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STATE OF WASHINGTON
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NO. 98719-0

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SPOKANE COUNTY DISTRICT COURT,
Judge Debra R. Hayes, Defendant

and

GEORGE E. TAYLOR,

Petitioner.

MOTION FOR DISCRETIONARY REVIEW Treated as a Petition for
Review

TODD MAYBROWN
Allen, Hansen, Maybrown
& Offenbecher, P.S.
600 University Street, #3020
Seattle, WA 98101
Phone: (206) 447-9681
Email: todd@ahmlawyers.com

ALANA BROWN
1324 West Mallon Avenue
Spokane, WA 99201
Phone: (509) 362-4928
Email: alana@brownlegalco.com

ATTORNEYS FOR PETITIONER

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1. IDENTITY OF PETITIONER

Pursuant to RAP 13.5A and 13.4(b), Rev. George Taylor moves this court to grant discretionary review of the decision entered below.

2. PANEL DECISION BELOW

On June 9, 2020, the panel below issued a published decision in which the majority ruled against Rev. Taylor. *See Appendix A* (available at *State ex rel. Haskel v. Spokane County District Court*, 2020 WL 3097460).

3. ISSUES PRESENTED FOR REVIEW

This case presents the following issues of substantial public interest:

1. Does a defendant have a constitutional right to present the defense of necessity to a jury, upon a pre-trial showing of *prima facie* threshold of evidence?
2. Is it the role of the jury, rather than a judge, to ultimately determine whether a defendant had “reasonable legal alternatives” before he engaged in an act of peaceful civil protest?
3. Did Division III err in rejecting Washington authorities, including Division I’s recent decision in *State v. Ward*, 8 Wn.App.2d 365, *rev. den.*, 447 P.3d 161 (2019), and instead relying upon authority from foreign jurisdictions in deciding that a civil protester is never permitted to pursue the necessity defense?
4. Does due process require notice to a defendant of the filing of an application for writ of review, prior to issuance of a discretionary order that subsequently denied his right to judicial disqualification pursuant to RCW 4.12.050(1)(a)?

4. STATEMENT OF THE CASE

a. Introduction

On September 23, 2016, Rev. George Taylor entered onto railroad tracks in the City of Spokane to protest governmental failure to address climate change and the dangerous transport of Bakken crude oil by train through downtown Spokane. He was arrested and charged with criminal trespass and train obstruction in the Spokane County District Court.

Rev. Taylor provided notice that he intended to pursue a necessity defense at trial. Following an extensive evidentiary hearing, the trial judge concluded that Rev. Taylor was lawfully entitled to present his theory of defense at trial and that it was the province of the jury to decide whether he should be convicted of the charged offenses. *See App. B.*

The *Taylor* case never proceeded to trial. Rather, the State filed an *ex parte* application for statutory writ of review with the Superior Court (*App. C*) and a judge signed a preliminary Order to stay proceedings in the District Court without notice to Rev. Taylor. *See App. D.* Once Rev. Taylor received a copy of the Order, he moved to disqualify the judge pursuant to RCW 4.12.050. *See App. E.* But his motion was denied. *See App. F.* Months later, that same judge granted the writ and ruled that a jury must not be permitted to consider the necessity defense at trial. *See App. G.*

Soon thereafter, Division I decided a strikingly similar case – *State v. Ward*, 8 Wn.App.2d 365, *rev. den.*, 447 P.3d 161 (2019) – thereby concluding that the defendant had been denied his constitutional rights when the trial court refused to permit him to pursue a necessity defense at trial. Division III subsequently granted Rev. Taylor’s motion for discretionary review. On June 9, 2020, in a split decision, two judges declined to follow *Ward* and instead announced a new rule to the effect that a criminal defendant is never permitted to present a necessity defense in a case involving what it described as “civil disobedience.” *See App. A.*

This Court should accept review for several reasons. First, the Court should resolve the clear conflict between Division I and Division III. *See* RAP 16.4(b)(2). Second, this case presents significant questions regarding a defendant’s constitutional rights to present a defense and to trial by jury. *See* RAP 16.4(b)(3). Third, this case involves issues of great public interest. *See* RAP 16.4(b)(4).

b. Proceedings in the District Court

On September 30, 2016, the State charged Rev. Taylor with the crimes of criminal trespass and train obstruction in the Spokane County District Court. Rev. Taylor provided prompt notice of his intent to present a necessity defense. At hearing on his motion, Rev. Taylor presented testimony from two expert witnesses, filed a declaration from a third expert,

and further testified on his own behalf. After considering the proffered evidence, a District Court judge issued extensive findings, conclusions, and an order authorizing Rev. Taylor to present his necessity defense at trial. *See App. B.* The judge did not reach the merits of Rev. Taylor's defense. Rather, she simply determined that he had presented sufficient evidence to pursue the defense at trial:

It is within the sole province of the jury, not the judge, to weigh the evidence, evaluate the credibility of each witness, and decide the facts at issue in the case. The jury will ultimately determine whether the Necessity Defense applies to the facts of the present case.

App. B at 16.

c. Proceedings in the Superior Court

Soon thereafter, the prosecutors filed an *ex parte* application for writ of review in Spokane County Superior Court. *See App. C.* Notably, the prosecutors made a tactical decision *not* to notify Rev. Taylor or his counsel of this new proceeding. That same day, a Superior Court judge issued the writ and an order staying the criminal case. *See App. D.*

After learning of the Order, Rev. Taylor promptly filed a notice to disqualify the judge who considered the *ex parte* application. *See App. E.* The prosecutors objected, and the Superior Court judge denied the motion to disqualify – ostensibly because he had already rendered a discretionary ruling (even though Rev. Taylor had yet to receive notice). *See App. F.*

Later, after considering briefing and argument, that same Superior Court judge reversed the trial judge's ruling and thereby prohibited the necessity defense. *See App. G.* Rather than considering whether Rev. Taylor had made a *prima facie* showing in the District Court, the judge substituted his view for that of the jurors and concluded:

The Court holds the Defendant has not met his burden to present a necessity defense. ***Specifically, he has not shown, and cannot under the circumstances of this case, that he does not have a reasonable legal alternative to the charged acts as alleged by the State.***

Id. at 3 (emphasis added).

d. Proceedings in the Court of Appeals

Rev. Taylor moved for discretionary review in Division III. A Commissioner initially denied the motion. However, following the *Ward* decision, a panel of the court modified the Commissioner's ruling and granted review. The parties submitted briefing. In addition, more than 100 law professors submitted an *amicus curiae* brief in support of Rev. Taylor's legal arguments. *See App. H.* A panel issued a split decision in which two judges affirmed the Superior Court's ruling on the merits. *See App. A.*

As a threshold matter, the majority issued no dispositive ruling whether the Superior Court judge should have honored Rev. Taylor's notice of disqualification. Instead, after suggesting that RCW 4.12.050 may not be invoked where a judge has ruled upon an *ex parte* application for relief

(even where the aggrieved party had no notice of that proceeding), the majority chose to reach the merits of Appellant’s claims.¹

In discussing the merits, the majority rejected the notion that a “protestor” may assert a necessity defense during a criminal proceeding. In refusing to follow Division I’s decision in *Ward*, the majority relied heavily upon foreign decisions. *See App. A* at 14-16 (citing *State v. Higgins*, 2020 MT 52, 399 Mont. 148, 458 P.3d 1036 (2020) and *United States v. Schoon*, 971 F.2d 193 (9th Cir. 1991)).² Thus, the majority determined that it was always the province of judges, rather than juries, to decide whether a peaceful protester – like Rev. Taylor – could sustain a claim of necessity. *See App. A* at 16-18.

Judge Fearing issued a formidable dissent. Regarding the procedural issue, he explained why the Superior Court judge had clearly erred in refusing to honor Rev. Taylor’s notice of disqualification. Not only had the judge failed to abide by the underlying statute, but his ruling could not be squared with fundamental fairness. As Judge Fearing explained:

The State could have given notice to George Taylor or his attorney before obtaining the superior court judge’s signature, but refused to do so. The State provides no explanation for this failure in courtesy. Under the State’s

¹ The majority claimed that it need not decide the procedural issue as it would reach the merits of the appeal as a matter of “judicial economy.”

² These judges also cited several older decisions from the federal courts.

theory, a party could rush to court and obtain an *ex parte* order, at the commencement of the case, from a judge the party knows will favor him or her or from a judge the party knows that the opposing party will wish to disqualify. The first party can then intentionally disadvantage the opponent.

App. A at 16.

Judge Fearing then went on to discuss the merits of Appellant's claims and emphasized that the court should have followed Division I's well-reasoned decision in *Ward*. Judge Fearing lamented:

In affirming the superior court, this court ignores Washington precedent, creates new law, emasculates the meaning of the word "reasonable," endangers the survival of the necessity defense, diminishes a patriotic tradition, overlooks political reality, rejects the moral worth of civil disobedience, discounts the universal need for honorable lawbreaking, shuts the court's ears to the disaffected, usurps the role of the jury, and denies George Taylor the right to a fair trial.

App. A at 25.

5. **ARGUMENT IN SUPPORT OF ISSUES PRESENTED AND THE NEED FOR THIS COURT TO GRANT DISCRETIONARY REVIEW**

a. **This Case Presents the Fundamental Question Whether it is the Province of the Court, Rather than the Jury, to Decide Whether a Criminal Defendant's Actions Should be Considered "Reasonable" for Purposes of the Necessity Defense.**

"Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense." *Washington v. Texas*,

388 U.S. 14, 19 (1967). *Accord Holmes v. South Carolina*, 547 U.S. 319, 324 (2006); *State v. Rehak*, 67 Wn.App. 157, 162 (1992). This right is a fundamental element of due process of law, “which the courts should safeguard with meticulous care.” *State v. Burri*, 87 Wn.2d 175, 181 (1976). Likewise, both the state and federal constitutions preserve a right to a jury trial to the accused. *See, e.g., Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968); *State v. Jones*, 168 Wn.2d 713, 720 (2010).

While trial courts may serve a gatekeeping function in determining whether the evidence is sufficient to support a given jury instruction, where the defendant hopes to present evidence of an affirmative defense the threshold burden of production is relatively low. *See, e.g., State v. Otis*, 151 Wn.App. 572, 582 (2007) (defendant satisfied *prima facie* threshold to allow affirmative defense); *State v. Adams*, 148 Wn.App. 231, 235 (2009) (same). *Accord State v. Tullar*, 9 Wn.App.2d 151, 156 (2019) (“In order to raise self-defense before the jury, a defendant bears the initial burden of producing *some evidence* that tends to prove the assault occurred in circumstances amounting to self-defense”) (emphasis added). *See also State v. Ginn*, 128 Wn.App. 872, 881-82 (2005); *State v. Theroff*, 25 Wn.App. 590, 593 (1980). Here, the trial court held an extensive evidentiary hearing – and viewed the testimony of several witnesses –

before issuing its ruling on this preliminary question. There can be no question that Rev. Taylor satisfied his threshold burden.³

The majority lost sight of these guiding principles when it issued the decision below. Moreover, if the majority's ruling stands, Rev. Taylor (and many other similarly situated defendants) will be deprived of the right to present a defense at trial.

Washington has recognized the common law necessity defense for decades. *See, e.g., State v. Diana*, 24 Wn.App. 908, 913-14 (1979); *State v. Jeffrey*, 77 Wn.App. 222, 224 (1995). The pattern jury instruction declares four elements, with the fourth element of the defense to be “no *reasonable* legal alternative existed.” WPIC 16.02.⁴ In *State v. Parker*, 127 Wn.App. 352 (2005), for example, the court ruled that this fourth element might be satisfied where the accused can demonstrate that she actually tried the alternative, she lacked time to try the alternative, or a history of futile attempts reveals the illusory benefits of any alternatives. *See id.* at 355.

³ In this context, a challenge to the sufficiency of evidence “requires the trial court and appellate courts to interpret the evidence *most favorably for the defendant.*” *State v. Cole*, 74 Wn.App. 571, 578 (1994) (emphasis added).

⁴ The contours of the defense – as set forth in WPIC 18.02 – were seemingly approved by this Court in *State v. Vander Houwen*, 163 Wn.2d 25, 32 (2008). Nevertheless, review is warranted because “Washington law has never directly addressed whether the defendant succeeds by establishing that he believed he held no reasonable legal alternative or whether the jury must find the absence of reasonable, available, effective, and adequate alternatives.” *App. A* at 30.

Yet, in the decisions below, the Superior Court judge and the majority usurped the jury's role – and concluded that the necessity defense is never available to a defendant like Rev. Taylor – based upon the notion that every “protestor” is free to petition the Government and that there “are always reasonable legal alternative to disobeying constitutional laws.” *See App. A* at 16. But this was not the reviewing judges’ decision to make. Rather, as noted by Judge Fearing, the law particularly leaves to jurors the question of reasonableness. *See App. A* at 42 (citing authorities).⁵

In essence, the majority adopted the superior court judge’s conclusion that the defense is unavailable whenever *any* legal alternative exists (no matter how illusory or futile that alternative might be). To require the defendant’s conduct to be the “sole” alternative to averting the harm would render the defense meaningless. *See, e.g., People v. Kucavik*, 854 N.E.2d 255, 259 (2006). Under this interpretation, the requirement of “reasonableness” would be eliminated from the instruction. Perhaps even more ominously, the majority’s decision would seem to eviscerate the necessity defense, thereby relegating it to the dustbins of history.

⁵ In so ruling, the majority intimates that juries cannot be trusted to follow the law as set forth in WPIC 18.02. *See App. A* at 17. Contrary to the majority’s protestations, the defense of necessity should not be equated with a request for jury nullification. *Cf. State v. Bonisisio*, 92 Wn.App. 783, 794 (1998).

At trial, the defendant bears the burden of proving the existence of necessity by a preponderance of the evidence. *See, e.g., Ward*, 8 Wn.App.2d at 372. In the pretrial setting, however, the trial judge must decide only whether the defendant should be permitted to present his case to the jury. Here, in light of the undisputed record, the trial judge did not abuse her discretion when she decided that Rev. Taylor had produced sufficient evidence such that he could present his chosen defense at trial.

Nevertheless, rather than viewing the admissibility question through the correct evidentiary prism, the majority reached the ultimate issue and concluded that Rev. Taylor “had reasonable legal alternatives other than trespassing on BNSF’s tracks and obstructing a train, even if those alternatives had not brought about timely legislative changes.” *App. A* at 2. In so ruling, the majority determined that protesters must be treated differently than all other defendants. *See id.* at 18 (“A person who engages in civil disobedience is not the typical defendant who historically has been entitled to assert a necessity defense.”)

The majority was wrong. Because Rev. Taylor met his initial burden of showing that he would likely be able to submit a sufficient quantum of evidence on each element of necessity to raise a jury question, the majority erred – and thereby violated Rev. Taylor’s fundamental rights – by granting a writ which directed the District Court judge to exclude all testimony and

evidence in support of the necessity defense. Simply put, a reviewing court should not use a writ proceeding to substitute its personal views for that of the trial judge or the jury.

b. **When Issuing its Decision, the Majority Rejected a Recent Decision from Division I which Addressed these Very Same Issues; This Court Must Accept Review to Resolve the Conflict.**

It is the duty of this Court to resolve conflicts among the divisions of the Court of Appeals. As the Court recently explained: “We recognize when there are conflicts in the Court of Appeals. We resolve them by granting review . . .” *Matter of Arnold*, 190 Wn.2d 136, 150 (2018) (citations omitted). The majority’s decision conflicts with last year’s ruling by Division I in *Ward*, necessitating resolution by this Court.

In *Ward*, Division I considered whether a climate activist would be permitted to present a necessity defense at trial. *See State v Ward, supra*. There, the jury convicted Kenneth Ward of second-degree burglary after he entered a Kinder Morgan facility and closed a pipeline valve. The closure stopped the flow of Canadian tar sands oil to refineries in Skagit and Whatcom Counties. Ward sought to protest the continued use of tar sands oil, which he contended significantly contributed to climate change. Ward also sought to remonstrate against inaction by government to meaningfully address a crisis of climate change. The trial court denied Ward the

opportunity to present evidence as to his political beliefs and the peril of climate change. *See* 8 Wn.App.3d at 369-70.

