

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF GEORGIA  
COLUMBUS DIVISION**

**United States Of America**

**v.**

**Val Fillenwarth**

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**No: 4:06-po-00038-GMF**

**MOTION AND MEMO FOR RULING ON ADMISSIBILITY OF EVIDENCE RE  
NECESSITY**

**Motion**

For the reasons set out in the accompanying memorandum, undersigned counsel requests that this Court authorize the presentation of evidence in support of the defense of necessity as part of the defense in this matter.

January 13, 2007

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## **Memorandum in Support of Motion re Admissibility Of Evidence Re Necessity**

*“The arc of history is long, but it bends towards justice.”*

Martin Luther King, Jr.

Defendants in this matter are charged with violating federal criminal law against unlawful trespass on a military installation. This memorandum is submitted to explain why the defendants had a legal right to take the action they did and to allow evidence about the reasons why they took their actions to come before the Court. The legal doctrine of necessity allows conduct that is otherwise criminal to be justified and legal if it is taken to prevent a larger crime. If a woman breaks into a house, she might be charged with breaking and entering. However, a woman who breaks into a house on fire to rescue a child is not guilty of breaking and entering because she acted for the purpose of fulfilling the higher justice responsibility of trying to help another live. The people before this Court are charged with the technical violation of trespassing onto federal property – but their actions are much more like those of the woman who broke into a house on fire to save a child. The people before this Court ask that this Court allow them to put on evidence to back up their claims that their actions were taken in order to prevent a much greater harm, and are therefore just.

The individuals charged in these matters did not engage in criminal action but rather actions of justice. Their acts of conscience undertaken to protest the continuation of SOA/WHINSEC are protected under the law of necessity. Undersigned counsel submits this memorandum in support of the request for a ruling on the presentation of evidence for the defense of necessity.

### **Section 1: Scope of This Motion**

In this motion, defendants specifically move to be allowed to put on evidence relevant to the defense of necessity. This evidence may include expert testimony, expert lay testimony, documentary evidence, books, videos and other information about the actions of the School of Americas/WHINSEC consistent with the Federal Rules of Evidence, some of the specifics of which are outlined below. This Court is not now

being asked to make an advance ruling on each of the specific items of evidence which may be offered, but to rule that evidence relevant to the defense of necessity be allowed to be offered, subject to normal evidentiary rulings.

Further, though defendants are filing an accompanying motion requesting a jury trial, undersigned counsel wants to make clear that defendants seek to put on evidence on these issues whether or not there is a jury in this matter. The basic constitutional right to put on a full defense obviously applies with equal force whether the trial is before a judge or a jury. *Armstrong v Manzo*, 380 US 545, 552 (1965). Arguably, there would even be a lower threshold standard for the introduction of this evidence if the trial is to the Court alone because the potential for the evidence to be prejudicial to the Court would be less than to a jury.

## Section 2: Necessity Defense

*“The necessity defense evolved in recognition of the fact that ‘justice’ and ‘law enforcement’ are not always coterminus.”*

Laura Schulkind, *“Applying the Necessity Defense to Civil Disobedience Cases*, 64 New York University Law Review 79, 83 (1989).

*“The essence of the [necessity] defense is that otherwise criminal conduct may be excused when the defendant commits the acts in order to avoid a greater evil.”*

*U.S. v. Duclos*, 214 F.3d 27 at 33, ( 1<sup>st</sup> Cir., 2000).

As another federal district court trying a civil disobedience case observed in April of 2004:

*“The US Supreme Court has left open whether a justification defense (sometimes referred to as a necessity defense) should be allowed where not specifically recognized by statute. US v Oakland Cannabis Buyer’s Project*, 532 US 483, 490-491.”<sup>1</sup>

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<sup>1</sup> US v Greenpeace, USDC, Southern District of Florida, Miami Division, Case 03-20577. See decision at [http://www.greenpeaceusa.org/pdfs/order\\_pendingmotions.pdf](http://www.greenpeaceusa.org/pdfs/order_pendingmotions.pdf)

The necessity defense is a common law affirmative defense that is “anciently woven into the fabric of our culture.” J. Hall, *General Principles of Criminal Law*, 416 (2d ed. 1960).

