

STATE OF MICHIGAN
IN THE 61ST JUDICIAL DISTRICT COURT

CITY OF GRAND RAPIDS,

v.

MONICA MARIE MILLER; ROBERT
THOMAS KOVALY; HEATHER RUTH
IDONI; ANNELORE B. NORTON; and
CAROLINE RENEE DAVIS

Case Nos. 2020-OM-0000672
2020-OM-0000673
2020-OM-0000674
2020-OM-0000675
2020-OM-0000676

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PROOF OF SERVICE

The undersigned certifies that the foregoing document was served upon all parties to the above cause and/or to each of the attorneys of record herein by email on June 29, 2021.



Robert J. Muise, Esq.
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**DEFENDANTS' NOTICE OF MOTION AND MOTION FOR JURY INSTRUCTIONS
ON THE DEFENSE OF OTHERS & THE DEFENSE OF NECESSITY**

To All Counsel of Record:

Please take notice that on July 14, 2021 at 10:00 a.m. before this Honorable Court, Defendants Dr. Monica Marie Miller, Robert Thomas Kovaly, Heather Ruth Idoni, Annelore B. Norton, and Caroline Renee Davis (“Defendants”), will, and hereby do, move this Court to provide jury instructions on the defense of others and the defense of necessity.

1. Defendants are alleged to have committed the criminal offense of trespass under the City of Grand Rapids Code of Ordinances.

2. Defendants honestly and reasonably believe that abortion is a violent act that results in the death of an innocent human life and that causes substantial harm to the mother.

3. Defendants intend to show at trial that their peaceful actions were justified and, in our system of justice, it is the role of a properly instructed jury to determine Defendants’ criminal liability in light of all of the facts and circumstances.

4. As set forth more fully in the accompanying brief, the defense of others and the defense of necessity have long been recognized under the common law, and they are particularly applicable in the context of this case in light of Michigan law, Michigan’s strong public policy favoring the protection of the unborn, and Defendants’ honest and reasonable belief that abortion is a violent act that results in the death of an innocent human life and substantial harm to others, including substantial harm to mothers.

WHEREFORE, Defendants request that the Court provide the requested jury instructions.

AMERICAN FREEDOM LAW CENTER



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Attorney for Defendants Miller, Kovaly, Idoni, and Norton

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A handwritten signature in cursive script that reads "Erin Mersino". The signature is written in black ink and is positioned above a horizontal line.

Erin Mersino (P70886)

Attorney for Defendant Davis

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Robert J. Muise, Esq.
*Attorney for Defendants Miller, Kovaly,
Idoni, and Norton*

**DEFENDANTS' BRIEF IN SUPPORT OF MOTION FOR JURY INSTRUCTIONS
ON THE DEFENSE OF OTHERS AND THE DEFENSE OF NECESSITY**

INTRODUCTION

This motion does not require the Court to make any pronouncements, rulings, or judgments regarding the viability of *Roe v Wade*, 410 US 113 (1973). Whether *Roe v Wade* was properly decided is a federal question for the U.S. Supreme Court to resolve. The issues presented for purposes of this motion are state law issues, and they are issues which a properly instructed jury should resolve. These issues can be framed broadly as (1) whether Defendants honestly and reasonably believed that human life was in grave and imminent danger on May 13, 2020, and if yes, then (2) whether Defendants' actions made in defense of life were reasonable under the circumstances. As argued further below, Defendants are entitled to a properly instructed jury—a jury that should be permitted to consider the defense of others and the defense of necessity when judging the criminality of Defendants' peaceful actions under the circumstances of this case.

FACTUAL BACKGROUND

On May 13, 2020, Defendants, along with a number of other pro-life advocates, were present at the Heritage Clinic for Women (“Heritage”) in the City of Grand Rapids, Michigan for the purpose of defending life. Heritage is an abortion center that terminates human life by abortion. Heritage *publicly* advertises that it aborts fetuses up to 22 weeks gestation. (See <https://www.heritageclinic.com/> [last visited June 14, 2021]).

All of the actions of the pro-life advocates on May 13, 2020, including Defendants' actions, were non-violent. No pro-lifer was charged with committing any act of violence. All of the pro-life advocates, including Defendants, were peaceful. No pro-lifer was charged with disturbing the peace.