On appeal, the State argued that Ward had legal alternatives available. Division I answered that Ward offered sufficient evidence to create a question of fact on the availability of reasonable legal alternatives. *See id.* at 373-74. As in this case, Ward testified that the window for action on climate change had narrowed to the point that immediate, emergency action is necessary. As Division I succinctly explained:

Ward offered evidence that he had tried the alternatives and they were unsuccessful. Whether Ward's evidence was sufficient to establish that his history of failed attempts to address climate change revealed the futility of supposed reasonable alternatives was a question for the jury. Viewed in the light most favorable to Ward, and admitting the truth of his evidence and all reasonable inferences therefrom, Ward's offer of proof created a question for the jury.

Id. at 375.

Petitioner presented comparable – if not more compelling – evidence by offer of proof in the District Court. Ultimately, as Division I confirmed, the question of “reasonableness” must be left to the jury.

Whether Ward's beliefs were reasonable was a question for the jury. *See State v. Negrin*, 37 Wn.App. 516, 524 (1984) (“It is the province of the jury to determine such issues” as whether the defendant acted with reasonable grounds.). And further, Ward did not have to prove that the harm he sought to avoid or minimize was actually avoided or minimized but instead that the reason he broke the law was in an attempt to avoid or minimize harm. Ward's past successes in effectuating change through civil disobedience in

conjunction with the proposed expert witnesses and testimony about Ward's beliefs were sufficient evidence to persuade a fair minded, rational juror that Ward's beliefs were reasonable.

Id. at 594 (some citations omitted).

Yet the majority rejected *Ward* out of hand – as if it were an outlier. This is far from the truth. For example, in a recent case concerning a homeless person's argument that it was necessary to trespass in order to escape brutal winter temperatures, the Massachusetts Supreme Judicial court held that the necessity defense

does not require a showing that the defendant has exhausted or shown to be futile all conceivable alternatives, only that a jury could reasonably find that no alternatives were available . . . so long as the defendant's evidence, taken as true, creates a reasonable doubt as to the availability of such lawful alternatives, the defendant satisfies [this element] . . . Our cases do not require a defendant to rebut every alternative that is conceivable; rather, a defendant is required to rebut alternatives that likely would have been considered by a reasonable person in a similar situation.

Commonwealth v. Magadini, 52 N.E.3d 1041, 1049-50 (Mass. 2016) (citations omitted).

Similarly, an Illinois court reversed the denial of a necessity defense and held that “[t]o require the defendant's conduct to be the ‘sole’ alternative to illegal conduct would render the language in the statute referring to the accused's reasonable belief meaningless.” *Kucavik*, 854 N.E.2d at 259. As that court explained:

If the trial court is permitted to determine that another “reasonable alternative” existed and therefore refuse to instruct the jury on the defense, then the accused’s reasonable belief becomes irrelevant. Stated differently, [the state’s necessity statute] creates both an objective and subjective test for the reasonableness of the accused’s conduct under the circumstances The existence of other alternatives may lead a jury to find that, given her subjective belief and the circumstances she faced, defendant nonetheless did not act objectively reasonably. The trial court was required to leave these determinations to the jury [D]enying a defendant the opportunity to have the jury decide the reasonableness of her conduct should the trial court find that another reasonable alternative existed would take the objective factor and transforms [sic] it into the determinative test for the availability of the defense.

Id. at 259-60.

To say that the majority’s ruling is far-reaching would be a grand understatement, as the judges announced a new rule to the effect that the necessity defense is *never* available to any defendant that the court might classify as a “protestor” – presumably because a citizen may always attempt to access the political process (no matter the circumstances and even if such attempts would be futile).

Before now, no Washington court has so restricted the defense. And this very same argument has been rejected in previous cases. The decision in *People v. Gray*, 571 N.Y.S.2d 851 (1991), is most instructive. There, the defendants were charged with disorderly conduct based upon their participation in an air pollution protest. Finding that the “legal alternative” requirement does not preclude the justification of protests, the court advised

courts not to rule out the presentation of the defense simply because there is always a logical possibility of further legal action:

It has been asserted that because a democracy creates legal avenues of protest, alternatives must always exist. In the opinion of this court, however, to dispense with the necessity defense by assuming that people always have access to effective legal means of protest circumvents the purpose of the defense. When courts rule as a matter of law that defendants always have a reasonable belief in other adequate alternatives, they are asserting that regardless of how diligent a party is in pursuing alternatives, no matter how much time has been spent in legitimate efforts to prevent the harm, no matter how ineffective previous measures have been to handle the emergency, the courts in hindsight can always find just one more alternative that a citizen could have tried before acting out of necessity.

Id. at 860-61.

c. **The Superior Court Judge Clearly Erred in Refusing to Honor Rev. Taylor's Motion to Disqualify.**

The majority chose not to issue a definitive ruling regarding the underlying procedural issue in this case, while Judge Fearing very clearly explained why the Superior Court judge had violated RCW 4.12.050 and Rev. Taylor's due process rights. This Court should accept review and clarify these important matters to avoid confusion for future litigants.

Ex parte communications are "anathema in our system of justice." *Guenter v. Comm'r*, 889 F.2d 882, 994 (9th Cir. 1989). The adversary system – the bedrock of American justice – is premised on the notion that

“[n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and the opportunity to meet it.” *United States v. James Daniel Good Real Property*, 510 U.S. 43, 55 (1993) (citation omitted). Because they strike at the very heart of this seminal principle, *ex parte* communications are – except in extraordinary circumstances – strictly forbidden.⁶

Due process is fundamental to all criminal proceedings. *See* U.S. Const. amend. 14; Wash. Const. Art. I, § 3. On a pragmatic level, due process protections are essential to ensure that every litigant has not only the opportunity to advance her own position, but also to correct or contradict the government’s claims. *See United States v. Abuhambra*, 389 F.3d 309, 322-33 (2d Cir. 2004). On a systematic level, due process protections guard against the appearance of partiality by the judge. *See State v. Ramano*, 34 Wn.App. 567 (1983). *Accord Sherman v. State*, 128 Wn.2d 164, 205-06 (1995).

⁶ *Ex parte* contacts are improper, in part, because they raise questions about basic notions of fairness and the legitimacy of the court proceedings. As noted by one commentator:

Probably the most serious danger of a prosecutor/judge relationship that has grown too cooperative is the opportunity for, and the occurrence of, improper *ex parte* communications. The close relationship between the prosecutor and the judge can lead to the unethical practice of improper *ex parte* communications.

Roberta K. Flowers, *An Unholy Alliance: The Ex Parte Relationship Between the Judge and the Prosecutor*, 79 Neb.L.Rev. 251, 272-73 (2000).

This Court should rule that due process protections apply in writ proceedings – particularly where the prosecution has initiated a court proceeding in an effort to obtain a legal ruling that could limit a defendant’s rights in an ongoing criminal case. In *Seattle v. Agrellas*, 80 Wn.App. 130 (1995), for example, the court concluded that the writ provisions in RCW 7.16 do not permit the superior court to “ignore fundamental principles of due process.” *Id* at 136. In the criminal context, due process requires that a defendant be given notice *prior* to deprivation of a substantial right. *See, e.g., City of Seattle v. Klein*, 161 Wn.2d 554, 566-67 (2007) (relying upon *Agrellas*; emphasis in original).⁷

Here, as in *Agrellas*, Rev. Taylor’s fundamental due process rights were violated when the prosecutor failed to provide notice when the writ proceeding was commenced in the superior court. Then, to compound that violation, the superior court judge accepted the State’s argument that Rev. Taylor was divested of his right to seek judicial disqualification simply because that same judge had signed a preliminary order in an *ex parte* proceeding soon after the new case was filed (but before Rev. Taylor had any notice or opportunity to be heard).

⁷ A *post hoc* hearing to alter or amend an *ex parte* ruling does not satisfy due process, or cure a previous due process violation. *See, e.g., Tom Grownney v. Shelley*, 834 F.2d 833, 836-37 (9th Cir. 1987).

RCW 4.12.050(a) sets forth a mandate that “[a]ny party to or any attorney appearing in any action or proceeding in a superior court may disqualify a judge from hearing the matter . . .” *Id.* The statute has created a substantive legal right that protects all litigants. In *State v. Dixon*, 74 Wn.2d 700, 702 (1968), for example, this Court explained:

Under these statutes and under our decisions a party litigant is entitled, as a *matter of right*, to change of judges upon the timely filing of a motion and affidavit of prejudice against the judge about the hear his cause or any substantial portion thereof on the merits.

Id. at 702 (emphasis added).

Under RCW 4.12.050, the right to seek disqualification is available to every “party or attorney appearing in any action or proceeding.” The language of the statute strongly suggests that this right may not be forfeited before the party opponent (or his attorney) had notice or an opportunity to appear in the case. As such, the interpretation adopted by the Superior Court judge defies common sense. *See, e.g., State v. Barbee*, 187 Wn.2d 375, 389 (2017) (when engaging in statutory interpretation, court must avoid constructions that yield unlikely, absurd or strained consequences). A party cannot be divested of a legal right when he was never afforded any reasonable opportunity to assert it.

In an effort to justify their conduct, the prosecutors relied upon the hyper-technical argument that granting a preliminary writ is not listed

among the exceptions in RCW 4.12.050(2). This Court should take review and confirm that such an order does not deprive an opponent of his right to judicial disqualification, even if the judge exercised some form of discretion when he signed off on an *ex parte* order to commence the proceeding. *See, e.g., In re Dependency of Hiebert*, 28 Wn.App. 905, 909 (1981).

Finally, the majority notes that the most-recent version of RCW 4.12.050 includes the proviso “subject to these limitations,” and from this it suggests that all prior caselaw no longer controls. While this type of reasoning is unpersuasive (*see App. A* at 15), the Court should make clear that the amendments to RCW 4.12.050 does not authorize the kind of gamesmanship that was endorsed by the Superior Court judge.

6. CONCLUSION

For these reasons, this Court should grant review and reverse the decision of the Court of Appeals.

Respectfully submitted this 2nd day of July, 2020.

ALLEN, HANSEN, MAYBROWN & OFFENBECHER, P.S.

By Todd Maybrown
Todd Maybrown, WSBA #18557
Attorney for Petitioner

BROWN LEGAL

By Alana Leigh Brown
Alana Leigh Brown, WSBA #50018
Attorney for Petitioner

PROOF OF SERVICE

Sarah Conger swears the following is true under penalty of perjury under the laws of the State of Washington:

On the 2nd day of July, 2020, I filed the above Motion for Discretionary Review via the Appellate Court E-File Portal through which all counsel and interested parties will be served.

/s/ Sarah Conger

Sarah Conger, Legal Assistant
ALLEN, HANSEN, MAYBROWN & OFFENBECHER, P.S.
600 University Street, Suite 3020
Seattle, WA 98101
206-447-9681
Fax: 206-447-0839
sarah@ahmlawyers.com

APPENDIX A —

Published Opinion in *State ex rel. Haskel v. Spokane County District Court*,
Court of Appeals No. 36506-9-III

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

STATE OF WASHINGTON, Ex Rel.)	No. 36506-9-III
LAWRENCE H. HASKELL,)	
)	
Respondent,)	
)	
v.)	
)	
SPOKANE COUNTY DISTRICT)	PUBLISHED OPINION
COURT, JUDGE DEBRA R. HAYES,)	
)	
Defendants,)	
)	
GEORGE E. TAYLOR,)	
)	
Petitioner.)	

LAWRENCE-BERREY, J. — George Taylor protested the delivery of oil and coal by railcars while standing on BNSF Railway Company’s mainline tracks. He refused to leave the tracks when directed by law enforcement, and the State charged him with second degree trespass and obstructing a train. We granted Taylor’s petition for discretionary review to determine whether he can assert the defense of necessity.

Persuasive authority rejects the notion that a person engaged in civil disobedience may assert a necessity defense when charged with violating constitutional laws. We

conclude that Taylor had reasonable legal alternatives other than trespassing on BNSF's tracks and obstructing a train, even if those alternatives had not brought about timely legislative changes.

FACTS¹

Reverend George Taylor was part of a group of protestors who walked onto BNSF property and stood on the mainline tracks. "No Trespassing" signs were posted, and Taylor knew the property was private and he had no permission to enter the property. Clerk's Papers (CP) at 167. Taylor and his fellow protestors held signs and banners protesting the transport of coal and oil. For the safety of the protestors, trains in the general vicinity were held idling at the railway yard.

BNSF and other law enforcement officers responded. The protestors, including Taylor, were told they would be arrested if they refused to leave. Three protestors, including Taylor, politely refused to leave and remained on the tracks. Law enforcement escorted the three off the tracks and peacefully arrested them.

The State charged Taylor with criminal trespass in the second degree and unlawful obstruction of a train, both misdemeanors. Taylor filed a motion requesting to assert the

¹ We take our facts from the district court's unchallenged findings.

defense of necessity. At the hearing, Taylor and two of his experts testified in support of his motion, and Taylor submitted a declaration of his third expert.

First, Taylor called Dr. Steven Running, a regents professor of ecology at the University of Montana. Dr. Running was the lead author for the 4th Assessment of the Intergovernmental Panel on Climate Change. He shared the Nobel Peace Prize with Al Gore in 2007. Dr. Running noted three facts that climate scientists observe: (1) greenhouse gases and carbon dioxide have been increasing in the atmosphere over the last 50 years, (2) because of the increase in greenhouse gases, the global temperature has risen and, in the last 20 years, the temperature rise has accelerated, and, (3) a reduction in carbon emissions is necessary to stabilize the global climate.

Human behavior has caused the rise of carbon emissions—the largest single source of carbon dioxide (CO₂) emissions is from burning coal, the second leading cause is from burning oil, and the third largest contributor is from burning natural gas. Dr. Running recommended that in order to reduce carbon emissions, people around the globe need to stop burning coal, stop burning oil, and move to nonfossil fuel energy sources. China is the biggest consumer of coal. China purchases a lot of coal from Montana and Wyoming, which is then shipped by train through western cities, including Spokane.

Next, Taylor called Tom Hastings, an assistant professor of conflict resolution at Portland State University. Professor Hastings has served on the Peace and Conflict Studies Consortium, the Peace and Justice Studies Association of the Binational U.S.-Canada Academic Association, the International Peace Research Association Foundation, and the International Center on Nonviolent Conflict in Washington D.C. Professor Hastings specializes in civil resistance, civil disobedience, and strategic nonviolent conflict.

Professor Hastings testified that civil resistance is effective in bringing about social change. A comprehensive study showed that nonviolent civil resistance is twice as effective as violent civil resistance and is more likely to succeed in achieving the desired goal. Often times, the classic nonviolent resistance campaign attempts to reach the media to try to help educate citizens because that is how public policy is transformed. In his opinion, Taylor's actions aligned with a nonviolent civil resister. In civil disobedience cases, the judicial branch is the last best hope. Professor Hastings testified that civil resistance can reduce climate change.

Taylor intended to call Fred Millar, but because Mr. Millar could not make the hearing, Taylor submitted Mr. Millar's declaration. Mr. Millar is an international analyst in nuclear waste storage and transportation, accident prevention, and emergency planning

and homeland security. Mr. Millar's declaration addressed the preparedness and emergency protocols to protect public safety in the event of crude oil train derailments, spills, or explosions. In his opinion, the nation is inadequately prepared for such circumstances and the harm associated with crude oil train derailments, spills, or explosions are imminent. The United States has almost monthly occurrences of some type of crude oil train derailment, spill, or explosion. Some have involved trains carrying coal from Montana and some have involved trains traveling through Spokane.

Lastly, Taylor testified. He said he protested on the train tracks to bring local legislative attention to the imminent danger posed by coal and oil trains that pass through cities. Taylor is involved in environmental education and studies, participates in the Safer Spokane Initiative, is a member of the Sierra Club, and votes for "green" candidates—those who want to save and preserve the environment. CP at 143. In addition, he has brought his concerns to many local state and federal officials. He testified that nothing in the environmental community was working, and he was quite discouraged. He believed there was no other reasonable alternative than to protest on the railroad tracks.

Taylor believed his actions were necessary to avoid the imminent danger to Spokane citizens of train derailment and to minimize the danger to the Earth due to

climate change. He believed the danger to the public through the railroad transport of coal and oil through Spokane was far greater than his act of trespassing.