*“This defense, like other justification defenses, allows a defendant to evade responsibility for otherwise criminal actions notwithstanding proof of the elements of the offense.”*

*U.S. v. Duclos*, 214 F.3d 27, 33 C.A.1 (N.H.),2000.

Defendants have the right to present evidence to support the defense of necessity. *United States v. Hill*, 893 F.Supp 1044 (N.D. Fla 1994).

The Sixth Amendment guarantees defendants the right to present their defense. The only way that evidence of the defense of necessity can be excluded is if this Court decides that there is absolutely no foundation for it at all. Because criminal defendants are entitled to present any legal defense which has "any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility." *United States v. Opdahl*, 930 F.2d 1530, 1535 (11th Cir.1991).

This Court decided in a previous SOA-WHINSEC civil disobedience case that the necessity defense did not apply. (*US v Booker-Hirsch et al*, 4:02- M -225). The Court reviewed the *US v Kabat*, 797 F2d 580 (8<sup>th</sup> Cir. 1986) and *Montgomery, supra*, and ruled that evidence of necessity was not allowed.

*“In the case at bar, defendants had the option to continue with their protest without crossing into Ft. Benning, or continuing to petition the legislature or executive branches of government. The current conditions at Ft. Benning indicate that the latter efforts have met with some success. The School of the Americas has been closed and succeeded by the Western Hemisphere Institute of Security Cooperation under the direction of a different department of government and with stated new objectives. Therefore, any evidence presented regarding a necessity defense is unjustified.”*

It is worth noting a fundamental factual difference between *Montgomery* and the case at bar. *Montgomery*, and the line of cases that it represents, are nuclear weapons protest cases. As is explained in the section below, *Montgomery*, and the other courts facing similar protests, have made a big point that necessity is not at issue because the

proof of harm from the weapons is speculative because the weapons are not presently being used. While undersigned counsel does not agree that nuclear weapons are not harmful until they are used, and since they have already been used, the fact that the courts have found their harm to be speculative makes the legal posture of those cases different from these. Certainly the harm from SOA-WHINSEC is not speculative since thousands of people have already been directly harmed by the graduates of the SOA.

Further, defendants are filing a separate Trial Memorandum on the issue of the Relevance of the Linkage between the School of the Americas and the Western Hemisphere Institute of Security Cooperation. As that memo points out, the creation of WHINSEC does not resolve, address, or exculpate the fundamental injustices and human rights abuses of graduates of the SOA.

The courts have made several slightly different formulations of the necessity defense. This memorandum will address the fundamentals common to all. The Supreme Court has not endorsed any of these specific approaches to necessity as the proper formulation of the defense in federal courts. *United States v. Bailey*, 444 U.S. 394, 100 S Ct 624, 62 L Ed 2d 575, at 635 (1980).

The basic theory of the necessity defense is that the defendant properly exercised her/his free will in order to achieve a greater good or prevent a greater harm.

The Model Penal Code, Section 3.02 defines the defense of necessity as follows:

Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:

- the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
- neither the code or other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
- a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

Some courts restate the defense as a four part test. To establish a defense of necessity, a defendant must establish the existence of four elements:

*(1) that he was faced with a choice of two evils and he chose the lesser evil; (2) that he acted to prevent imminent harm; (3) that he reasonably anticipated a causal relation between his or her conduct and the harm to be avoided; (4) that there were no legal alternatives to violating the law.*

*US v Aguilar*, 883 F2d 662, 693 (9<sup>th</sup> Cir. 1989).