Defendants were at Heritage on May 13, 2020—a killing day for the abortion center—because they honestly and reasonably believed that their peaceful actions at the center were

necessary to protect mothers and their unborn babies from the imminent harm caused by the violence of abortion. To that end, Defendants counseled expectant mothers and their family members and distributed literature and red roses to the mothers to further their objective of protecting innocent life. Defendants' objective was to peacefully and persuasively convince the mothers and their family members to choose life. Given the physical layout of the abortion center, it was necessary, at times, for some Defendants to engage in their pro-life advocacy from the driveway and parking lot of the abortion center in order to reach the mothers with their pro-life message and to encourage the mothers to protect the life within them. At no time did any Defendant physically obstruct access to the abortion center. And at no time did any Defendant use violence toward anyone. At all times Defendants were peaceful.

Defendants believe as a matter of science that human life begins at fertilization and that abortion prematurely and violently ends human life. Defendants believe as a matter of direct, personal observations and other irrefutable data and information that abortion is a violent act that not only destroys the innocent human life of the unborn but that also causes substantial harm to the mother. Defendants are Christians. They also believe as a matter of universal, consistent moral norms that abortion is intrinsically evil.

Defendants have been involved in the pro-life movement for many years. Defendant Monica Miller, for example, has been actively involved in the movement for over four decades. She has been involved in nearly every aspect: political, educational, offering material help and counseling for women in difficult pregnancy situations, and pro-life activism, which has included investigating illegal and unethical activities of abortion providers, resulting in the shutting of abortion centers in Michigan.

In 1985, Defendant Miller founded Citizens for a Pro-Life Society while a graduate student at Loyola University in Chicago. She became involved in the pro-life rescue movement in 1976, and she exercised activist leadership on both the local and national level, organizing literally hundreds of pro-life demonstrations, pickets, rallies, seminars, and pro-life training. In 2017, Defendant Miller helped found the new pro-life rescue effort known as the Red Rose Rescue, and she is a Red Rose Rescue leader as well as a participant. In fact, all Defendants were engaged in a Red Rose Rescue at Heritage on May 13, 2020.

Defendant Miller is one of very few people who has actually retrieved the remains of aborted babies from trash containers and planned their burials—the most recent burial taking place on November 24, 2018. She has written dozens of published articles on the subject of abortion and three books: *Social Liberation and the Pro-Life Cause*; *Abandoned—The Untold Story of the Abortion Wars*; and *I Was a Stranger, Meditations on Abortion-Victim Photography*—the latter two books were published.

Defendant Miller has a Ph. D. in theology from Marquette University. She taught Theology at the university-level from 1986 to 2019, most recently at Madonna University in Livonia where she held the position of Associate Professor. Defendant Miller currently teaches at Fr. Gabriel Richard High School in Ann Arbor, and she has been hired to teach Catholic Moral Theology as a part-time professor at Sacred Heart Major Seminary in Detroit. Defendant Miller has written dozens of published articles in the area of theology, and she has three books published on theological subjects.

Defendants' actions on May 13, 2020, were motivated by biological facts and science; they were motivated by their personal experiences and observations regarding the harm caused by abortion; they were motivated by their sincerely held philosophical and religious beliefs; and they

were motivated by Michigan’s strong public policy recognizing the humanity—the “personhood”—of the unborn.

Defendants firmly believe that the unborn are human beings who have a God-given right to be welcomed, respected, and defended. This belief is based on Scripture and the teachings of the Catholic Church, and it is affirmed by Michigan law and public policy, as argued below. Genesis 1:26-27, for example, states that “God made man in his image, in the divine image he created him—male and female he created them.” The humanity of the unborn is consistently affirmed by Scripture as is evident in Psalm 139:

Truly you formed my inmost being; You knit me in my mother’s womb.
I give you thanks that I am fearfully, wonderfully made; wonderful are your works.
My soul you also knew full well; nor was my frame unknown to you when I was made in secret, when I was fashioned in the depths of the earth.

The above passage indicates that the body and soul of the unborn are both fashioned by God and are both present in the one person God creates “in the depths of the earth” (the womb) before birth—indicating the humanity of the unborn child. Protestant author Randy Alcorn writes:

The Bible gives theological certainty to this biological evidence. Job graphically described the way God created him before he was born (Job 10:8-12). The person in the womb was not *something* that might become Job, but *someone* who was Job, simply a younger smaller version of the same man. To Isaiah God said, “This is what the LORD says: he who made you, who formed you in the womb” (Isaiah 44:2). Isaiah was not just a “potential person” but an actual person while in his mother’s womb.