The district court entered findings of fact and conclusions of law and discussed the four elements a defendant must establish to assert the defense of necessity. With respect to the fourth element, the element contested on appeal, the district court concluded Taylor was required to establish “the *Defendant* believed no reasonable legal alternative existed.” CP at 15 (emphasis added). Because Taylor believed no reasonable legal alternative existed to trespassing and obstructing a train, and because he had presented sufficient evidence of the first three elements, the district court granted Taylor’s motion allowing him to present the defense of necessity at trial.

Soon after the ruling, the State filed an application for statutory writ of review with the county superior court. The superior court granted the writ without notice to Taylor. The writ ordered four things: (1) that it be served on the district court within 20 days, (2) that the district court record be transmitted to superior court in accordance with applicable rules, (3) that the parties agree to a briefing schedule, and (4) that the district court proceedings be stayed pending superior court review.

The State thereafter served Taylor with its application and writ. Taylor moved to disqualify the superior court judge pursuant to RCW 4.12.050. The superior court denied

Taylor's motion, reasoning that the issuance of the writ was a discretionary ruling that caused Taylor's motion to be untimely.

In their briefs to the superior court, the parties discussed the four elements of the defense of necessity, including the fourth element, whether "no reasonable legal alternative existed" other than for Taylor to trespass and obstruct trains. In its decision, the superior court wrote: "[Taylor] . . . has interpreted 'reasonable' to be synonymous with effective; that is, not whether legal alternatives exist to protest climate change, but whether the attempts to utilize those alternatives to date have been effective." CP at 232. The trial court disagreed with Taylor's interpretation and concluded the standard was whether no reasonable legal alternative existed. The superior court determined that Taylor had reasonable legal alternatives and reversed the district court.

Taylor timely petitioned this court for discretionary review and raised two issues. First, whether the superior court erred by precluding him from raising the defense of necessity. Second, whether the superior court erred by not disqualifying itself.

Our commissioner denied Taylor's petition. Taylor moved to modify our commissioner's decision, and we granted Taylor's motion. A panel of this court considered these issues without oral argument.

ANALYSIS

A. NOTICE OF DISQUALIFICATION

As a preliminary matter, we address Taylor’s argument that the superior court erred by not disqualifying itself.

Due process and the appearance of fairness doctrine require disqualification of a judge who is biased against a party or whose impartiality may be reasonably questioned. *State v. Ryna Ra*, 144 Wn. App. 688, 704-05, 175 P.3d 609 (2008). Taylor did not seek to disqualify the superior court judge under these standards. To the extent his arguments on appeal raise due process and appearance of fairness concerns, we deem those arguments waived. RAP 2.5(a); *In re Rapid Settlements, Ltd.*, 166 Wn. App. 683, 695, 271 P.3d 925 (2012).

Taylor sought to disqualify the superior court judge pursuant to a statute.

RCW 4.12.050, in its current form,² provides in relevant part:

(1) Any party to or any attorney appearing in any action or proceeding in a superior court may disqualify a judge from hearing the matter, *subject to these limitations*:

(a) Notice of disqualification must be filed and called to the attention of the judge before the judge has made any discretionary ruling in the case.

² The current version of this statute applies. It became effective on July 23, 2017, and Taylor filed his notice of disqualification after that date—on April 4, 2018.

(Emphasis added.)

We first discuss whether the superior court’s issuance of a writ of review is a discretionary ruling. A writ of review may be granted in limited circumstances specified by statute. RCW 7.16.040. A court may deny the writ or it may require notice before granting a writ, or it may grant the writ without notice. *See* RCW 7.16.050. Here, the superior court chose to grant the writ without notice to Taylor. Taylor does not dispute that granting the writ was a discretionary act.

We next discuss how to construe RCW 4.12.050(1)(a) in the context of a defendant having had no opportunity to file a notice of disqualification prior to the court’s discretionary ruling. “Statutes are to be interpreted as they are plainly written, ‘unless a literal reading would contravene legislative intent by leading to a strained or absurd result.’” *Pub. Util. Dist. No. 1 of Klickitat County v. Walbrook Ins. Co.*, 115 Wn.2d 339, 343, 797 P.2d 504 (1990) (quoting *Marine Power & Equip. Co. v. Dep’t of Transp.*, 102 Wn.2d 457, 461, 687 P.2d 202 (1984)) Here, subsection (1) of the statute is “subject to the limitation[]” of subsection (a). It is undisputed that Taylor did not file his notice of disqualification before the trial court made its discretionary ruling. Therefore, a literal reading of RCW 4.12.050(1)(a) results in entities, not yet a party, having no right to

file a notice of disqualification if the trial court had previously exercised its discretion in the case.

This literal reading is inconsistent with established precedent. But the prior statute contained limiting language not present in the current statute. Former RCW 4.12.050(1) (2009) provides in relevant part:

Any party to or any attorney appearing in any action or proceeding in a superior court, may [disqualify a judge by motion and affidavit of prejudice]: PROVIDED, That such motion and affidavit is filed and called to the attention of the judge before he or she shall have made *any ruling whatsoever in the case . . . of which the party making the affidavit has been given notice*, and before the judge presiding has made any order or ruling involving discretion

(Emphasis added to emphasize limitation.) There is no similar limitation in RCW 4.12.050(1)(a). Arguably, under the current statute, the party requesting a new judge need not have been given notice of the matter over which the trial court previously exercised discretion. The parties do not discuss this change in the statute and how it impacts prior decisions.³

³ The dissent argues that former RCW 4.12.050 and current RCW 4.12.050(1)(a) should be read similarly, despite the noted difference in language. The dissent suggests this must be done to preserve a litigant's fundamental right to an impartial decision-maker. We disagree.

Due process and the appearance of fairness doctrine require judicial disqualification if the judge is biased or if the judge's impartiality may be reasonably questioned. *Ryna Ra*, 144 Wn. App. at 704-05. These rights are independent of

Nevertheless, it is not necessary for us to resolve this preliminary issue. Even if we resolved it in Taylor's favor, we would decide the substantive issue now rather than remand the substantive issue for the superior court to decide. In the interest of judicial economy, an appellate court may consider an issue that is likely to occur following remand if the parties have briefed and argued the issue in detail. *Philadelphia II v. Gregoire*, 128 Wn.2d 707, 716, 911 P.2d 389 (1996). The issue of whether Taylor is permitted to assert a necessity defense is a purely legal issue that has been fully briefed and argued by the parties. Were we to remand without resolving this substantive issue, the parties would find themselves back before us in due time and after much expense. Judicial economy compels us to decide the substantive issue now.

B. NECESSITY DEFENSE

Taylor contends the superior court erred when it reversed the district court and held he could not assert the defense of necessity. We review de novo whether a defendant proffered sufficient evidence to merit presentation of a defense to a jury. *State v. Fry*, 168 Wn.2d 1, 11, 228 P.3d 1 (2010).

RCW 4.12.050. Taylor did not assert below that due process or the appearance of fairness doctrine required the trial judge to disqualify himself. Rather, Taylor relied on RCW 4.12.050.

The Sixth Amendment to the United States Constitution and article I, sections 21 and 22 of the Washington Constitution guarantee a criminal defendant the right to defend against criminal allegations. “The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations.” *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). “A defendant’s right to an opportunity to be heard in his defense, including the rights to examine witnesses against him and offer testimony, is basic in our system of jurisprudence.” *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010).

This right is not absolute. A defendant does not have a constitutional right to present irrelevant evidence. *Id.* Therefore, if Taylor cannot demonstrate a colorable necessity defense, he may not present evidence relevant to that defense.

“[A]n act is justified if it by necessity is taken in a reasonable belief that the harm or evil to be prevented by the act is greater than the harm caused by violating the criminal statute.” *State v. Aver*, 109 Wn.2d 303, 311, 745 P.2d 479 (1987). To raise the defense of necessity, a defendant must show by a preponderance of the evidence: “(1) [the defendant] reasonably believed the commission of the crime was necessary to avoid or minimize harm, (2) the harm sought to be avoided was greater than the harm resulting from a violation of the law, (3) the threatened harm was not brought about by the

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defendant, and (4) no reasonable legal alternative existed.”⁴ *State v. Ward*, 8 Wn. App. 2d 365, 372, 438 P.3d 588 (citing *State v. Gallegos*, 73 Wn. App. 644, 650, 871 P.2d 621 (1994); 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTION: CRIMINAL 18.02, at 292 (4th ed. 2016)), *review denied*, 193 Wn.2d 1031, 447 P.3d 161 (2019). The parties largely focus on the fourth element, which we believe is dispositive.

Taylor relies on *Ward*. There, Ward broke into a pipeline facility and closed a valve to stop the flow of tar sands oil. The State charged Ward with burglary in the second degree. *Id.* at 368-69. He asserted a necessity defense and argued he broke into the facility and closed the valve to protest the use of tar sands oil, which he believed significantly contributed to climate change. He argued his act was necessary because the government had failed to take meaningful action to address climate change. *Id.* at 369. Before trial, the court granted the State’s motion in limine to prevent Ward from presenting evidence of necessity. *Id.* A jury found the defendant guilty. He appealed and argued the trial court erred by disallowing his necessity defense. Division One of this court agreed.

⁴ Our Supreme Court has explicitly adopted the “reasonable legal alternative” standard. *State v. Vander Houwen*, 163 Wn.2d 25, 31-32, 177 P.3d 93 (2008). Although the dissent suggests different standards, *Vander Houwen* is controlling authority.

Division One discussed Ward’s evidence with respect to the first three elements of his necessity defense and determined the evidence was sufficient for those elements. *Id.* at 372-75. Division One then discussed Ward’s evidence with respect to the fourth element. Ward offered evidence of his more than 40 years of participation in environmental movements and causes, which had largely failed to address climate change. *Id.* at 375. Ward also submitted proposed testimony from three experts that the fossil fuel industry’s influence over political institutions rendered traditional legal avenues unreasonable as a means of addressing the climate emergency. *Id.* The court held, “Whether [the defendant’s] evidence was sufficient to establish that his history of failed attempts to address climate change revealed the futility of supposed reasonable alternatives was a question for the jury.” *Id.* at 376.

We contrast *Ward* with *State v. Higgins*, 2020 MT 52, 399 Mont. 148, 458 P.3d 1036. Higgins was concerned about climate change, he lobbied legislators, organized rallies, and engaged in civil disobedience to educate the public. But when Higgins entered a pipeline facility, damaged property, and shut off the flow of oil, the State charged him with criminal trespass and felony criminal mischief. He asserted a common law necessity defense. The State filed a motion to prevent him from asserting the defense, and the trial court granted the State’s motion. A jury found Higgins guilty. On

appeal, Higgins argued the trial court erred by disallowing his common law necessity defense.

The *Higgins* court discussed the common law necessity defense and characterized the fourth element of its necessity defense as “consistent with *United States v. Schoon*, 971 F.2d 193 (9th Cir. 1991).” *Higgins*, 399 Mont. at 153. Similar to Washington, the fourth element is “no reasonable lawful alternatives to breaking the law.” *Id.*

With respect to this fourth element, the *Schoon* court discussed two concepts. One concept, indirect civil disobedience, involves violating a law or interfering with a government policy that is not, itself, the object of protest. The other concept, direct civil disobedience, involves protesting the existence of a law by breaking that law or by preventing the execution of that law in a specific instance in which a particularized harm would follow. *Schoon*, 971 F.2d at 196 (citing Note, *Applying the Necessity Defense to Civil Disobedience Cases*, 64 N.Y.U. L. Rev. 79, 79-80 & n.5 (1989)). The *Schoon* court held that the defense of necessity is never available in cases involving indirect civil disobedience. *Id.* at 197.

The Montana Supreme Court reasoned that Higgins, who was not challenging the law of criminal trespass or criminal mischief, had engaged in indirect civil disobedience.

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Higgins, 399 Mont. at 154-55. It, therefore, concluded that the common law defense of necessity was not available to him. *Id.*

The necessity defense does not apply to persons who engage in civil disobedience by intentionally violating constitutional laws. This is because such persons knowingly place themselves in conflict with the law and, if the law is constitutional, courts should not countenance this. There are always reasonable legal alternatives to disobeying constitutional laws. Examples of reasonable legal alternatives include protests on public property, educating the public, and petitioning elected officials. Should these legal alternatives not produce legislative changes, a protestor still may not engage in criminal conduct. “People are not legally justified in committing crimes simply because their message goes unheeded.” *United States v. Montgomery*, 772 F.2d 733, 736 (11th Cir. 1985).

One court persuasively wrote:

The necessity defense was never intended to excuse criminal activity by those who disagree with the decisions and policies of the lawmaking branches of government [A] court in allowing the defense would be making a negative political or policy judgment about [the current law]. Judgments of that type, however, are not the province of *judge (or jury)* under the separation of powers established by our Constitution.

United States v. Kabat, 797 F.2d 580, 591-92 (8th Cir. 1986) (emphasis added).

Another court persuasively wrote:

[A] defendant’s legal alternatives will rarely, if ever, be deemed exhausted when the harm of which he complains can be palliated by political action. . . . While legally sanctioned forms of activism might not have achieved an *immediate* halt to [the harm they seek to stop], appellants cannot claim they have no legal alternatives merely because their law-abiding efforts are unlikely to effect a change in policy as soon as they would like. A contrary holding would be tantamount to giving an individual carte blanche to interpose a necessity defense whenever he becomes disaffected by the workings of the political process.

United States v. Ayala, 289 F.3d 16, 26-27 (1st Cir. 2002) (internal quotation marks and citation omitted).

The dissent suggests that a jury should always decide whether one who violates a constitutional law should be found guilty. We agree. But a defendant is not entitled to receive a jury instruction that violating the law is permitted.

Jury nullification occurs in a trial when a jury acquits a defendant, even though the members of the jury believe the defendant to be guilty of the charges. This may occur when members of the jury disagree with the law . . . or believe that the law should not be applied in that particular case. Nullification is a juror’s knowing and deliberate rejection of the evidence or refusal to apply the law because the result dictated by law is contrary to the juror’s sense of justice, morality, or fairness.

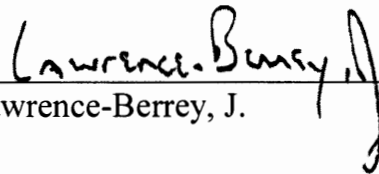
State v. Nicholas, 185 Wn. App. 298, 301, 341 P.3d 1013 (2014). In *Nicholas*, we concluded that a defendant was not entitled to a jury instruction that allowed him to argue in favor of jury nullification. We said, “[C]ourts recognize that jury nullification occurs

in practice but we will not promote it or educate jurors about nullification.” *Id.* Where reasonable legal alternatives exist so that violating the law is not necessary, a jury instruction allowing the jury to acquit is tantamount to promoting jury nullification.

At its essence, the question presented is whether a person who desires change in government policy may abandon reasonable but unsuccessful legal alternatives and adopt *illegal* alternatives. Our Supreme Court has not answered this question. We answer no. A person who engages in civil disobedience is not the typical defendant who historically has been entitled to assert a necessity defense. A person who engages in civil disobedience is not faced with an emergency and required to quickly choose between a bad illegal choice and a worse legal choice. Taylor, like other persons engaged in civil disobedience, intentionally placed himself in conflict with the law. He planned the protest, knew it violated the law, and proceeded forward. As noted by the *Kabat* court, the necessity defense was never intended to permit judges or juries to allow people to ignore constitutional laws. *Kabat*, 797 F.2d at 591-92; *see also* 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW: NATURE OF THE DEFENSE OF NECESSITY § 10.1(a) at 158 n.14 (3d ed. 2018) (citing several authorities for the proposition that persons charged with trespass or obstruction may not assert the necessity defense).


CONCLUSION

Taylor had reasonable legal alternatives to protest the use of railcars to transport coal and oil. He testified about these alternatives. Simply because these alternatives did not bring about legislative change does not permit Taylor to commit crimes or courts to ignore constitutional laws. To the extent *Ward* authorizes people to intentionally violate constitutional laws when protests and petitions are unsuccessful, we disagree with it. We remand to the district court for proceedings consistent with this opinion.



Lawrence-Berrey, J.

I CONCUR:



Pennell, C.J.