One summary of the law of necessity in civil disobedience cases found that all of the above requirements essentially come down to three:

- the actor has acted to avoid a significant evil;
- there are not adequate legal means to escape the harm;
- the remedy is not disproportionate to the evil sought to be avoided.

Schulkind, *supra*, at 82.

Under these legal standards, defendants are entitled to put on evidence of necessity.

### Section 3: Elements of Necessity Are Met

The first question facing the Court is whether the alleged crime of non-violent trespass is an evil more serious than the evils of the School of Americas/WHINSEC sought to be prevented.

Some of the evils of the School of Americas/WHINSEC have already been outlined in a previous section of this memo and will not be repeated. They include training individuals who engaged in individual murders, mass murder, torture, the overthrow of democratically elected governments and wide-ranging violations of international human rights laws.

Evidence about the evils of the School of Americas/WHINSEC should be allowed to be presented to this Court. The Court in *US v Dorrell*, 758 F 2d 427 (9<sup>th</sup> Cir. 1985) said evidence supporting the defense of necessity should be evaluated by the Court to see if it is sufficient as a matter of law to support the proposed defense.

As a matter of law, the choice of evils question is easily answered in favor of defendants having the right to put on evidence.

### Statute is Silent on the Exceptions Provided by this Case

The second requirement of the Model Code is that the statute at issue must not address the circumstances before the Court.

As noted in earlier sections of this memorandum, 18 USC 1382 does require proof of individual criminal intent or unlawful purpose, but is otherwise silent as to the circumstances before this Court.

Therefore this part of the test has also been met.

### Imminent Harm

The third requirement is sometimes formulated to require that the defendant act to prevent imminent harm.

The government will likely suggest to this Court that defendants are required to provide evidence that torturing or murder were occurring at the School of Americas/WHINSEC in Georgia on the day in question in order to meet this part of the test. That would be an unreasonably restrictive view of the necessity defense.

The defendants are prepared to show a long and consistent history of human rights violations by military officers trained at the School of Americas/WHINSEC, as briefly outlined above.

The imminent and continuing harm resulting from the United States support and training of Latin American soldiers distinguishes the matter before the Court from most of the reported cases on necessity which address the concerns of nuclear protests - where courts held that the protesters could not show imminent harm because there was no proof that the weapons would be used. *United States v. Montgomery*, 772 F.2d 733, 736 (11th Cir. 1985). See similar arguments in *US v May*, 622 F2d 1000 (9<sup>th</sup> Cir. 1980) (Trident missile system); *US v Cottier*, 759 F2d 760 (9<sup>th</sup> Cir. 1985) (missile system); *US v Dorrell*, 758 F2d 427 (9<sup>th</sup> Cir. 1985) (missile system); *US v Quilty*, 741 F2d 1031 (anti-nuclear protest); *US v Maxwell*, 254 F3d 21 (1<sup>st</sup> Cir. 2001) (Trident submarine).

Clearly the School of Americas/WHINSEC is not like a bomb that might never go off - it is a bomb that has gone off repeatedly - it is an active training facility that has been operating for years and causing violations of international human rights for years, as outlined above.

Recall that defendants are not required, at this stage of the proceeding, to prove that they can win based on a necessity defense, but only that they can provide "any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility." *United States v. Opdahl*, 930 F.2d 1530, 1535 (11th Cir.1991) to support their cause.

Given the consistent and prolonged history of human rights violations committed by graduates of School of Americas/WHINSEC defendants can provide evidence of imminent harm.

### Causal Connection

Another part of the necessity defense is that the defendant reasonably anticipated a causal relation between his or her conduct and the harm to be avoided.

In this matter, the actions of defendants occurred right on the grounds where the School of Americas/WHINSEC have actually engaged in the human rights abuses outlined above. Thus there was a direct physical connection between the actions of defendants and the harm to be avoided.

Could the defendants reasonably think that their non-violent actions could make a difference to help stop the harm to be avoided?