Scripture consistently refers to the unborn as “babies”—a term that expresses the innate human status of those in the womb in relation to the social family. Many other biblical references prove that the Judeo/Christian religion to which Defendants subscribe show that the unborn are human persons. For example, per Alcorn:

Scripture says Mary “was found to be with child through the Holy Spirit.” The angel told Joseph, “what is conceived in her is from the Holy Spirit” (Matthew

1:18-20). To be pregnant, even at the very earliest moments after conception, is to be *with child*, not simply with what might become a child.

The Christian religion from the very start condemned abortion as can be seen in the mid-first century document the *Didache* (“The Teaching of the Twelve Apostles”). The first part of chapter 2 teaches, contrary to what the pagans practiced: “Do not murder a child by abortion or kill a new-born infant.” The term “murder” in the original Greek could not be applied to the killing of the unborn in abortion unless the unborn was fully human, and abortion was to unjustly deprive such persons of their right to life.

Defendants’ firmly held and reasonable beliefs rest on the foundation of the Early Church Fathers such as Tertullian, Jerome, and Augustine, who consistently taught that abortion was an act of homicide. Indeed, the modern articulation of Catholic doctrine on the right to life is clear and unequivocal. For example, the 1974 *Vatican Declaration on Procured Abortion* teaches:

11. The first right of the human person is his life. He has other goods and some are more precious, but this one is fundamental—the condition of all the others. Hence it must be protected above all others. It does not belong to society, nor does it belong to public authority in any form to recognize this right for some and not for others: all discrimination is evil, whether it be founded on race, sex, color or religion. It is not recognition by another that constitutes this right. This right is antecedent to its recognition; it demands recognition and it is strictly unjust to refuse it.

12. Any discrimination based on the various stages of life is no more justified than any other discrimination. The right to life remains complete in an old person, even one greatly weakened; it is not lost by one who is incurably sick. The right to life is no less to be respected in the small infant just born than in the mature person. In reality, respect for human life is called for from the time that the process of generation begins. From the time that the ovum is fertilized, a life is begun which is neither that of the father nor of the mother, it is rather the life of a new human being with his own growth. It would never be made human if it were not human already.

21. The role of law is not to record what is done, but to help in promoting improvement. It is at all times the task of the State to preserve each person’s rights and to protect the weakest. In order to do so the State will have to right many wrongs. The law is not obliged to sanction everything, but it cannot act contrary to

a law which is deeper and more majestic than any human law: the natural law engraved in men's hearts by the Creator as a norm which reason clarifies and strives to formulate properly, and which one must always struggle to understand better, but which it is always wrong to contradict. Human law can abstain from punishment, but it cannot declare to be right what would be opposed to the natural law, for this opposition suffices to give the assurance that a law is not a law at all.

22. It must in any case be clearly understood that whatever may be laid down by civil law in this matter, man can never obey a law which is in itself immoral, and such is the case of a law which would admit in principle the liceity of abortion. Nor can he take part in a propaganda campaign in favor of such a law, or vote for it. Moreover, he may not collaborate in its application. It is, for instance, inadmissible that doctors or nurses should find themselves obliged to cooperate closely in abortions and have to choose between the law of God and their professional situation.

24. Following one's conscience in obedience to the law of God is not always the easy way. One must not fail to recognize the weight of the sacrifices and the burdens which it can impose. Heroism is sometimes called for in order to remain faithful to the requirements of the divine law. Therefore, we must emphasize that the path of true progress of the human person passes through this constant fidelity to a conscience maintained in uprightness and truth; and we must exhort all those who are able to do so to lighten the burdens still crushing so many men and women, families and children, who are placed in situations to which, in human terms, there is no solution.