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FEARING, J. (dissent) —

A man may break the words of the law, and yet not break the law itself ... where the words of them are broken ... through necessity. Reniger v. Fogossa (1551) 75 Eng. Rep. 1, 32, 31;1 Plowd. 1.

Accused George Taylor and law professor amici curiae present, in their appellate briefs, a primer on climate change and civil disobedience. In turn, they issue a Jericho trumpeter's call for local and global civic intervention to stall an inexorable increase in carbon emissions and greenhouse gases that precipitate a rise in the earth's temperature and presage a collapse of the planet's ecosystem and human society. Reverend George Taylor, on a more limited scale, seeks to prevent a conflagration resulting from a railroad oil tanker car derailing and to avert the spilling and spewing of grimy coal dust from railroad coal cars while traversing downtown Spokane. But, contrary to Taylor's and the professors' focus, this appeal centers on the banal question of whether an accused possesses a right to present his case to the jury when his facts support a defense under the defense's recognized elements.

The district court correctly ruled that George Taylor presents facts to support the defense of necessity to the charges of trespass and obstructing a train. Any other ruling would violate Taylor's constitutional rights to a jury trial and to the presentation of a complete defense. Therefore, I dissent. I also dissent from the majority's ruling that the superior court judge had no obligation to honor Taylor's notice of disqualification.

Before elaborating on the facts, the procedure, and the law, I first wish to declare what this dissent is not about. This dissent takes no position as to whether George Taylor should be convicted or acquitted of the charges of obstructing a train or of trespassing. The opinion only concludes that a jury should determine Taylor's guilt or innocence.

This opinion also takes no position on whether climate change is occurring, the extent of any occurrence, or humankind's contribution to any climate change. This opinion takes no position as to whether coal or oil trains contribute to climate change or whether oil tankers or coal cars passing through downtown Spokane pose a danger. Nevertheless, this court must accept the facts as presented by Reverend George Taylor and in a light most favorable to him. Those facts support such factual propositions.

Liberals and environmentalists should not deem my dissent and our sister division's recent decision, in *State v. Ward*, 8 Wn. App. 2d 365, 438 P.3d 588, *review denied*, 193 Wn.2d 1031, 447 P.3d 161 (2019), a victory for a progressive agenda. Civil disobedience is color blind at least as to the colors red and blue. Right wing causes are just as amenable as left wing causes to social protest and defiance of law. Cheryl K.

Chumley, Analysis/Opinion, *Civil Disobedience Can End the Coronavirus Stupidity*, WASH. TIMES, Apr. 16, 2020, <https://www.washingtontimes.com/news/2020/apr/16/civil-disobedience-can-end-coronavirus-stupidity/>. Some liberals only recognize the legitimacy of law breaking as to acts on behalf of liberal causes, while some conservatives deny the rightfulness of civil disobedience by liberals.

In recent weeks, conservatives, to the dismay of many liberals, have protested state governors' social distancing orders resulting from the coronavirus, and President Trump has encouraged disobedience of governors' quarantine orders, if not his own administration guidelines. Andrew Restuccia & Sabrina Siddiqui, *Trump Backs Protests Against Governor's Stay-at-Home Orders*, WALL. ST. J., Apr. 17, 2020; Marty Johnson, *Trump Ally Compares Coronavirus Protestors to Rosa Parks*, THE HILL, Apr. 18, 2020, <https://thehill.com/homenews/administration/493484-trump-ally-compare-coronavirus-protestors-to-rosa-parks>. Parishioners have attended churches in violation of rules prohibiting congregations from congregating. Danielle Wallace, *Louisiana Pastor Breaks House Arrest to Hold Sunday Service Amid Coronavirus Stay-at-Home Orders*, FOX NEWS Apr. 26, 2020, <https://www.foxnews.com/us/louisiana-pastor-house-arrest-stay-at-home-order-coronavirus-tony-spell>. Dallas salon owner Shelley Luther defied state pandemic restrictions, after which the Texas Supreme Court ordered her immediate release from jail. Tyler Olson, *Texas Supreme Court Orders Dallas Salon Owner Released as Abbott Bans Jailing Citizens for Lockdown Violations*, FOX NEWS, May 7,

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2020, <https://www.foxnews.com/politics/abbott-issues-executive-order-eliminating-jail-as-punishment-for-violating-coronavirus-restrictions>. In solidarity with Luther, United States Senator Ted Cruz flew from Houston to Dallas for a haircut in Luther's Salon a la Mode. *Ted Cruz Gets Haircut at Salon Whose Owner Flouted Orders*, AP NEWS, May 8, 2020, <https://apnews.com/ef035b6c551b44ad26c7e5da7ff83166>. Some Washington county sheriffs refuse to enforce Governor Jay Inslee's stay-at-home orders in addition to earlier having declined to implement new state gun laws. Bradford Betz, *Washington County Sheriff Says He Won't Enforce Governor's Stay-at-Home Order*, FOX NEWS, April 22, 2020, <https://www.foxnews.com/us/washington-county-sheriff-wont-enforce-governors-stay-at-home-order>; Ryan Gados, *Several Sheriffs in Washington State Counties Refuse to Enforce New Gun-Law Measure*, FOX NEWS, February 11, 2019, <https://www.foxnews.com/us/sheriffs-in-conservative-counties-in-washington-refuse-to-enforce-new-gun-law>.

Before the district court, the State argued, in George Taylor's prosecution, that civil disobedients should accept punishment as part of the act of disobedience, and the State erroneously asserted that Rosa Parks paid her \$10 fine and \$4 court costs when convicted for her refusal to relinquish her seat on the Montgomery public bus. This opinion takes no side as to whether George Taylor should willingly accept punishment for violating Washington statutes, and thus this opinion takes no stance in the debate among civil disobedients as to whether the social protestor should willingly submit to his

or her punishment as opposed to defending the charges. Some protestors accept punishment under the violated statute as essential to civil disobedience and as a method of drawing further attention to the evil protested. According to this view, jail arouses the conscience of the community over its injustice. The act of civil disobedience is incomplete until the dissident enters prison.

Other civil disobedients deny that they violated the law such that submitting to punishment would be contrary to sound principles. These demonstrators do not challenge the rule of law or the need for an ordered society, but deem a particular law, policy, or practice morally repugnant. Still other lawbreaking protestors refuse to accept the authority of the criminal justice system because of the system's arbitrary rules, discriminatory practices, brutality, and inhumanity.

FACTS

Because we must read the evidence in a light most favorable to George Taylor and draw all reasonable inferences from the evidence, the reader should gain a full picture of the conduct of Taylor and the motivations behind his behavior. The majority opinion misses important subtleties in the facts.

In short, on September 29, 2016, George Taylor, with other members of Veterans for Peace, stood on a BNSF Railway mainline track near the intersection of Trent Street and Crestline Street in the industrial neighborhood of eastern Washington's principal city, Spokane. Taylor refused to step from the track when confronted by a railway police

officer. He lingered on the track as a means of protesting climate change, the contribution to global warming by BNSF Railway coal and oil train cars, and the proximate danger caused by coal and oil cars lumbering through downtown Spokane.

During a hearing before the district court, George Taylor presented the testimony of three experts and himself, the content of which testimony expands my short synopsis of the facts. The experts addressed climate change, the danger of oil tankers, and the nature of and success of civil disobedience. In turn, the State presented the testimony of a BNSF Railway police officer.

Steven Running, a professor of Global Ecology at the University of Montana, testified on behalf of George Taylor. Running served as a chapter author for the 2014 U.S. National Climate Assessment and as lead author for the Intergovernmental Panel on Climate Change – IPCC Fourth Assessment Report in 2007. He currently chairs the NASA Earth Science Subcommittee and is a member of NASA’s Science Advisory Council. Running testified, not only about global warming, but warming in Washington State.

According to Professor Steven Running, state climate records show a temperature increase of three-tenths of a degree Fahrenheit in Washington State during each decade since 1950. Based on current increases of greenhouse gases and carbon emissions and based on average increases in temperature, computer model projections predict

temperatures in Washington State will rise twelve to fourteen degrees Fahrenheit by 2100. The temperature increases will flood the Puget Sound Basin.

Over the last fifty years, according to Steven Running, Washington mountain snowpack has consistently melted earlier in succeeding years. The pack now begins to melt two weeks earlier than it did in 1950. Based on scientific data, Running and other climatologists predict Washington's current summer water runoff levels will decrease by thirty to fifty percent by 2040. Washington rivers will encounter lower flows by the end of each ensuing summer.

Professor Running testified that Washington forests are particularly vulnerable to climate change. The number of forest fires has accelerated dramatically in Washington State. Continuing increases in temperature will double or triple the area burned by forest fires in Washington State. In turn, climate change has caused major forest insect epidemics.

According to Steven Running, if humankind fails to take steps to significantly halt climate change, a stable functioning global society will cease by 2100. Not every human will be dead, but the changes will cause such disruption worldwide that the earth will encounter chaos. Even if the human population now chooses to significantly lower emissions, average temperatures will increase by four degrees by the end of the century, which increase will still cause catastrophic results. Running insists on an overwhelming scientific consensus to the statistics he provided to the district court.

According to Steve Running, from 1970 to 1985, oil caused most carbon emissions. From 1985 to 2005, coal and oil were equal carbon emitters. For the last fifteen years, coal has been the largest carbon emitter because of China's burst in use of coal. China purchases significant amounts of coal from Montana and Wyoming. The coal passes through Spokane on trains during its travel to Pacific harbors.

Fred Millar testified by declaration for George Taylor. Millar is a recognized international analyst in nuclear waste storage and transportation, an expert on industrial chemical use, transportation, and accident prevention, and a planner for emergency responsiveness and homeland security. In his testimony, Millar lamented a lack of adequate preparedness and emergency response protocols to protect public safety in the event of a crude oil train derailment, spill, and explosion. He characterized the damage associated with derailment of trains carrying crude oil as an imminent and grave harm. Governmental accident data and regulatory impact analyses estimate an ongoing, almost monthly, occurrence of United States crude oil releases by railroad derailments, some with oil spills and fires. Some oil and coal car derailments occurred recently in Montana and Oregon and involved trains that traveled through Spokane.

Tom Hastings, an expert on nonviolent resistance and a professor at Portland State University, testified for George Taylor. Hastings opined that civil disobedience brings social change. He presented historic examples such as the Boston Tea Party and nonviolent and unlawful protests for woman's suffrage, the labor movement, and the

iconic African American civil rights movement. Women and minority would not have gained advances in American society without civil disobedience.

Professor Tom Hastings testified that Reverend George Taylor acted in the manner of a quintessential nonviolent civil resister. Taylor acted calmly and peaceably. He acted transparently, cared for other's physical and psychological well-being, and submitted to arrest peacefully. These methods ultimately beget public policy change.

According to Tom Hastings, peaceful civil disobedience is essential to attacking climate change. Our local, state, and national governments refuse to address or even recognize the threat of global warming. Based on the history given by George Taylor to Hastings, Taylor, according to Hastings, had taken reasonable legal alternatives to civil resistance, before September 29, 2016, without success. A nonviolent resister always exerts lawful methods, such as letter writing, lobbying, and imploring government representatives and officials, before engaging in civil disobedience.

Finally, George Taylor testified on his own behalf. Taylor served in the United States Navy for four years. He graduated from Princeton Theological Seminary and served as an ordained minister in the Presbytery Church USA for thirty-six years in five parishes. Taylor currently is the volunteer visitation pastor at All Saint's Lutheran Church in Spokane.

On September 29, 2016, George Taylor, with other military veterans, went to BNSF Railway railroad tracks to bring attention to City of Spokane executive and

legislative officers of the imminent danger that coal and oil trains present to city public safety and the present danger that the trains cause to the earth's ecology. Taylor particularly worries about train safety because his granddaughter attends Spokane's Lewis and Clark High School adjacent to mainline railroad tracks of BNSF Railway. One hundred and thirty trains pass through Spokane every day, many of which include coal cars and oil tankers. Taylor frets about a derailment of a car while passing through Spokane. Although he did not identify the location of the spills, Taylor averred that, in the year preceding September 29, 2016, trains derailed seven times.

George Taylor and his September 29 coconspirators intended to stop trains from moving by their standing on the railroad tracks. The group spoke publicly about their intentions when beginning the civil protest. Taylor and his cohorts would have remained standing indefinitely on the railroad tracks if not arrested. Nevertheless, law enforcement arrived within minutes.

George Taylor had earlier attempted other means to affect change with regard to the burning of fossil fuels and the traverse of downtown Spokane by oil trains. He sent letters to United States Senators Maria Cantwell and Patty Murray and United States Representative Cathy McMorris Rodgers. He also went to government offices to advocate the desired changes. He personally visited the office of, called, and sent e-mail to Representative McMorris Rodgers with no response from her. He delivered a petition against the railroad transporting coal and oil personally to the office of Congresswoman

McMorris Rodgers. Taylor always exercises his right to vote, and he votes for “green” candidates.

According to George Taylor, he and other environmental advocates pressured the Spokane City Council to adopt measures precluding the spread of coal dust from coal trains and bolstering the safety of oil tankers to prevent spillage in the event of a derailment. The City Council declined the demand. George Taylor participated in a Safer Spokane Initiative that placed on the city ballot a measure affording city government the authority to regulate trains passing through town. He testified at Army Corps of Engineers hearings on statewide environmental railroad issues.

According to George Taylor, by September 29, 2016, he had exhausted, without success, all legal means to promote environmental change. Taylor laments that the United States is retreating from cleansing the environment.

George Taylor concluded his testimony by averring that the public danger caused by the trains outweighed the damage caused by his standing on the railroad track. He deemed his protest on the railroad track necessary to prevent harm. His protest was an effective, if not the most or only effective, means of producing clean air for his children and grandchildren. Taylor conceded that his and other’s protest on September 29 may not have engendered immediate change, but he insisted that the cumulative effect of protests will provoke beneficial change in environmental policy. According to Taylor,

the environmental movement relies on the combined effect of numerous acts of civil disobedience.

Alan Dryer, a police officer employed by BNSF Railway, testified for the State of Washington. Despite Dryer being an employee of the railroad, the State commissioned him as a law enforcement officer, confirming the public nature of railroads and illustrating the ties between government and railroads beginning with the United States government's granting of free property to railroads and financing of major railroad construction. Civil disobedience often extends to corporations, whose decisions entail serious public consequences.

Alan Dryer, who arrested George Taylor, confirmed that oil and coal trains used the tracks on which Taylor stood. Because of the protest, BNSF Railway stopped train traffic. Dryer could see some of the stopped trains. Spokane serves as a funnel for train traffic, such that the stopping of the trains around the protest site caused a rippling effect, whereby trains outside of Spokane also ceased movement for an hour.

PROCEDURE

The State of Washington charged George Taylor, in Spokane County District Court, with criminal trespass in the second degree, under RCW 9A.52.080, and obstructing and delaying a train, in violation of RCW 81.48.020. Taylor gave notice to the State of the intent to assert the necessity defense. Taylor, in turn, filed a motion to allow this affirmative defense and to approve the calling of expert witnesses at trial to

support the defense. The State objected to the motion and requested that the district court deny George Taylor the opportunity to present the necessity defense.

After conducting an evidentiary hearing, the district court entered numerous findings of fact and conclusions of law. The findings included an entry that George Taylor, on September 29, 2016, believed he had exhausted all legal reasonable means to effect change. The March 13, 2018, findings and conclusions included an order authorizing Taylor to present his necessity defense at the upcoming jury trial.

On March 30, 2018, the State of Washington filed, with the Spokane County Superior Court, an application for a writ of review directed to the district court judge. The application claimed that the district court erred in authorizing the necessity defense. The application sought an order reversing the district court. The application also requested a stay of the pending district court trial until a full hearing before the superior court on the question of whether the district court erred. The application cited law concerning the issuance of a writ of review, but no legal argument about any error in the district court's decision.

On March 30, 2018, the superior court signed an order for issuance of writ of review and stay of district court proceedings. The order stayed a pending April 20, 2018 trial date.

The State of Washington gave no advance notice to George Taylor or his counsel when applying for the writ of review. Thus, any hearing for entry of the writ transpired

ex parte. A certificate of service shows that the State mailed the application, motion for stay, and affidavit in support of the application to George Taylor's counsel on April 2, 2018.