This nation has a long history of actually responding to acts of principled non-violent political protest which violate law. From its very foundation and through the movements of people who opposed slavery, supported women's suffrage, acted for civil rights, and numerous other peace and justice efforts, the actions of people who chose the lesser of two evils have demonstrated a causal connection between their actions and the evils they sought to overcome.

Professor of Law Nicholas N. Kittrie of American University, who has served as counsel for the United States Senate Judiciary Committee and as Chair of the Eleanor Roosevelt Institute for Justice and Peace, and Professor Eldon D. Wedlock of the University of South Carolina School of Law, are co-editors of the two volume work, *The Tree of Liberty: A Documentary History of Rebellion and Political Crime in America* (Johns Hopkins Press 1998). That history includes over 700 pages of documents of political protest and civil disobedience from colonial times to the present. Among the

hundreds of incidents it details, this memo will illustrate with a few examples taken from the documents, which were all considered crimes at the time:

- Imprisonment and trial of John Peter Zenger in 1735 for publishing true but critical attacks on the colonial government, at 28.
- Sons of Liberty Boston Tea Party in 1773, at 44.
- The 1786 Shays Rebellion to stop court foreclosures of the farms of impoverished soldiers. The actions to protect the impoverished from foreclosure were declared to be treason, but were ultimately enacted into laws protecting against unfair foreclosure, at 70.
- An 1820 South Carolina law made it a crime for free black seamen to leave their vessels when their ship entered ports in the state. South Carolina imprisoned free black seamen who violated the law until it was struck down in *Elkinson v Deliesseline*, 8 F. Cass 493 by Justice William Johnson, at 113.
- In 1853 Margaret Douglas was arrested in Norfolk Virginia for the crime of teaching black children to read. She defended herself and was found guilty by a jury, which gave her a sentence of one dollar. The judge in the case over-ruled the jury saying that the prevention of Negro education was necessary “as a matter of self-defense against the schemes of Northern incendiaries,” and sentenced her to one month in prison, at 157.
- In 1873 Susan B. Anthony was arrested for voting when women were not allowed to vote. The court said: “She undertook to settle a principle in her own person. She takes the risk, and she cannot escape the consequences,” and found her guilty of the federal crime of voting as a woman, at p 231.
- In 1917, women were arrested for picketing in favor of the right to vote in front of the White House and were imprisoned for 60 days, at 290.
- A citizen of the United States, Gordon Hirabayashi, was arrested for being out of his home after 8 pm at night on May 9, 1942.

Despite the fact that Gordon was a US citizen, was born in the United States, was educated in public schools, and was, at the time of his arrest a senior at the University of Washington, he was arrested because he was of Japanese ancestry and by law had to be inside his home from 8pm to 6 am every day. His defense was that he was a US citizen and entitled to be as free as every other US citizen. After a trial, he was convicted by the jury and sentenced to three months in prison. The United States Supreme Court in *Hirabayashi v US*, 320 US 81, 63 S Ct 1375, 87 L Ed 177 (1943) denied his appeal and affirmed his conviction.

- In the 1960s, African American citizens were arrested and prosecuted for sit-ins at restaurants, freedom rides, and demonstrations large and small. Martin Luther King, Jr. was arrested and imprisoned many times. In 1963 while he was incarcerated in the Birmingham jail, he was severely criticized by white clergymen for “unwise and untimely” demonstrations and over his willingness to break the law. His response included the following:

*“We can never forget that everything that Hitler did in Germany was ‘legal,’ and everything the Hungarian freedom fighters did was ‘illegal.’ It was ‘illegal’ to aid and comfort a Jew in Hitler’s Germany, but I am sure that if I lived in Germany during that time I would have comforted my Jewish brothers even though it was illegal...we who engage in nonviolent direct action are not the creators of tension. We merely bring to the surface the hidden tension that is already alive.” at 488.*

So, in light of our history is there causal connection? Our history shows that there is a causal connection between principled non-violent protest and the harm it seeks to avoid.