In 1995, Pope John Paul II (now Saint John Paul II) issued his encyclical *Evangelium Vitae* (*The Gospel of Life*), which proclaimed Catholic doctrine regarding the sanctity of life and the obligations of the Christian conscience. Article 71 states:

Certainly the purpose of civil law is different and more limited in scope than that of the moral law. But "in no sphere of life can the civil law take the place of conscience or dictate norms concerning things which are outside its competence," which is that of ensuring the common good of people through the recognition and defence (sic) of their fundamental rights, and the promotion of peace and of public morality. The real purpose of civil law is to guarantee an ordered social coexistence in true justice, so that all may "lead a quiet and peaceable life, godly and respectful in every way" (1 Tim 2:2). Precisely for this reason, civil law must ensure that all members of society enjoy respect for certain fundamental rights which innately belong to the person, rights which every positive law must recognize and guarantee. First and fundamental among these is the inviolable right to life of every innocent human being. While public authority can sometimes choose not to put a stop to something which—were it prohibited—would cause more serious harm, it can never presume to legitimize as a right of individuals—even if they are the majority

of the members of society—an offence against other persons caused by the disregard of so fundamental a right as the right to life. The legal toleration of abortion or of euthanasia can in no way claim to be based on respect for the conscience of others, precisely because society has the right and the duty to protect itself against the abuses which can occur in the name of conscience and under the pretext of freedom.

Article 74 teaches:

In order to shed light on this difficult question, it is necessary to recall the general principles concerning cooperation in evil actions. Christians, like all people of good will, are called upon under grave obligation of conscience not to cooperate formally in practices which, even if permitted by civil legislation, are contrary to God's law. Indeed, from the moral standpoint, it is never licit to cooperate formally in evil. Such cooperation occurs when an action, either by its very nature or by the form it takes in a concrete situation, can be defined as a direct participation in an act against innocent human life or a sharing in the immoral intention of the person committing it. This cooperation can never be justified either by invoking respect for the freedom of others or by appealing to the fact that civil law permits it or requires it. Each individual in fact has moral responsibility for the acts which he personally performs; no one can be exempted from this responsibility, and on the basis of it everyone will be judged by God himself (cf. Rom 2:6; 14:12).

Article 77 goes on to say: "It is therefore a service of love which we are all committed to ensure to our neighbor, that his or her life may be always defended and promoted, especially when it is weak or threatened. It is not only a personal but a social concern which we must all foster: a concern to make unconditional respect for human life the foundation of a renewed society."

Defendants, who were participating in a Red Rose Rescue on May 13, 2020, put into practice Christian spiritual principles, including the Golden Rule: "Do unto others as you would have them do unto you" (Mt. 7:12) and "Whatever you do to the least of my brethren, that you do unto me"—namely to Jesus himself (Mt. 25: 35-47). Defendants' primary purpose for being at the abortion center was to talk to the mothers scheduled for abortions and to convince them to choose life over the violence of abortion. Defendants sought to offer the mothers words of encouragement to choose life for their unborn children in the last desperate moments before the abortion procedures begin and to provide practical help to continue with the pregnancy, including

emotional, financial, material, and spiritual assistance. Defendants’ vast experience with pro-life work over many decades shows that their efforts at abortion centers like Heritage are efficacious. They have been involved in countless rescues of unborn babies, and they have saved countless women from the short- and long-term harm caused by abortion. Defendants honestly and reasonably believed that they would have the same results on May 13, 2020, at Heritage.

Through their peaceful actions, Defendants were performing an act of defense of others—a *morally positive action* on behalf of persons (mother and unborn child) whose lives were *imminently* in danger. It was action arising from necessity, particularly since the police officers at the scene would not respond to Defendants’ requests for assistance but instead protected the abortion center and its killing practices.¹

ARGUMENT

I. Unlike the U.S. Constitution, Michigan Law and Public Policy Expressly Recognize the Humanity and Life of the Unborn.

When deciding *Roe v Wade*, the Supreme Court infamously stated:

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.

Roe v Wade, 410 US at 159. Consistent with this philosophical pronouncement by the high court (and make no mistake, this *is* a statement of philosophy, which is grounded in secular positivism), a majority of the justices concluded that the U.S. Constitution “does not define ‘person,’” leading the Court to ultimately conclude that “the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.” *Id* at 158. This ruling is similar to how the Court had previously

¹ Defendant Miller is prepared to testify at trial to the facts, including the moral and theological discussion, set forth throughout this motion.

concluded in the infamous *Dred Scott* decision (*Dred Scott v Sandford*, 60 US 393 (1857)) that people of color were not legal “persons” as a matter of federal constitutional law.²

Unlike a vast majority of states, Michigan is unique in that, as a matter of constitutional interpretation, its law proscribing abortion is still valid following *Roe v Wade*. See *People v Bricker*, 389 Mich 524 (1973) (refusing to invalidate state criminal law proscribing abortion and construing the law consistent with the federal constitution while maintaining loyalty to the public policy of the state); see also *id* at 529 (noting that “[i]t is the public policy of the state to proscribe abortion”). In short, Michigan has a strong public policy that recognizes the humanity of the unborn and thus provides protection for this human life as a matter of *state law*.