On April 4, 2018, George Taylor filed a notice of disqualification on the superior court judge who signed the order for writ. The superior court judge denied disqualification on the basis that he previously issued a discretionary ruling. An order denying disqualification recognized that the State gave no notice to Taylor's counsel before the State procured the order for writ of review.

LAW AND ANALYSIS

Superior Court Judge Disqualification

On appeal to this court, George Taylor challenges two court rulings: (1) the superior court judge's refusal to honor Taylor's notice of disqualification and (2) the superior court's reversal of the district court's order authorizing presentment of the necessity defense to the jury. The assertion of these two weighty assignments of error prolongs this opinion. I first address the notice of disqualification.

RCW 7.16.040 and .050 control the issuance and procedure behind the issuance of a writ of review. The former statute reads:

A writ of review shall be granted by any court, except a municipal or district court, when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, or one acting illegally, or to correct any erroneous or void proceeding, or a proceeding not according to the course of the common law, and there is no

appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law.

In turn, RCW 7.16.050 declares:

The application must be made on affidavit by the party beneficially interested, and the court may require a notice of the application to be given to the adverse party, or may grant an order to show cause why it should not be allowed, or may grant the writ without notice.

Although the statute allows issuance of the writ without notice, RCW 7.16.050 does not expressly allow ex parte contact between the judge and the applicant when the opposing party is already represented by counsel.

RCW 4.12.050 controls the disqualification of a superior court judge. The current version of the statute provides:

(1) *Any party to or any attorney appearing in any action or proceeding in a superior court may disqualify a judge from hearing the matter, subject to these limitations:*

(a) Notice of disqualification must be filed and called to the attention of the judge *before the judge has made any discretionary ruling* in the case.

....

(2) Even though they may involve discretion, the following actions by a judge do not cause the loss of the right to file a notice of disqualification against that judge: Arranging the calendar, setting a date for a hearing or trial, ruling on an agreed continuance, issuing an arrest warrant, presiding over criminal preliminary proceedings under CrR 3.2.1, arraigning the accused, fixing bail, and presiding over juvenile detention and release hearings under JuCR 7.3 and 7.4.

(Emphasis added.) An earlier version of RCW 4.12.050 controlled at the time of George Taylor’s trespass. That version lacked the language “subject to these limitations.” The current version of RCW 4.12.050 became effective on July 23, 2017, before entry of the

order for writ of review and the filing of the notice of disqualification. The parties do not discuss which of the two versions should apply in this appeal. This court proceeds on the assumption that the current version controls. I will also.

The State argues that George Taylor filed his notice of disqualification untimely because Taylor filed the notice after the superior court judge signed the order for a writ of review. In so arguing, the State ignores the impossibility of Taylor's filing the notice timely because of the State's own conduct. The State could have given notice to George Taylor or his attorney before obtaining the superior court judge's signature, but refused to do so. The State provides no explanation for this failure in courtesy. Under the State's theory, a party could rush to court and obtain an ex parte order, at the commencement of the case, from a judge the party knows will favor him or her or from a judge the party knows that the opposing party will wish to disqualify. The first party can then intentionally disadvantage the opponent.

I conclude for numerous reasons that the superior court judge erred when refusing to accept the notice of disqualification. First, George Taylor was not a party to the case, within the meaning of RCW 4.12.050, when the superior court signed the order for issuance of a writ of review because Taylor received no notice of the application for the writ. Second, George Taylor and his legal counsel had not appeared, within the meaning of RCW 4.12.050, when the superior court judge signed the order for writ, and Taylor had the right to disqualify one judge on his appearance regardless if the judge earlier

issued a discretionary ruling. Third, the State's reading of RCW 4.12.050 would deny a litigant his established right to disqualify one judge of his choice. Fourth, the exceptions to "discretionary rulings" found in RCW 4.12.050(2) echo the nature of the order for issuance of writ such that the order for writ should not be deemed a discretionary ruling. In my analysis, I conflate the first three reasons for concluding that the superior court judge needed to honor the disqualification notice.

A party may, as a matter of right, change judges on the timely filing of a motion and affidavit of prejudice, now a notice of disqualification, against a judge about to hear his cause on the merits. RCW 4.12.040, .050; *State v. Dixon*, 74 Wn.2d 700, 702, 446 P.2d 329 (1968). A party holds the right to one change of a judge without inquiry into the reasons for the change. *Public Utility District No. 1 of Klickitat County v. Walbrook Insurance Company*, 115 Wn.2d 339, 349, 797 P.2d 504 (1990). Following the timely filing of notice, the law deems that prejudice exists, and the judge to whom it is directed no longer has authority to act in the matter. *Harbor Enterprises, Inc. v. Gudjonsson*, 116 Wn.2d 283, 285, 803 P.2d 798 (1991).

If the litigant complies with the terms of RCW 4.12.050, the statute removes any discretion as to removal from the superior court judge. *Public Utility District No. 1 of Klickitat County v. Walbrook Insurance Company*, 115 Wn.2d 339, 343 (1990).

Thereafter, the judge to whom the notice of disqualification is directed is divested of authority to proceed further into the merits of the action. *Marine Power & Equipment*

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Co. v. Department of Transportation, 102 Wn.2d 457, 460, 687 P.2d 202 (1984); *Public Utility District No. 1 of Klickitat County v. Walbrook Insurance Company*, 115 Wn.2d at 343.

The right to remove one superior court judge also belongs to new parties brought into ongoing litigation. *Public Utility District No. 1 of Klickitat County v. Walbrook Insurance Company*, 115 Wn.2d at 343-44. Even if the superior court judge previously issued a discretionary ruling, a party who appears later in the case may disqualify the judge. *Public Utility District No. 1 of Klickitat County v. Walbrook Insurance Company*, 115 Wn.2d at 343. One must be a party to the action in question to waive the right to disqualify the judge who issues a discretionary ruling. *Public Utility District No. 1 of Klickitat County v. Walbrook Insurance Company*, 115 Wn.2d at 343.

I discuss numerous Washington decisions in order to accentuate this court's error in affirming the superior court. In *Public Utility District No. 1 of Klickitat County v. Walbrook Insurance Company*, 115 Wn.2d 339 (1990), the superior court judge issued a summary judgment ruling favoring the insureds at a time when the wrong insurance company was the named defendant. At the time of the ruling, the proper party insurer knew of the proceedings, agreed to be substituted as a defendant, and attended the summary judgment hearing. Still, the trial court had yet to sign the order of substitution. After being substituted as a defendant, the second insurance company filed an affidavit of prejudice against the judge who issued the summary judgment ruling. The Supreme

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Court held that the trial court judge committed error when refusing to disqualify himself despite the prejudice to the insureds. The court declared that a party's right to one change of judge takes priority over the orderly administration of justice.

In *State v. French*, 88 Wn. App. 586, 945 P.2d 752 (1997), the State applied to forfeit a bail bond and moved to join the bonding company as a party to the criminal prosecution. The defendant, after being convicted, fled the jurisdiction. After the bonding company entered a notice of appearance, the company filed an affidavit of prejudice against the trial judge. The judge, when entertaining the motion to forfeit the bond, refused to remove himself. This court reversed. Although the trial judge issued discretionary rulings, the bonding company had the right to demand disqualification once the company made an appearance. In a similar vein, George Taylor had the right to demand disqualification of the superior court judge on Taylor's appearance in the suit.

In *State ex rel. Goodman v. Frater*, 173 Wash. 571, 24 P.2d 66 (1933), Jay Allen obtained a judgment against Kitty and J.W. David, after which the superior court judge presided over proceedings supplemental to execution on the judgment. As a result of questioning the judgment debtors, Allen determined that the debtors transferred property to Fannie Goodman and that such property should be subjected to Allen's judgment lien. Allen obtained a show cause order directing Goodman to respond to a claim that she owned property subject to the lien. After being served with the order, Goodman filed an affidavit of prejudice and demanded a change in the judge. The superior court judge

refused to reassign the case because he had issued earlier rulings. On review before the Supreme Court, the high court reversed. When Goodman was added to the suit, she had the right to remove one judge. This right could not be denied because the judge already rendered discretionary rulings.

Although George Taylor may have been a named party to the suit at the time that the Spokane County Superior Court judge signed the order of writ, he was not a participating party. He had yet to be served with any process. The State did not bring Taylor in as a party to the suit until after the signing of the order.

In *State ex rel. Jones v. Gay*, 65 Wash. 629, 118 P. 830 (1911), W.M. Jones entered a plea of not guilty on a felony charge. At the arraignment, the superior court judge scheduled a trial date. Later that day, attorney Willett was hired to defend Jones. The following day Willett learned of the plea and the scheduling of the trial date. Two days later, Willett filed an affidavit for change of judge. Willett wanted to disqualify the judge who entered the plea and scheduled the trial date. The judge denied the motion to disqualify.

On petition for a writ of prohibition, in *State ex rel. Jones v. Gay*, the Washington Supreme Court reversed the superior court judge's refusal to remove himself from the proceedings. The Supreme Court might have rested its decision solely on the basis of the order setting the trial date not being a discretionary ruling, but the Supreme Court based its ruling on the ground that W.M. Jones' attorney did not earlier have an opportunity to

file the affidavit of prejudice. Similarly, George Taylor and his counsel had no opportunity to file the notice of disqualification before entry of the order for writ of review.

RCW 4.12.050 precludes the filing of a notice of disqualification by a party already present in the case only if the superior court judge has issued a “discretionary ruling.” RCW 4.12.050(2) excludes from the definition of “discretionary rulings” actions that include “[a]rranging the calendar, setting a date for a hearing or trial, ruling on an agreed continuance, issuing an arrest warrant, presiding over criminal preliminary proceedings under CrR 3.2.1, arraigning the accused, [and] fixing bail.” The order for the issuance of a writ signed by George Taylor’s superior court judge was similar in nature to the examples in RCW 4.12.050(2). The order arranged the calendar, stayed the district court trial, and directed filing of the district court record. All actions constituted preliminary proceedings.

In reviewing the refusal to honor the notice of disqualification, this appellate court does not know the circumstances under which the superior court judge signed the order for writ of review. We do not know whether the State’s attorney appeared in person before the judge and argued the merits of the State’s position. We do not know if anyone handed the superior court judge the law cited by the State about the issuance of the writ of review and whether the superior court reviewed that law. The record shows that the State handed the superior court no law concerning the necessity defense.

In *State ex rel. Mead v. Superior Court*, 108 Wash. 636, 185 P. 628 (1919), a decision on which the superior court relied, the Supreme Court ruled that an order to show cause is a discretionary ruling for purposes of disqualification of a superior court judge. Nevertheless, no Washington court has ruled that the issuance of an order for a writ of review constitutes a discretionary ruling. For all we know, the Spokane County Superior Court judge summarily signed the State's order for issuance of a writ without any weighing of competing factors. Certainly, the State did not afford George Taylor the opportunity to present competing factors so that the court could weigh them and exercise discretion before signing the order for writ.

Although RCW 7.16.050 bestows permission to grant the writ of review without notice, *City of Seattle v. Agrellas*, 80 Wn. App. 130, 136-37, 906 P.2d 995 (1995) holds that the respondent to the writ must receive notice before entry of the writ if the writ implicates speedy trial rights. The writ directed to the Spokane County District Court stayed George Taylor's trial and thereby stalled an impending trial date.

The decisions that I previously outlined were decided by Washington courts before the 2017 amendments to RCW 4.12.050. This court's majority emphasizes language added to RCW 4.12.050 in the 2017 amendments that reads "subject to these limitations," one of which limitations is the issuance of a discretionary ruling. The majority's underscoring of this amending language may imply an understanding that previous case law no longer controls. Based on policy reasons, principles of statutory

interpretation, and the legislative history behind the 2017 amendments, I disagree. I further note that, under the previous version of the statute, a party could also not file an affidavit of prejudice after a discretionary ruling, but Washington courts still allowed a party to remove the judge issuing the ruling if the party lacked an earlier opportunity to do so.

The Supreme Court has held that those coming before the court have a fundamental right to an impartial decision-maker and RCW 4.12.050 protects this right, although usually before a discretionary ruling. *Godfrey v. Ste. Michelle Wine Estates Ltd.*, 194 Wn.2d 957, 959, 453 P.3d 992 (2019). Nevertheless, no reason exists to deny this fundamental right when the opposing party gained an ex parte order at the beginning of litigation before one had any notice and an opportunity to file a notice of disqualification.

We must read a statutory amendment in light of earlier case law. *Neil F. Lampson Equipment Rental & Sales, Inc. v. West Pasco Water System, Inc.*, 68 Wn.2d 172, 175, 412 P.2d 106 (1966). In the absence of an indication to change case law, we must assume that new legislation is in line with our prior decisions. *Neil F. Lampson Equipment Rental & Sales, Inc. v. West Pasco Water System, Inc.*, 68 Wn.2d at 176. The 2017 amendments to the statute do not expressly prohibit a new party entering the litigation from disqualifying a judge previously rendering a discretionary ruling.

Legislative history serves an important role in divining legislative intent.

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State v. Bigsby, 189 Wn.2d 210, 216, 399 P.3d 540 (2017). The 2017 amendments were intended to allow disqualification without creating embarrassment to superior court judges by the allegation of prejudice and to declare what decisions constituted discretionary rulings, not to take a fundamental right away from a litigant. The Senate Judiciary Committee staff summary of the January 25, 2017 Senate Bill Report for SB 5277 (Wash. 65th Leg. Reg. Sess.) declares:

This bill is by request of the courts. It makes it easier for parties to understand what rulings are considered non-discretionary. Many different types of preliminary hearings are non-discretionary and listing them in this bill clarifies the law and rights of the parties. Clarity will reduce the motions and costs. Changing the language in the law from the term “prejudice” to “disqualification” is helpful to the court and parties. It is more accurate and some parties don’t like to use the term prejudice. *It has no effect on the rights of a party to seek a change of judge.*

(Emphasis added.)

In *Public Utility District of Klickitat County v. Walbrook Insurance Company*, 115 Wn.2d 339 (1990), the high court afforded an added party the right to disqualify a superior court judge who previously made a discretionary ruling. The Supreme Court focused on the words “any party” found in RCW 4.12.050. The court held that such language requires that one be a party to the action for the earlier discretionary ruling to preclude the party from removing the judge. The language “any party” remains in RCW 4.12.050 after the 2017 amendments.

This court determines to resolve the appeal regardless of whether the superior court should have honored the notice of disqualification. I question the ability of this court to do so. On the filing of the notice of disqualification, the superior court judge lacked any authority to render a ruling. *Harbor Enterprises, Inc. v. Gunnar Gudjonsson*, 116 Wn.2d 283, 285 (1991); *State v. Dixon*, 74 Wn.2d 700, 702 (1968). Thus, the superior court's order is null, and this court lacks any ruling to review on the merits.

Necessity Defense

Because this court resolves to address the merits of the appeal regardless of the superior court's authority, I do so also. The superior court also committed error when ruling the district court erroneously authorized George Taylor to present his necessity defense at trial. In affirming the superior court, this appeals court, in turn, rejects an even handed application of the necessity defense and, in particular, component four of the defense, the no reasonable legal alternative element. In affirming the superior court, this court ignores Washington precedent, creates new law, emasculates the meaning of the word "reasonable," endangers the survival of the necessity defense, diminishes a patriotic tradition, overlooks political reality, rejects the moral worth of civil disobedience, discounts the universal need for honorable lawbreaking, shuts the court's ears to the disaffected, usurps the role of the jury, and denies George Taylor the right to a fair trial.

Beginning in 1551, the common law recognized the defense of necessity to criminal charges despite the statute creating the crime admitting no such defense.

Reniger v. Fogossa (1551) 75 Eng. Rep. 1; 1 Plowd. 1. The necessity defense recognizes that justice and law enforcement are not always coterminous. Therefore, the law excuses an accused's violation of a discrete law when his or her action promotes a greater good for society.