As one commentator has noted, this is not

*...a rigid time/space nexus between the act and the perceived harm...A court may find that an attenuated relationship between the act and the harm does not constitute a strict causal nexus. However, it does not follow from this finding that no reasonable juror [or the Court itself] could find that the particular*

*scenario created a reasonable belief in the efficacy of the act. The court should not use its power to interpret the meaning of the defense narrowly to keep the determination of reasonableness from the jury.*

Schulkind, *supra*, at 103.

Recall that defendants are not required, at this stage of the proceeding, to prove that they can win based on a necessity defense, but only that they can provide "any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility." *United States v. Opdahl*, 930 F.2d 1530, 1535 (11th Cir.1991) to support their cause.

Defendants meet this standard of the test

#### No Adequate Legal Alternative

The government will no doubt argue that there are other opportunities for people to stop the human rights abuses committed at the School of Americas/WHINSEC. The government will no doubt try to suggest that this part of the test cannot be met by defendants in a democracy as long as there is any legal alternative, no matter how speculative, available.

However, the test is not so stringent. If the test was that stringent it would effectively nullify the defense in this country. As with all tests in criminal cases, it is based on reasonable interpretation and the standards set out by the Court in *Opdahl* as cited above.

Further, the application of this part of the test cannot be premised on the availability of unrealistic or unreasonable or unavailable alternatives.

This standard must be also premised on reasonable belief *as held by the defendants*:

*"Consider, for example, the case where defendants make a prima facie showing that they reasonably believed that history demonstrates the futility of legal action. Even if these defendants are before a judge who does not believe that a history of futile attempts constitute a no-legal-alternative situation, due process entitles them to jury consideration of whether their belief in the futility of legal action was reasonable and whether this established a reasonable belief that no legal alternative existed."*

Schulkind, *supra*, at 92.

The defendants are prepared to put on evidence that there are currently no realistic adequate legal alternatives. Defendants are prepared to put on evidence of years of so far unsuccessful legislative attempts to close the School of Americas/WHINSEC and that legal alternatives so far have proven inadequate.

Courts have found that where legal alternatives are futile or illusory, they are not reasonable legal alternatives.

Consider the language in the Fifth Circuit decision in *US v Gant* discussing this part of the necessity defense:

*In demonstrating that he had no alternative to violating [the criminal statute] Gant must show he had actually tried the alternative or had no time to try it, or that a history of futile attempts revealed the illusory benefit of the alternative.”*

*US v Gant*, 691 F 2d 1159, at 1164 (5<sup>th</sup> Cir. 1982).

Likewise in *United States v. Hill*, 893 F. Supp. 1044:

*“As a general proposition, evidence that a defendant exhausted all available legal alternatives...and that such alternatives as a class had been futile over a long period, might be sufficient to allow a defendant to present his necessity defense to the jury.”*

*United States v. Hill*, 893 F. Supp. 1044 (N.D. Fla. 1994).

Defendants meet this test.

The remedy is not disproportionate to the evil sought to be avoided.

The final requirement is that the actions of those seeking to invoke the defense of necessity are not disproportionate to the evil sought to be avoided.

Given the number and seriousness of human rights violations committed by people trained at the School of Americas/WHISC, it is clear that defendants' actions were not disproportionate to the evil sought to be avoided.

Defendants easily satisfy this part of the test.

In sum, defendants have met the threshold test to be allowed to put on evidence of necessity.

#### Section 4: Conclusion

For these reasons, the defendants request that they be allowed to put on evidence of the defense of necessity.

January 13, 2007

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 10, 2007, I electronically filed this MOTION AND MEMO FOR RULING ON ADMISSIBILITY OF EVIDENCE RE NECESSITY with the Clerk of the Court using the CM/ECF system, which shall cause service to be electronically made upon the following attorneys of record:

**Melvin E. Hyde**

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January 10, 2007

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