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 clearly reached the conduct involved. As a result, the dismissal of the charge was reversed. See *id* at 449-50. In other words, *Roe v Wade* did not prevent the court from applying the principles of Michigan law and Michigan’s strong public policy of providing protection for the unborn to a case involving abortion.

Indeed, Michigan law prohibits, with a narrow exception for medical emergencies, any physician from performing an abortion without “*informed* written consent, given freely and

² If a man of color was in grave and imminent danger resulting in another man trespassing upon the property of a landowner to save the man from the harm, there is nothing in the *Dred Scott* decision that would preclude the rescuer *as a matter of state law* from asserting the defense of others or the defense of necessity in the rescuer’s criminal trial for trespassing. A similar principle applies here.

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. See MCL § 750.213a (proscribing coerced abortions and 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”) (emphasis added). Moreover, in 1998, Michigan passed the Fetal Protection Act (MCL §§ 750.90a *et seq*). Pursuant to this Act:

If a person intentionally commits [a criminal assault] against a pregnant individual, the person is guilty of *a felony punishable by imprisonment for life* or any term of years if all of the following apply:

- (a) The person intended to cause a miscarriage or stillbirth by that individual or *death or great bodily harm to the embryo or fetus*, or acted in wanton or willful disregard of the likelihood that the natural tendency of the person’s conduct is to cause a miscarriage or stillbirth or death or great bodily harm to the embryo or fetus.
- (b) The person’s conduct resulted in a miscarriage or stillbirth by that individual or *death to the embryo or fetus*.

MCL § 750.90a (emphasis added); see *People v Kurr*, 253 Mich App 317, 322 (2002) (“The plain language of [MCL § 750.90a] shows the Legislature’s conclusion that fetuses are worthy of protection as *living entities* as a matter of public policy.”) (emphasis added); see also MCL § 750.323 (“Any person who shall administer to any woman pregnant with a quick child any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, shall, in case the death of such child or of such mother be thereby produced, be guilty of *manslaughter*.”) (emphasis added).

In *People v Kurr*, 253 Mich App 317 (2002), the defendant killed her boyfriend with a knife and was convicted by a jury of voluntary manslaughter. The trial court sentenced her as a

fourth-offense habitual offender to five to twenty years imprisonment. The defendant appealed her conviction, arguing that she should have been allowed a jury instruction regarding the defense of others because the jurors could have concluded that she killed her boyfriend while defending her unborn children.³ The appellate court agreed that a defense of others jury instruction was appropriate and reversed the conviction, remanding the case for a new trial. *Id* at 318-19.

Thus, in a case involving a defendant on trial for *homicide*—that is, the defendant used *lethal* force to protect an unborn life—the court held that “the defense [of others] extend[s] to the protection of a fetus, viable or nonviable, from an assault against the mother.” *Id* at 321. The court “base[d] this conclusion primarily on the fetal protection act adopted by the Legislature in 1998.” *Id*. In sum, the defense of the “other” could not be applied here unless the “other” was fully human and had an independent right to life worthy of protection, thereby permitting the use of *deadly force* to protect that life.

The evidence at trial in this case will show that abortion causes grave harm in that its very purpose is to end the life of a human being. Defendants have many decades of experience in the pro-life movement. They have witnessed firsthand the harm caused by abortion to not only the unborn babies but to their mothers. Defendants have witnessed the coercion that is inherent in almost every abortion, including those performed at Heritage. Too often, it is a family member, husband, or boyfriend who insists on the abortion, coercing the mother into having it. The mother’s *natural* instinct is to *protect* the life within her. They have witnessed the lack of informed consent that occurs at abortion centers, including Heritage. Defendants have spent time and treasure to help prevent the harm of abortion and to care for those who have been harmed by this

³ The defendant was apparently carrying quadruplets at the time of the stabbing. *Kurr*, 253 Mich. App. at 318 n1.

violent act, specifically including the mothers. As noted, Defendant Miller has even recovered the remains of aborted babies from dumpsters in order to provide the deceased child with a decent burial.