The common law whittled four elements for the necessity defense: (1) the accused acted to avoid a grave harm, (2) the accused did not create the harm by his own conduct, (3) the harm sought to be avoided was greater than that committed, and (4) the accused lacked adequate legal means to avoid the harm. *People v. Gray*, 150 Misc. 2d 852, 853, 571 N.Y.S.2d 851 (1991). Some states now codify the defense and the codifications often add to or vary the common law elements. MODEL PENAL CODE § 3.02 (AM. LAW INST. 1985); COLO. REV. STAT. § 18-1-702; ME. STAT. tit. 17-A, § 103; MONT. CODE ANN. § 45-2-212; N.Y. PENAL LAW § 35.05; OR. REV. STAT. § 161.200; 18 PA. CONS. STAT. § 503; TEX. PENAL CODE ANN. § 9.22.

Washington courts, without legislative approval or ratification, have adopted the common law necessity defense. *State v. Diana*, 24 Wn. App. 908, 913-14, 604 P.2d 1312 (1979). In Washington, the accused may assert the necessity defense when circumstances cause the accused to take unlawful action in order to avoid a greater injury. *State v. Jeffrey*, 77 Wn. App. 222, 224, 889 P.2d 956 (1995). Washington has embraced the four common law elements of the necessity defense. *State v. Vander Houwen*, 163 Wn.2d 25, 31-32, 177 P.3d 93 (2008).

The State of Washington wishes this court to add elements to the common law defense in George Taylor's appeal. Therefore, I mention some elements added in other jurisdictions, but never adopted in Washington. A few states require the accused to show he or she sought to avoid an emergency and to avert pending imminent harm. *State v. Prince*, 71 Ohio App. 3d 694, 595 N.E.2d 376, 379 (1991); *People v. Gray*, 150 Misc. 2d at 853-54; *Egger v. State*, 817 S.W.2d 183, 186 (Tex. App. 1991); *Andrews v. People*, 800 P.2d 607, 609 (Colo. 1990); *State v. Dansinger*, 521 A.2d 685, 688 (Me. 1987). The Model Penal Code specifically rejects the imminence of harm requirement. MODEL PENAL CODE § 3.02 cmt. 3. Anyway, according to one court, the grave harm from pollution is imminent because it occurs every day. *People v. Gray*, 150 Misc. 2d 852, 862 (1991).

Some American jurisdictions also require the accused to establish the lack of legislative intent to exclude the accused's desired justification under the prosecuted circumstances. *Commonwealth v. Berrigan*, 325 Pa. Super. 242, 472 A.2d 1099, 1103 (1984), *rev'd*, 509 Pa. 118, 501 A.2d 226 (1985). Under this element, the defense is not available if, under the circumstances, the defense would conflict with some other provision of the law. *State v. Clownes*, 310 Or. 686, 801 P.2d 789, 796 (1990).

Finally, some jurisdictions demand that the accused establish a causal connection between his or her conduct and cessation of the harm sought to be averted. *United States v. Ayala*, 289 F.3d 16, 26 (1st Cir. 2002); *State v. Dansinger*, 521 A.2d at 688 (Me.

1987). Under this element, the action taken must be reasonably expected to avert the impending danger. *People v. Gray*, 150 Misc. 2d at 853-54.

Presumably, the Washington legislature could add elements to the necessity defense beyond the common law elements and even abolish the defense in civil disobedience cases, if not for all prosecutions. Nevertheless, despite the courts adopting the defense with its four elements decades ago, the legislature has taken no action to nullify the defense or add new elements.

George Taylor contends he fulfills all four elements of the Washington formulation of the necessity defense. As to elements one and three, courts generally recognize that the harms perceived by activists protesting environmental hazards far exceed those created by a trespass or disorderly conduct. *People v. Gray*, 150 Misc. 852, 857 (1991). In Taylor's appeal, the State of Washington only challenges the fulfillment of element four of the Washington test. This court's majority and I focus on this element, although I must later respond to the State's attempt to add more elements to the Washington test.

In some formulations of the necessity defense, the Washington courts frame the fourth element as demanding proof that "no" legal alternative exists or as denying the defense when "a legal alternative" subsists. *State v. Jeffrey*, 77 Wn. App. 222, 225 (1995); *State v. Gallegos*, 73 Wn. App. 644, 651, 871 P.2d 621 (1994); *State v. Diana*, 24 Wn. App. 908, 913-14 (1979). In this appeal, the State of Washington impliedly argues

that “no legal alternative” must exist, when citing *State v. Diana* and *State v. Gallegos* in its brief. Nevertheless, all courts, even federal courts, soften the element of “no legal alternative” with modifying adjectives such as “effective,” “viable,” “reasonable,” “adequate,” or “available.” *United States v. Bailey*, 444 U.S. 394, 410, 100 S. Ct. 624, 62 L. Ed. 2d 575 (1980); *Commonwealth v. Magadini*, 52 N.E.3d 1041, 1047 (2016); *Muller v. State*, 196 P.3d 815, 816 (Alaska Ct. App. 2008); *People v. Kucavik*, 367 Ill. App. 3d 176, 854 N.E.2d 255, 258, 304 Ill. Dec. 913 (2006); *People v. Gray*, 150 Misc. 2d 852, 853 (1991); *Andrews v. People*, 800 P.2d 607, 610 (Colo. 1990).

According to other jurisdictions, the legal alternative course of action must be “reasonable” to defeat the necessity defense. *United States v. Dorrell*, 758 F.2d 427, 431 (9th Cir. 1985); *People v. Cromwell*, 64 Misc. 3d 53, 104 N.Y.S.3d 825, 830, *appeal denied*, 34 N.Y.3d 979 (2019). As to the element of other legal alternatives, the accused succeeds if he or she establishes that other steps would be “futile.” *Commonwealth v. Magadini*, 52 N.E.3d at 1048; *Andrews v. People*, 800 P.2d at 610. The element does not demand that the accused show that he exhausted all conceivable alternatives, only that a jury could reasonably conclude that no alternatives were “available.” *United States v. Dorrell*, 758 F.2d at 431 (9th Cir. 1985); *United States v. Gant*, 691 F.2d 1159, 1164 (5th Cir. 1982); *Commonwealth v. Magadini*, 52 N.E.3d at 1049. To require the defendant’s conduct to be the “sole” alternative to averting the harm would render the defense meaningless. *People v. Kucavik*, 854 N.E.2d 255, 259 (2006).

WPIC 18.02, the necessity defense pattern jury instruction, declares the fourth element of the defense to be “no *reasonable* legal alternative existed.” *Washington Practice: Washington Pattern Jury Instructions: Criminal* 18.02, at 292 (4th ed. 2016 (WPIC)) (emphasis added). The Washington Supreme Court has impliedly approved WPIC 18.02. *State v. Vander Houwen*, 163 Wn.2d 25, 32 (2008). This court has ruled that, to show the absence of a reasonable legal alternative, the accused can demonstrate that she actually tried the alternative, she lacked time to try the alternative, or a history of futile attempts reveals the illusionary benefits of any alternatives. *State v. Parker*, 127 Wn. App. 352, 355, 110 P.3d 1152 (2005).

Washington law has never directly addressed whether the defendant succeeds by establishing that he believed he held no reasonable legal alternative or whether the jury must find the absence of reasonable, available, effective, and adequate alternatives. One jurisdiction deems the proper inquiry to be whether the defendant “reasonably believed” that there was no legal alternative to his actions. *People v. Gray*, 150 Misc. 2d 852, 865-66 (1991). This rule promotes an objective view because the accused must hold a reasonable belief. The State of Washington contends and the superior court ruled that element four presents an objective standard. I am inclined to agree with the State and superior court, but this agreement is immaterial to the outcome of this appeal.

The State contends that George Taylor presents only his subjective belief that he had no reasonable legal alternative. Even assuming such to be true, the jury could

conclude that Taylor's subjective belief was objectively a reasonable belief. Regardless, in addition to stating his belief, Taylor presented to the district court evidence of his many attempts to achieve his goal of ending the transport of oil and gas by railroad tankers and cars and his aim of imposing greater safety measures on the railroad and the lack of any response from government officials. Taylor presented testimony from his witnesses of the need for and effectiveness of civil disobedience in achieving Taylor's goals and the inability to bring change through alternative measures.

The State primarily argues that George Taylor had many other alternatives to civil disobedience as illustrated by his own actions. He could have demonstrated in legal locations. He could have written letters to the editor, sent letters to government officials, and met with his representatives in the state legislature and in the United States Congress.

The superior court adopted the State's contention and ruled that, because a democracy creates legal avenues of protest, alternatives must always exist. This court adopts the superior court's ruling. Such a ruling, however, negates the necessity defense in all civil disobedience cases since the accused can always protest legally, ask the government to change the law or its policies, and file voter initiatives. The ruling could even completely abrogate the necessity defense since the accused could have in advance asked legislators to adopt an exception to a statutory crime to fit his or her later circumstances. For example, a felon accused of unlawfully possessing a firearm when he grabbed a gun from and shot his attacker in self-defense could have earlier requested the

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legislature to fashion an exception to the crime of unlawful possession of a firearm when possession was needed to preserve one's life. *See State v. Houfmuse*, No. 34394-4-III (Wash. Ct. App. Sept. 5, 2017) (unpublished),

http://www.courts.wa.gov/opinions/pdf/343944_unp.pdf. One might consider this hypothetical absurd because the felon did not know in advance the need to wrest the gun from his attacker, but, for reasons examined later, it is equally nonsensical to require one to futilely and repeatedly beseech the legislature and executive officials to adopt urgently needed measures shunned by the government.

The New York court, in *People v. Gray*, 150 Misc. 2d 852 (1991), presents a rational approach to the fourth element of the necessity defense. In *People v. Gray*, the government charged the accused with disorderly conduct as a result of participating in a demonstration at the Queensboro Bridge in opposition to the opening to vehicular traffic of a lane previously reserved for bicycles and pedestrians during evening rush hours. The government argued that the accused could not assert the necessity defense because he could petition and lobby the Department of Transportation and elected officials to close the lane to vehicles. The court rejected that argument. The accused testified to a long history of attempts to prevent the harm he perceived, including regular consultations with Department of Transportation officials to propose measures to encourage walking, cycling, and the use of mass transit in order to relieve traffic congestion with its accompanying pollution. The accused previously engaged in petitioning, letter writing,

phone calling, leafletting, and lobbying to no avail. Other groups had pressed government officials to comply with the Clean Air Act. The court noted that a history of futile attempts by others will meet the no-legal alternative requirement.

State v. Ward, 8 Wn. App. 2d 365 (2019) adopts the teachings of *People v. Gray*. The jury convicted Kenneth Ward of second degree burglary after he entered a Kinder Morgan facility and closed a pipeline valve. The closure stopped the flow of Canadian tar sands oil to refineries in Skagit and Whatcom Counties. Ward sought to protest the continued use of tar sands oil, which he contended significantly contributed to climate change. Ward also sought to remonstrate against inaction by government to meaningfully address a crisis of climate change. The trial court denied Ward the opportunity to present evidence as to his political beliefs and the peril of climate change.

On appeal, in *State v. Ward*, the State argued that Kenneth Ward's offer of proof failed to establish the elements of the necessity defense. The State contended that Ward failed to forward evidence of a reasonable belief that his protest could minimize climate change. According to the State, Ward only inconvenienced the pipeline company. The court responded that Ward did not need to prove that he actually minimized climate change only that the reason he broke the law was in an attempt to minimize the danger.

The State of Washington, in *State v. Ward*, also argued that Kenneth Ward had legal alternatives available. The court answered that Ward offered sufficient evidence to create a question of fact on the availability of reasonable legal alternatives. Ward

testified to the narrowing of the window for action on climate change to the point where the populace needed immediate, emergency action. Ward offered evidence of forty years of experience in various environmental movements, the numerous attempts he exerted to address climate change, and the failure of those efforts. Ward offered testimony by pipeline industry expert Eric de Place, professor and climate campaigner Bill McKibben, and professor of political science Martin Gilens, to the effect that the fossil fuel industry's influence over political institutions renders traditional legal avenues unreasonable as a means of addressing the climate emergency.

Our court's ruling today rejects our sister division's opinion in *State v. Ward* for two foreign decisions: *People v. Higgins*, 2020 MT 52, 399 Mont. 148, 458 P.3d 1036 and *United States v. Schoon*, 971 F.2d 193 (9th Cir. 1991). Neither foreign decision should be followed.

In *People v. Higgins*, the Montana Supreme Court ruled that that the Montana legislature had codified the necessity defense into a defense entitled compulsion, not necessity. MONT. CODE ANN. § 45-2-212. The statute severely limited the necessity defense from its common law articulation. The statute required the defendant to show he acted "under the compulsion of threat or menace of the imminent infliction of death or serious bodily harm." Civil disobedience obviously does not comport with the Montana statute.

In *United States v. Schoon*, 971 F.2d 193 (9th Cir. 1991), the federal Court of Appeals announced an awkward and unworkable distinction between “indirect civil disobedience” and “direct civil disobedience.” The court purportedly saved the necessity defense for direct civil disobedience and barred the defense in indirect civil disobedience cases. The court defined “direct civil disobedience” as violating the law or preventing the execution of the law that constitutes the subject of the protest. “Indirect civil disobedience” involves violating a law or interfering with a government policy that is not itself the object of the protest. *Schoon* is not good precedent to follow by Washington courts because all federal courts, unlike Washington and other state courts, narrow the necessity defense from its common law parameters. Also, the Ninth Circuit announced a decision on an issue never briefed by the parties.

This court promotes the *Schoon* court’s distinction of indirect and direct civil disobedience, but then ignores the distinction and rules that George Taylor had other alternatives to protesting. This court then holds that civil disobedience, even direct civil disobedience, can never provide a defense because alternatives to protesting always exist. The Ninth Circuit, in *United States v. Schoon*, similarly abandoned its distinction when ruling that the civil disobedient, Gregory Schoon, showed no cognizable harm when protesting United States policy in Central American because congressional action authorized the American policy of providing financial aid and military support to

paramilitaries in El Salvador and the accused could seek congressional change. The *Schoon* court's reasoning would also apply to direct civil disobedience.

I now return to this appeal's facts to assess whether George Taylor failed as a matter of law to show the lack of other reasonable legal alternatives to avert the harm. When addressing the sufficiency of evidence for purposes of asserting a defense to the jury, this court must view the facts in favor of Taylor. *State v. Ward*, 8 Wn. App. 2d 365, 372-73 (2019). In its brief, the State cites a newspaper article about recent events in support of its version of the facts. Therefore, in addition to reviewing district court testimony, I cite articles that confirm Taylor presented sufficient facts that, if believed, fulfilled the fourth element of the necessity defense.

The State emphasizes that George Taylor could seek political change through proselytizing government officials and proposing voter initiatives. In fact, Taylor's district court testimony mentioned the Safer Spokane coal and oil train initiative that he and others promoted. The initiative, Spokane Proposition 2, would have imposed a \$261 fine on the owner of each rail car containing an uncovered coal shipment or containing oil that had not been treated to reduce vapor pressure at flashpoint. Kip Hill, *Spokane Voters Reject Fines for Coal, Oil Trains Traveling through Downtown*, Spokesman Rev., Nov. 7, 2017, <https://www.spokesman.com/stories/2017/nov/07/spokane-voters-reject-fines-for-coal-oil-trains-tr/>. In November 2017, Spokane citizens voted to reject the initiative. Hill, *supra*. The Committee to Protect Spokane's Economy, a political group

funding the effort to defeat the measure, raised \$264,000, most of which came from BNSF Railway contributions. Hill, *supra*. By comparison, Taylor's committee, Safer Spokane, raised \$7,000, which came from individual donors. Hill, *supra*. The defeat of the initiative reinforces Taylor's evidence of the lack of viable alternatives for him.

When arguing that George Taylor possessed other reasonable legal alternatives to gaining his political goals, the State assumes that all persons have equal access to government officials and equal ability to influence public policy and laws. Of course, the truth lies elsewhere. Our court's reasoning that the accused always possesses the alternative of cajoling elected representatives and government officials also shows sightlessness to the realities of the political process. All candidates and office holders, regardless of party affiliation, will meet with and listen to large donors, not pensioner military veterans or retired ministers lacking a largesse. Money buys access to power. George Taylor's congresswoman refuses to respond to him.

The opponents of the Safe Spokane initiative, mostly large corporations, raised thirty-seven times the amount of money as George Taylor and his colleagues. The money purchased advertisements that promoted fears spread by BNSF Railway and its benefactors. In addition to purchasing politicians, the rich can buy advertisements in newspapers, purchase radio and television time, and rent billboard space.

