750.213a to occur; that they trespassed in order to prevent a violation of MCL 750.213a; and that they reasonably believed that their continued trespass would prevent a violation of MCL 750.213a.
>
> That said, it will be impossible for appellants to establish the fourth element of the necessity defense - that they had no other legal recourse apart from trespassing. To wit, there was uncontroverted testimony that the police arrived at the premises and appellants were provided with opportunities to leave before being arrested or charged with criminal trespass. See Trial Transcript Vol. I at 81 and 166. At any time prior to being arrested, they could have reported the alleged violation of MCL 750.213a to the police and vacated the premises, thereby avoided any criminal charges. Under these circumstances, the Court is satisfied that appellants necessarily must fail to establish the fourth element of the necessity defense. Consequently, the district court did not err in precluding them from presenting this defense.

(Amended Op & Order at 7 at Ex 1).

Defendants filed a motion for reconsideration, pointing out the following error in the Circuit Court's opinion:

> In its Opinion and Order, the Court ultimately rejected the proffered necessity defense based on a conclusion that Appellants failed to establish the fourth element of the defense—that they had no other legal recourse apart from trespassing. (Op & Order at 7). The Court stated further that "there was uncontroverted testimony that the police arrived at the premises and appellants were provided with opportunities to leave before being arrested or charged with criminal trespass. . . . At any time prior to being arrested, they could have reported the alleged violation of MCL 750.213a to the police and vacated the premises, thereby avoid[ing] any criminal charges." *Id*

With all due respect, the Court is mistaken. As Appellants set forth in their opening brief, "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)." (Appellants' Br at 8-9 [emphasis added]). Thus, the record demonstrates (and it certainly, *at a minimum*, permits the reasonable inference demonstrating) that Appellants reported the alleged violation to the police, but the police refused to take any steps to stop or even investigate the imminent harm, thereby necessitating that Appellants remain on the premises. In other words, contrary to the Court's Opinion and Order, Appellants have established the fourth element of the necessity defense.

As the Court noted in its Opinion and Order,

> Importantly, it is not for this Court to evaluate whether the defense in question is credible by a preponderance of this evidence. Rather, the Court is simply required to determine whether there is proffered evidence "*from which each element of such defense may be inferred* before the defense may be considered by a trier of fact." *Hubbard*, 115 Mich App at 77. The defense is only precluded where "the proffered evidence, *construed most favorably to the defendant*, would fail to establish all elements of that defense." *Cervantes-Flores*, 421 F3d 825.

(Op & Order at 6 [quoting *People v Hubbard*, 115 Mich App 73; 320 Nw2d 294 (1982) & *US v Cervantes-Flores*, 421 F3d 825 (2005)]).

In sum, the Court should reconsider its Opinion and Order and conclude by finding "that the decision of the district court precluding appellants from presenting a defense of 'necessity' is properly reversed." (Op & Order at 7).

(Defs' Mot at 3-5 at Ex 3).

As Defendants noted in their motion for reconsideration and per the testimony adduced at trial, there was evidence from which the fourth element of the defense may be inferred:

> Q And did her agitation, as you described, with you -- she conveyed to you that she thought you were arresting the wrong people, as they were merely there peaceful, whereas there were people there that were actually killing unborn babies?
> A That would be accurate.
> Q And it would be accurate to say that you, in fact, and none of the officers that -- that you were with, did anything to stop any killing of unborn babies that day at the Northland Center; is that right?
> MR. DENAULT: Objection, Your Honor; presumes killing is part of the vocabulary in this constitutional area.
> THE COURT: I'll overrule the objection; you can answer it, if you can?
> THE WITNESS: That would be correct, sir.

(Trial Tr Vol I at 121:21-25 to 122:1-11 at Ex 5).

> Q Officer, did you, or any of the other officers, conduct any investigation to determine whether, in fact, there was any criminal activity going on at the Northland Family Center by the Northland employees?
> MR. DENAULT: Your Honor, I'm just going to object because it's not related to my redirect.
> THE COURT: I'll allow it; overruled.
> THE WITNESS: I personally did not.

(Trial Tr Vol 1 at 128:8-15 at Ex 5).

On January 9, 2019, the Circuit Court denied Defendants' motion for reconsideration. (Op & Order at 2 at Ex 4).