In sum, it is indisputable that Michigan law, unlike federal constitutional law, recognizes and protects the humanity of the unborn—the individual and unique “person” who is alive within a mother’s womb. Accordingly, as a matter of Michigan law and public policy, Defendants are entitled to the requested instructions in that their actions were honestly and reasonably done for the express purpose of protecting innocent human life from an imminent and violent death.

II. Michigan Law Recognizes the Defenses of Others and the Defense of Necessity.

As noted, in *People v Kurr*, 253 Mich App 317 (2002), the court recognized the defense of others in the context of a defendant taking the life of another to defend her unborn children from violence. *See also id* at 324 (“Our Legislature, as noted earlier, has expressed its intent that fetuses and embryos be provided strong protection under the law from assaults against pregnant women, and we believe that our decision today effectuates that intent.”). Because this defense is available for a homicide, it should be available for a simple trespass. An unborn child cannot consent to the abortion, which is an assault against his or her life—a life that Michigan law recognizes and protects. Moreover, as noted above, it is Defendants honest and reasonable belief that the women going to the abortion center on May 13, 2020, were doing so under duress and coercion. Michigan law proscribes all abortions under these circumstances. *See, e.g.*, MCL § 333.17015; MCL § 750.213a; MCL §§ 750.90a. Accordingly, Defendants are entitled to an instruction on the proposed defense of others.

Michigan courts also recognize the availability of the necessity defense in cases involving trespass. As stated by the court in *People v Hubbard*, 115 Mich App 73, 77 (1982):

We are of the opinion that, in 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.

The court ultimately rejected the defense in the context of the defendants' protest on the property of a nuclear power plant, stating, in relevant part, that "[i]n 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 (stating that "defendants have acknowledged that the purpose of their trespass was to inform the company and others of their perceived danger attendant to nuclear power") (emphasis added). Consequently, unlike the futile attempt to halt the production of nuclear power at a power plant by simply trespassing on the property, 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 at the abortion center on the day in question. Unlike halting the operation of a nuclear power plant, Defendants' presence at the abortion center placed them in a position to provide *direct assistance* to those who are in imminent harm and to actually avert that harm. Defendants have a long history of protecting women and their unborn babies at abortion facilities. They know firsthand that their presence and the assistance they offer can and do keep women from making the permanent and life-ending abortion decision. Certainly, Defendants' acts "support an inference" that they would alleviate the impending harm. Consequently, Defendants are entitled to an instruction on the defense of necessity.

III. Proposed Jury Instruction.

A. Defense of Others.

Michigan has a model jury instruction for the defense of others. See CJI2d 7.21; see also

7.22. A slightly revised version of this instruction that Defendants would propose for this case would read as follows:

7.21 Defense of Others

(1) The defendants claim that they acted to prevent serious harm to others. A person has a right to trespass on the property of another to defend someone else under certain circumstances. In fact, the law recognizes that 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, including trespass.

*(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 defendants' actions*

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.

As noted above, Defendants will present evidence that when they acted, they “*honestly and reasonably believed that another was in danger of being killed or seriously injured.*” Michigan law and public policy recognize that an unborn child is “another” worthy of defense, as is the unborn child’s mother. *See Kurr*, 253 Mich App at 317. Defendants are entitled to the requested instruction.

B. Necessity.

Additionally, in light of the foregoing, Defendants request that, at the close of evidence, the Court provide the jury with the following necessity instruction, which is patterned after the defense of necessity instruction recommended by the U.S. Court of Appeals for the Ninth Circuit, a copy of which is attached as Exhibit A:

In some situations, necessity may excuse a person’s committing what would otherwise be a criminal offense, including the offense of trespass. 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 the trespass charge.

A defendant acts out of necessity 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.*

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

IV. Conclusion.

In a case in which a Massachusetts appellate court reversed a conviction and held that the defendant was entitled to a new trial in that his evidence was sufficient to create a reasonable doubt whether the escape was justified by *necessity*, 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). Similarly here, at a minimum, the Court should take the prudent course of waiting until all the evidence has been adduced at trial before ruling on the sufficiency of Defendants' proffered defenses.

In the final analysis, Defendants are entitled to the requested instructions as a matter of state law. In our system of justice, it is the role of a properly instructed jury to consider the facts and circumstances of this case and whether Defendants' actions were justified and thus not criminal. Justice compels the Court to grant Defendants' motion and to provide the jury with the requested instructions at the close of evidence.

Respectfully submitted,

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EXHIBIT A

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

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