An ineffective method of procuring change is an unreasonable alternative to civil disobedience, and, according to George Taylor's evidence, contacting legislators and

filing initiatives to adopt measures combating climate change has been ineffective. This court's instruction to Taylor to continue with lobbying efforts parallels Zeus' dictate to Sisyphus to forever roll a boulder up a hill in Hades.

I now respond to the State of Washington's advocacy to add other elements to Washington's necessity defense. In addition to arguing that George Taylor lacked evidence of no reasonable legal alternative, the State contends George Taylor presented no facts that his trespass on railroad property will lower carbon emissions or will avoid the greater harm of climate change. The State uses a recent newspaper article that reports China's building of an insane number of coal fired plants such that Taylor's civil disobedience could not have any impact on global warming.

Washington State does not require causation as an element in establishing the necessity defense. Anyway, George Taylor forwarded sufficient testimony for a jury to consider causation even if Washington adopted this element. In addition to presenting evidence from expert witnesses of the chaotic world our descendants face, one expert talked about the efficacy of civil disobedience in bringing policy and social change. Whereas Taylor may be unable to directly influence Chinese government policy, his protests could prevent shipment of coal to China and provide an example for protests of potential activists in China.

The State of Washington's argument about causation assumes that the protesting defendant must show that his protest alone will render change. This position fails to

recognize the expansive impact of numerous small protests throughout the nation, if not the world. Every protest plays a role in social change. One protest begets other protests.

The State of Washington also contends that George Taylor presented no evidence that his trespass blocked oil trains. Once again, Washington does not have a causation element to the necessity defense. Anyway, the record contains evidence of many trains in the environs of Spokane being stopped because of Taylor's actions. Taylor would have continued to obstruct trains indefinitely had he not been arrested.

The State asserts that George Taylor presented no evidence of a possibility of a train derailment or explosion in Spokane. Nevertheless, Taylor and Fred Millar referred to derailments of trains that passed through Spokane.

The Spokane City Council approved sending the oil tanker initiative, Proposition 2, to the voters after a catastrophe in Mosier, Oregon, following the fiery derailment of a train carrying crude oil that had passed through downtown Spokane hours earlier. Hill, *supra*. On June 3, 2016, a Union Pacific train with ninety-six tank cars carrying Bakken oil from North Dakota to U.S. Oil and Refining in Tacoma derailed in the Columbia River Gorge near Mosier. 42,000 gallons of oil spilled. Several cars caught fire after large explosions in tanker cars, despite all of the tanker cars being of standard modern design. Twenty government agencies responded to the fire. Mosier residents were evacuated, and the town sewage treatment plant closed. An oil sheen formed on the Columbia River. *Oregon Train Derailment Spills Oil, Sparks Fire*, WJTV.COM, June 3,

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2016, <https://www.wjtv.com/news/oregon-train-derailment-spills-oil-sparks-fire/966700802/>; Andy Giegerich, *In Mosier, Angry Residents, Complicated Tasks Ahead*, PORTLAND BUS. J., June 9, 2016, https://www.bizjournals.com/portland/morning_call/2016/06/in-mosier-angry-residents-complicated-tasks-ahead.html; Aaron Mesh, *Oil Train Spilled 42,000 Gallons of Crude Oil in Columbia River Gorge Crash*, WILLAMETTE WK., June 6, 2016, <https://www.wweek.com/news/2016/06/06/oil-train-spilled-42000-gallons-of-crude-in-columbia-river-gorge-crash/>.

In 2015, a train derailment in rural eastern Montana spilled 35,000 gallons of crude oil and forced the evacuation of thirty people. In 2013, the derailment of an oil train in Lac-Megantic, Quebec, flattened the city's downtown and killed forty-seven people.

This appeal holds ramifications beyond the necessity defense, which ramifications impact fundamental and critical constitutional rights. United States Constitution Sixth Amendment and Washington Constitution article I, section 22 preserve a right to a jury trial to the accused. *Duncan v. Louisiana*, 391 U.S. 145, 155-56, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968); *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). Both the Sixth and Fourteenth Amendments to the United States Constitution and article I, sections 21 and 22 of the Washington Constitution guarantee an accused the right to present a defense. *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006); *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992). When

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reading the constitutional protections together, the trial court must afford an accused a meaningful opportunity to present a complete defense to a jury. *Holmes v. South Carolina*, 547 U.S. at 324; *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); *State v. Ward*, 8 Wn. App. 2d 365, 370-71 (2019).

The constitutional right to present a defense extends to the right to call witnesses on one's behalf. *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *State v. Smith*, 101 Wn.2d 36, 41, 677 P.2d 100 (1984). An accused possesses a fundamental right to present defensive evidence so long as such evidence is relevant and not excluded under an evidentiary rule. *Washington v. Texas*, 388 U.S. at 23. The right to present evidence and call witnesses extends to the necessity defense. *State v. Ward*, 8 Wn. App. 2d at 371-72.

By its ruling, this court ignores the critical role of juries in the American legal system. This court instead concludes that judges, not jurors, should decide the presence of no reasonable legal alternative to civil disobedience. According to this court, judges know best as to whether civil disobedience may ever be reasonable in advocating social change.

Judges should be the last persons to decide the viability of civil disobedience within the rubric of the necessity defense. A judge assumed and keeps his or her position by conforming to societal norms and befriending and flattering others in power. A judge campaigns for office on a platform of law and order, not disobedience and discord. A

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judge wishes to protect the status quo, which inevitably benefits him or her. The demonstrator annoys a judge because the protestor clogs the court system with moralistic ranting. My first reaction as a judge to George Taylor's appeal was: don't plague me with your whining about being charged with a crime resulting from your petty, inconsequential trespass on some isolated railroad track in support of your bleeding heart sympathies.

By its ruling, this court usurps a jury's role in determining what constitutes reasonable behavior. This court holds that, as a matter of law, petitioning government officials or legislative representatives is always a "reasonable" method of averting harm. Nevertheless, the law particularly leaves to jurors the question of "reasonableness." *Stephens v. Omni Insurance Co.*, 138 Wn. App. 151, 170, 159 P.3d 10 (2007), *aff'd sub nom. Panag v. Farmers Insurance Co. of Washington*, 166 Wn.2d 27, 204 P.3d 885 (2009). Stated differently by another court, assessing what is reasonable in any given set of circumstances will give rise to a jury question. *Towe v. Sacagawea, Inc.*, 357 Or. 74, 347 P.3d 766, 778 (2015).

This court's modification of established Washington law and imposition of new restrictions on the necessity defense represent a significant change in public policy that should be reserved for the state legislature or the Washington Supreme Court. This court's ruling, for the first time in Washington State, brands all civil disobedience as objectionable and worthy of punishment. This court thereby ignores the rich American

history, beginning with our Revolution, of honorable lawbreaking. This court also overlooks the universal and compelling nature of civil disobedience in altering social practices and government policy.

Political dissent and protest gave birth to the United States. Revolutionary colonists engaged in civil disobedience over King George III's tariffs when dumping tea in Boston's harbor. The Tea Party initiated continuous acts of disobedience by patriots. After the creation of the United States, civil disobedience precipitated necessary change when appeals to the government went unanswered. Suffragettes and desegregationists risked and gave their lives, while awakening a nation to their righteous causes through civil disobedience.

This court's viewpoint would punish African-American student protestors arrested and charged with trespassing after they sat at the Greensboro F.W. Woolworth segregated lunch counter. After all, the students could press the all-white Greensboro City Council to adopt laws requiring desegregation in public places of business. This court's ruling would return a fugitive slave to an angry and vengeful master because the slave or the slave's white abetter could petition the United States Congress to repeal the Fugitive Slave Act. This court's ruling protects the property rights of an over ground railroad, but denies the validity of an underground railroad.

One might suggest that my slave example is extreme, but, if we take the evidence in the light most favorable to George Taylor, his cause is also extreme. According to the

evidence presented by Taylor, climate change will wreak global havoc, if not destroy human existence on earth, unless humankind takes immediate action.

Instead of recognizing the legitimacy of civil disobedience, this court sides with the detractors of civil disobedience, who demand from their government strict application of endless laws. The opponents of civil disobedience fear disorder, if not chaos, being unleashed on society. History disproves this fear. Few people violate the criminal law out of conscience and to achieve a higher goal. Instead, the cost of defending oneself, the inconvenience of the criminal prosecution process, the scorn received from polite society and government officials, and the potential punishment on conviction limit instances of civil disobedience.

Adversaries of civil disobedience also worry that the necessity defense will promote fraud. To the contrary, no historic example confirms the use of the necessity defense by one who did not truly believe in the proffered cause.

The question of whether to allow the necessity defense in the context of civil disobedience strikes at the heart of American society and its justice system. According to its critics, the necessity defense for civil disobedience sanctions departures from legality and encourages private determinations of law. The nation should be governed by laws, not men and women, and those laws should be made through representatives chosen by the majority. The accused's professed unselfish motivation in violating the law, rather than a justification, identifies a form of arrogance that organized society cannot tolerate.

But the civil disobedient does not ask to be a law unto himself or herself. Instead, the remonstrator submits his or her case to the jury, sitting as the conscience of the community, and the disobedient's peers decide whether he or she made an objectively correct choice of values. George Taylor's Spokane County jury could conclude that Taylor did not seek the lesser of two evils or that he had a reasonable alternative to trespass and obstruction.

The necessity defense for civil disobedients does not engender limited lawlessness. Instead, the defense provides an essential safety valve to vent frustration in a democratic and libertarian society. The necessity defense allows the airing of views by those most in need of a hearing, those frustrated by the workings of the political system and those lacking representation in the halls of legislative bodies. Recent events confirm the need for courts to listen to unheard voices.

The stone and steel of criminal statutes can afford to bow on occasion in order to promote justice. A skyscraper that cannot bend with the wind eventually collapses.

John Wycliffe, Jan Hus, Martin Luther, Thomas More, Galileo Galilei, Anne Hutchinson, Roger Williams, Thomas Paine, John Brown, Harriet Tubman, Saad Zaghloul, Susan B. Anthony, Emily Davison, Emmeline Pankhurst, Dorothy Day, Mohandas Gandhi, Evelyn Thomas Butts, Martin Luther King, Jr., Nelson Mandela, John Lewis, Joseph McNeil, Steven Biko, Muhammed Ali, Russell Means, Andrei Sakharov, Aleksandr Solzhenitsyn, Larry Kramer, Lech Walesa, Vaclav Havel, Liu Xiaobo, the

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anonymous rebel in Tiananmen Square, and the Estonian singers, along with innumerable lesser known or anonymous dissidents constructively influenced history with civil disobedience. One might draw an inference from this appeal's facts that someday history will add George Taylor and scores of his coconspirators to the roll call of honorable lawbreakers who precipitated political transformation. In resolving this appeal, this court must only draw reasonable inferences from the facts before it, and I cannot predict or discern if such an inference is reasonable. I pray, however, for the sake of my grandchildren and great-grandchildren, that the inference becomes a reality.



Fearing, J.

APPENDIX B —

Findings of Fact and Conclusions of Law in *State v. George Taylor*,
Spokane County District Court No. 6Z0117975

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IN THE DISTRICT COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON)
)
Plaintiff,) No. 6Z0117975
)
v.) PA# 16-6-90725-2
) RPT# CT I, II: 2016-00950725
GEORGE E. TAYLOR) RCW CT I: 9A.52.080-M (#17735)
WM 12/15/39) CT II: 81.48.020-M (#63031)
) FINDINGS OF FACT AND
Defendant(s).) CONCLUSIONS OF LAW
)

THIS MATTER having come on for hearings on June 26, 2017 and August 21, 2017 pursuant to the Defendant's pre-trial Motion to Allow Affirmative Necessity Defense and to Call Expert Witness at Trial. Those present included Defendant GEORGE TAYLOR, and Counsel for the Defendant, ERIC CHRISTIANSON, MARK HODGSON, and RACHEL OSBORN, and Counsel for the State, MARGARET MACRAE and RACHEL E. STERRET. The Defendant, after the hearings on the motion, obtained counsel KAREN S. LINDHOLT and ALANA L. BROWN.

1 The Defendant presented testimony of Dr. Steven Running and Professor Tom Hastings, both
2 of whom who are qualified as experts upon motion in their respective fields, testified regarding their
3 respective fields, and were subject to cross-examination by Counsel for the State of Washington.
4 Defendant George Taylor testified and presented the Declaration of Fred Millar, submitted by
5 agreement of the parties. The State of Washington presented the testimony of Karl Dreyer, Burlington
6 Northern Santé Fe Corp (BNSF) police officer. The COURT having heard the live testimony,
7 reviewed both parties briefing on the motion and reviewed the stipulated declaration, and heard
8 Counsels' oral arguments, now makes the following:
9

10
11 **FINDINGS OF FACT**
12

- 13 I. On September 29, 2016, the defendant was a part of a group of approximately twenty-four
14 (24) protestors who walked onto BNSF Railway property and stood on the mainline railroad
15 tracks in front of a BNSF freight train near the intersection of Crestline and E. Trent
16 Avenue.
17
18 II. The protestors were on BNSF property which is private property and posted with signs that
19 read "No Trespassing".
20
21 III. The defendant knew that he was entering private property and that he did not have
22 permission to enter that property.
23
24 IV. The defendant took actions to safely protest, including placing a phone call to BNSF to tell
25 the company that there was a planned protest at one of their properties and reviewing train
schedules to plan the protest when no trains were scheduled to be on the tracks, believing
these actions would prevent the risk of harm.
V. While on the property and tracks, some of the protestors chanted, held up signs and
displayed large banners protesting the transport of coal and oil.

- 1 VI. For the safety concerns of the protestors, BNSF employees and the public, trains in the
2 general vicinity were held idling at the railway yard.
- 3 VII. BNSF and other law enforcement officers responded to the area.
- 4
5 VIII. The protestors, including the defendant, were advised to leave and warned by law
6 enforcement that they would face arrest if they did not leave.
- 7 IX. Three protestors, including the defendant, politely refused to leave the property and
8 remained on the railroad tracks.
- 9
10 X. The three remaining protestors were escorted off the railroad tracks, peacefully arrested and
11 transported to the Spokane County Jail where they were charged and released.
- 12 XI. **The Defendant, Mr. George Taylor testified:**
- 13
14 1. His actions on September 29, 2016 were acts of civil disobedience to bring attention to
15 the Legislative and Executive Branches about the imminent harm he perceived was
16 occurring;
- 17
18 2. He believed his actions and the actions of the other protestors were necessary to avoid or
19 minimize the imminent danger to the Earth due to climate change and the serious and
20 imminent risk of danger to safety of Spokane citizens in the downtown area where
21 BNSF transports volatile oil.
- 22
23 3. He believed the danger to the public by BNSF transporting coal and oil through the city
24 of Spokane was far greater than his act of trespassing on the railroad tracks;
- 25
4. He stated that he and the other protestors took measures to protest safely and minimize
any potential harm caused by their actions by providing notice of the protest to BNSF,
planning the protest when no trains were scheduled to approach and making themselves
aware of railroad safety;

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5. He stated that the protestors' purpose was much more than to just garner media attention, they believed their actions would be an impetus to effect actual change;
6. He believes members of his family are at risk for asthma symptoms resulting from the environmental hazards of the transportation of coal;
7. He testified that he is seriously concerned about his granddaughter's safety as she attends Lewis & Clark High School near the downtown area where the trains travel. His concerns were that she and others would suffer tragic consequences if the oil cars derailed or erupted in flames due to the volatile nature of the oil and inadequate construction of the railroad cars.
8. He has voted for "green" legislation in support of his concerns;
9. He has met with all three Washington State Senators;
10. He has personally visited, called and sent emails to Representative McMorris Rodgers with no response.
11. He delivered a petition against the railroad transporting coal and oil personally to the office of Representative McMorris Rodgers.
12. He has testified three times on the dangers and risks of BNSF's decision to transport coal and volatile oil through the downtown corridor.
13. He supported the Spokane City Council's proposed ordinance to intervene in dangerous conduct of BNSF,
14. He is a member of the Sierra Club and Safer Spokane;
15. He noted that there have been seven derailments in 2017 and believes it is necessary to act now to minimize imminent harm caused by derailments and oil spills.