## ARGUMENT

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

#### A. Standard of Review.

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

#### B. 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 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] *See Hubbard*, 115 Mich App at 77 (providing that the court is simply required to determine whether there is proffered evidence "from which each element of such defense *may be inferred* before the defense may be considered by a trier of fact") (emphasis added); *Cervantes-Flores*, 421 F3d at 828 (providing that a defense is only precluded where "the proffered evidence, *construed most favorably to the defendant*, would fail to establish all elements of that defense") (emphasis added).

As set forth below, the trial court's refusal to give the instructions was error as a matter of law, and this error violated Defendants' right to due process. A new trial with a properly instructed jury is warranted.

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

### C. 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 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:

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[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.

> 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." *Compare 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, including the forth element. *See supra*. 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.

### D. 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. 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 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 court's 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.

## II. The Pretrial Denial of the Requested Defenses Further Highlights the Due Process Violation in this Case.

The trial court's ruling to prohibit the defenses was issued *prior* to trial. Thus, Defendants were precluded from presenting evidence that would have supported their requested defenses. (*See* Mot Hr'g Tr at 13 at Ex 6 [rejecting Defendants' request to delay the court's ruling on the defense instructions until after the presentation of evidence and noting that this would be like "letting the horse out of the stable, so to speak"]). As a result, Defendants, through counsel, made a proffer for the record that they would present evidence demonstrating that unlawful activity was taking place at Northland.

Consequently, the Circuit Court's argument that Defendants would have failed to present evidence at trial in support of the fourth element[7] of the necessity defense (Amended Order & Op at 7 at Ex 1)—a defense which was *disallowed prior to trial*—is wrong, and it highlights the due

[7] (*See* Defs' Proposed Necessity Def Instruction at Ex 7 ["4. There were no other legal alternatives to violating the law."]).

process problem in this case. Indeed, Defendants argued during the motion hearing that the trial court should delay its ruling on the proffered defenses until *after* they have presented the *entirety* of their evidence at trial to avoid, in part, this very problem. In their written motion and during the hearing (Mot Hr'g Tr at 6 at Ex 6), Defendants cited a Massachusetts Court of Appeals decision in which the court stated:

> In the usual case, therefore, it is far more prudent for the judge to follow the traditional, and constitutionally sounder, course of waiting until all the evidence has been introduced at trial before ruling on its sufficiency to raise a proffered defense. If, at that time, the defendant has failed to produce some evidence on each element of the defense, the judge should decline to instruct on it.

*Commonwealth v O'Malley*, 14 Mass App Ct 314, 325, 439 NE2d 832, 838 (1982). Counsel for the City objected to the request, and, as noted above, the trial court agreed. As a result, Defendants' counsel made the evidentiary proffer—a proffer that included evidence of a coerced abortion (it is certainly evidence that would permit a reasonable juror to infer this fact), which is *illegal* in Michigan. The supporting evidence at trial would have come from the testimony of Defendants, who were in the abortion center and who could testify as to their observations, and from the testimony of the officers through cross-examination. Defendants have vast experience dealing with victims of coerced abortion, so their observations would be particularly relevant in this context. And Defendants and the officers could have testified more fully as to the fact that the officers rejected Defendants' pleas for assistance. That is, the evidence adduced at trial could have shown that Defendants had "no other legal alternatives to violating the law." The prosecutor would have had the opportunity to cross-examine Defendants and to present testimony of his own as to each element of the proffered defenses. The point here is that the jury should be the one to decide whether Defendants' actions were justified in light of the evidence presented and the requirements of the proposed defenses. The jury never had that opportunity.

In the final analysis, the necessity defense is available to stop illegal behavior, such as a coerced abortion, as the Circuit Court properly concluded. (*See* Amended Op & Order at 4-7 at Ex 1 [stating, in relevant part, that "[t]he proffered evidence could *arguably* be construed as supporting the first three elements of the necessity defense"]). However, the Circuit Court erred by concluding that the defense was not available in this case due to a failure to satisfy the fourth element. And this error is compounded by the fact that the defense was rejected prior to trial and the presentation of a complete record.

## CONCLUSION

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

Dated: January 29, 2019.

Respectfully submitted,

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