1 16. He is discouraged by the lack of progress on this issue but still hopes that the
2 government will do the right thing;

3 17. He believes he has exhausted all other reasonable legal means.
4

5 **XII. State's Witness BNSF Officer Dryer testified:**

6 1. The protestors presented a dangerous situation because the trains travel through the area
7 of the protest;

8 2. The advance call of the protestors was to the BNSF office in Texas and the details were
9 too vague to support stopping the trains;

10 3. BNSF held trains in the vicinity at the railroad yard to protect the public;

11 4. Local law enforcement was contacted;

12 5. He responded to the scene and spoke to Mr. Taylor. He asked him to leave or face arrest;

13 6. The defendant refused to leave but was cooperative during the arrest;

14 7. BNSF had to check the tracks for any tampering before train track could resume. No
15 evidence of tampering was found.
16

17
18
19 **XIII. Defense Expert Witness Dr. Steven Running, Professor of Global Ecology at the
20 University of Montana, testified:**

21 1. He served as co-Lead Chapter Author for the 2014 U.S. National Climate Assessment,
22 currently chairs the NASA Earth Science Subcommittee, is a member of the NASA
23 Science Advisory Council and a member of the NASA Science Advisory Council. As
24 Lead Author for the 4th Assessment of the Intergovernmental Panel on Climate Change,
25 he shared the Nobel Peace Prize with Al Gore in 2007.

2. There are three basic facts that climate scientists see (a) Greenhouse gasses and carbon
dioxide are going into the atmosphere and have been measured for over 50 years; (b)

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Because of these increasing greenhouse gasses, the global air temperature has gone up and in the last 20 years has accelerated significantly; and (c) That, what we as climate scientists propose, is to reduce carbon emissions necessary to stabilize the global climate in the future.

3. The global impact is caused by human behavior – the largest source of CO2 emissions is from burning coal, the second is from burning oil and the third is from burning natural gas;
4. If carbon emissions continue to grow, all climate models project higher global temperatures in the coming decades.
5. With current national policies, temperatures in the Pacific Northwest could rise 10 Degrees Fahrenheit. Reducing carbon emissions reduces the CO2 in the atmosphere proportionally, which reduces temperature increases and impacts proportionally.
6. The failure to act more forcefully to abate GHG emissions will lead to harms that are severe, imminent, and irreparable, both at a global level and regionally in the Inland Northwest.
7. China is the largest consumer of coal and that coal comes from Montana and Wyoming and is shipped through our area. China is trying to reduce its CO2 emissions and is committed to reducing the amount of coal they import from the United States.
8. Global warming is increasing rapidly and is the result of the collective practices of global citizens. Individual choices such as driving cars as well as each country's government policies all contribute to the problem of global warming. It is crucial that this issue continues to be addressed and action taken before the damage to our planet is too great.

1 **XIV. Defense Expert Witness Tom Hastings, Assistant Professor of Conflict Resolution, at**
2 **Portland State University testified:**

- 3
4 1. He teaches courses on the efficacy of nonviolent civil resistance and has served as an
5 Academic Advisor to the Washington DC-based International Center on Nonviolent
6 Conflict and is a member of the Governing Council of the International Peace Research
7 Association. He is also Co-Chair of the Peace and Conflict Studies Association.
8
9 2. Civil resistance is effective in bringing about social changes. Drs. Erica Chenoweth and
10 Maria Stephan examined 323 case studies from 1900-2006, both violent and nonviolent,
11 and found that nonviolent civil resistance is not only approximately twice as effective as
12 violent civil resistance, but also that nonviolent civil resistance is more likely than not to
13 succeed in achieving the stated goal (See Stephan, M.J. & Chenoweth, E. *Why Civil*
14 *Resistance Works*", Columbia University Press, 2011.)
15
16 3. Reverend Taylor's actions are an example of the non-violent civil resistor.
17
18 4. Civil resistance includes outreach to the media and others to educate fellow citizens and
19 ultimately change public policy;
20
21 5. Some examples of civil disobedience resulting in significant changes include the Boston
22 Tea Party, Women's Suffrage which resulted in the right of women to vote, and Labor
23 Actions which resulted in the creation of unions to protect worker's rights;
24
25 6. Each resulted in victory where nonviolent resistance had been used. The same result
could be accomplished for environmental protections, resulting in institutional,
corporate, and public policy change.

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- 7. When all other legal means have been taken, and those attempts have not resulted in change, the judicial branch is the last best hope. The most notable cases are (1) *Brown v. Board of Education*; (2) *Plessy v. Ferguson*; and (3) Rosa Parks.
- 8. Civil resistance is breaking a law to uphold a higher law when the threat is imminent and every legal means has not resulted in policy change.
- 9. He stated experts agree that climate change is conducive to a civil resistance campaign.

XV. **Defense Expert Fred Millar** is a recognized international analyst in nuclear waste storage and transportation and industrial chemical use, transportation and accident prevention, and emergency planning and homeland security.

- 1. His declaration addressed the lack of adequate preparedness and emergency response protocols around the nation to protect public safety in the event of crude oil train derailment, spills and/or explosion.
- 2. He stated the harm associated with the derailment of trains carrying BAKKEN crude oil is an imminent and grave harm. Governmental accident data and regulatory impact analyses estimate than an ongoing, almost monthly, occurrence of U.S. crude oil releases by rail derailments, some with oil spills and fire events. Such events have recently occurred with respect to trains carrying coal and oil products in Montana and Oregon, and involved trains that traveled through Spokane.

From the foregoing Findings of Fact, the Court now makes the following:

CONCLUSIONS OF LAW

1 I. The U.S. Constitution provides criminal defendants a Constitutional right to present a
2 complete defense, including presenting the Affirmative Necessity Defense, when legally
3 relevant.

4
5 II. The evidence must be relevant, although the threshold is low, "even minimally relevant
6 evidence is admissible". *State v. Darden*, 145 Wn.2d 612.

7
8 III. Rules for the Necessity Defense are purposefully flexible and calls for reasonableness in its
9 application, so that justice may be served. 38 New Eng. L. Rev. 3.

10 IV. Historically, the Necessity Defense has been allowed in numerous civil disobedience cases
11 in other state court on a case-by-case basis: (1) Protesting nuclear weapons – Oregon
12 (1977), Illinois (1978 and 1985), California (1979 and 1982), Pennsylvania (1989), Vermont
13 (1984), Michigan (1984 and 1985); (2) Protesting alleged corruption of county officials –
14 North Carolina (1988); (3) Anti-abortion protestors charged with Trespassing – Nebraska
15 (1990); (4) Catholic priest charged with malicious mischief for painting over billboards
16 advertising tobacco and alcohol – Chicago (1991); (5) Activists charged with illegally
17 supplying clean needles to protect people from the spread of the AIDs virus – Chicago and
18 California (1993).

19
20
21 V. While Washington courts have not officially recognized the Necessity Defense in civil
22 disobedience cases, several courts have allowed criminal defendants to raise this defense. In
23 1985, the Necessity Defense was allowed when doctors in Seattle protested the medical and
24 other effects of apartheid in South Africa at the home of the South African consul; and
25 again, in 1987 when Evergreen State College students were arrested for Trespass and
Disorderly Conduct when they also protested the effects of apartheid in South Africa.

1 VI. Other Washington courts have denied the use of the necessity defense in civil disobedience
2 cases. In 2017, climate activists charged with Sabotage and Burglary while protesting a
3 pipeline facility in Skagit County, responding to a call of action from the Standing Rock
4 pipeline protests in N. Dakota were denied the use of the Necessity Defense.
5

6 VII. A defendant may assert the common-law Necessity Defense when circumstances cause the
7 accused to take unlawful action to avoid a greater injury. *State v. Diana*, 24 Wn.App 908
8 (1979; *State v. Cozad*, 198 Wn.App 1007; WPIC 18.02
9

10 VIII. The defendant bears the burden of proof in asserting this defense and must satisfy four
11 prongs by a preponderance of the evidence: (1) he reasonably believed the commission of
12 the crime was necessary to avoid or minimize a harm; (2) the harm sought to be avoided
13 was greater than the harm resulting from the violation of the law; (3) the threatened harm
14 was not brought about by the Defendant; and (4) the Defendant believed no reasonable legal
15 alternative existed.
16

17 IX. In the present case, the defendant believed that his actions were necessary to avoid or
18 minimize the immediate harms of global change to the Earth.
19

20 X. The Defendant presented evidence that the harm sought to be avoided, the imminent danger
21 to the planet as well as imminent risk of harm to citizens of Spokane, including his
22 granddaughter was greater than the harm created when he and the other protestors violated
23 the law and were arrested for Obstructing or Delaying Train and 2nd Degree Criminal
24 Trespass.
25

XI. The harm that the defendant sought to prevent was not brought about by him or the other
protestors.

1 XII. The Defendant believed that he had exhausted all legal alternatives and that no other
2 reasonable alternative existed.

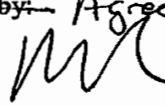
3 XIII. It is within the sole province of the jury, not the judge, to weigh the evidence, evaluate the
4 credibility of each witness, and decide the facts at issue in the case. The jury will ultimately
5 determine whether the Necessity Defense applies to the facts of the present case.
6


7 **ORDER**

8 Finding the Defendant has met the burden of proof by satisfying the four elements
9 required to present the Necessity Defense by a preponderance of the evidence, the Court
10 hereby grants the Defendant's motion to allow the Affirmative Necessity Defense to be
11 presented at trial and grants the Defendant's request to present expert witness testimony at
12 trial.
13

14
15 Dated: 3-13-18

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17 
18 JUDGE DERR R. HAYES

19 Presented by: Agreed as to form:
20  50783 for



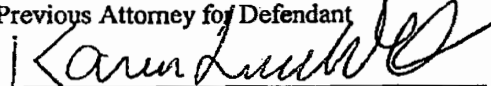
21 RACHEL E. STERETT
22 Deputy Prosecuting Attorney
23 WSBA #27141

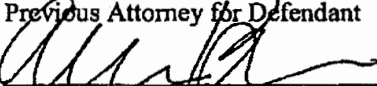
MARGARET MACRAE
Deputy Prosecuting Attorney
WSBA#50783

24 Agreed by:

25 W. Andrew from case
MARK HODGSON, WSBA #34176
Previous Attorney for Defendant

Rachael Osborn by KL
RACHAEL OSBORN, WSBA #21618
Previous Attorney for Defendant


KAREN LINDHOLDT, WSBA #24103
Attorney for Defendant


ALANA BROWN, WSBA #50018
Attorney for Defendant

APPENDIX C —

Application for Writ of Review in *State ex rel. Haskel v. Spokane County*
District Court, Spokane County Superior Court No. 18-2-01418-7

FILED
Court of Appeals
Division III
State of Washington
9/6/2019 3:09 PM

FILED
MAR 30 2018
Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

CN: 201802014187

SN: 1

PC: 16

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON, Ex Rel
LAWRENCE H. HASKELL

Petitioner,

vs.

SPOKANE COUNTY DISTRICT COURT,
JUDGE DEBRA R. HAYES,

Respondent,

GEORGE E. TAYLOR,

Defendant,

No.: 18201418-7

APPLICATION FOR WRIT OF REVIEW
OF DISTRICT COURT DECISION,
MOTION FOR STAY IN OF THE
PROCEEDINGS IN DISTRICT COURT,
AND AFFIDAVIT IN SUPPORT
OF APPLICATION

COMES NOW, LAWRENCE H. HASKELL, Spokane County Prosecuting Attorney, by and through the undersigned, Senior Deputy Prosecuting Attorney, RACHEL E. STERETT, and Deputy Prosecuting Attorney, MARGARET J. MACRAE, and petitions the above-captioned court for a Writ of Review, pursuant to RCW 7.16.040, directed to Judge Debra R. Hayes of the Spokane County

APPLICATION FOR WRIT OF REVIEW
OF DISTRICT COURT DECISION,
MOTION FOR STAY IN OF THE
PROCEEDINGS IN DISTRICT COURT,
AND AFFIDAVIT IN SUPPORT
OF APPLICATION

Page | 1

Lawrence H. Haskell, Prosecuting Attorney
Spokane County Prosecuting Attorney's Office
1100 W. Mallon Ave. - Spokane, WA 99216

1 District Court in cause number 6Z0117975 entitled *State of Washington vs. George Taylor*. Petitioner
2 is an interested party in that matter.

3 Petitioner requests the writ because Judge Hayes erred in her decision to allow Defendant
4 George Taylor to present a necessity defense in the prosecution against him. *See Attachment A -*
5 *Findings of Fact and Conclusions of Law, dated and filed March 13, 2018*. The basis of the decision is
6 not supported by the evidence in the record, applicable Washington statutes, or by case law and the
7 decision was in error.

8 Additionally, Petitioner requests this Court stay the continued proceedings in District Court in
9 matter 6Z0117975. The case is currently set for trial on April 20, 2018, and Defendant Taylor will
10 present his necessity defense to a jury. A stay is necessary to allow this Court time to consider this writ,
11 and to avoid any issue of double jeopardy if Defendant Taylor were to be found not guilty.

12 This Court has the authority to review a District Court's decision pursuant to RCW 7.16.040
13 and to issue a stay while reviewing the writ pursuant to RCW 7.16.080. A writ of review enables
14 limited appellate review of a judicial or quasi-judicial action when the remedy of appeal is
15 unavailable. *Saldin Sec., Inc. v. Snohomish County*, 134 Wash.2d 288, 306-07, 949 P.2d 370 (1998)
16 (collecting cases). Writs are only available in extraordinary circumstances where there is no plain,
17 speedy, and adequate remedy at law. *County of Spokane v. Local No. 1553, AFSCME, AFL-CIO*, 76
18 Wn. App. 765, 768, 888 P.2d 735 (1995). "A remedy is not inadequate merely because it is attended
19 with delay, expense, annoyance, or even some hardship." *State ex rel. O'Brien v. Police Court of*
20 *Seattle*, 14 Wn.2d 340, 347, 128 P.2d 332 (1942). Rather, there must be something about the lower
21 court's proceeding that renders it necessary for the higher court to exercise this extraordinary
22 jurisdiction. *Id.* at 348.

23 APPLICATION FOR WRIT OF REVIEW
24 OF DISTRICT COURT DECISION,
25 MOTION FOR STAY IN OF THE
PROCEEDINGS IN DISTRICT COURT,
AND AFFIDAVIT IN SUPPORT
OF APPLICATION
Page | 2

Lawrence H. Haskell, Prosecuting Attorney
Spokane County Prosecuting Attorney's Office
1100 W. Mallon Ave. – Spokane, WA 99216

1 Petitioner requests a writ because there is no other adequate remedy of law available and if the
2 decision is not reviewed before the District Court matter goes to trial, Petitioner will be prejudiced.
3 Petitioner only has the right to appeal a final decision or a decision that effectively abates, discontinues
4 or determines the case at hand. RALJ 2.2(c). The decision at issue here is an interlocutory order, and
5 not a final decision because the decision is limited to an intervening matter pertaining to the cause of
6 action, and does not decide the merits of the case. *Alwood v. Aukeen Dist. Court Comm'r Harper*, 94
7 Wash.App. 396, 400, 973 P.2d 12 (1999). Further, the decision did not in effect terminate Petitioner's
8 ability to prosecute the underlying matter. As such, Petitioner does not have a right to appeal the
9 decision. *See* RALJ 2.2(c). Finally, it is necessary to review the decision before Defendant Taylor
10 presents the defense to a jury. Petitioner will be further prejudiced if the decision is not reviewed before
11 trial and a writ of review is the only option available to Petitioner.
12

13 Petitioner submits that Judge Hayes has entered an order contrary to law and prejudicial to the
14 rights of the Petitioner, and prays for a Writ of Review directing Judge Hayes to certify to this court a
15 full transcript, record, and proceedings for the aforementioned 6Z0117975 matter to this Court at a
16 specified time and place. Thereafter, it is requested that this Court grant the application and order the
17 issuance of the Writ and stay of proceedings without further notice or hearing. RCW 7.16.050. It is
18 then requested that this Court schedule a hearing to review that record so that the reasonableness and
19 lawfulness of its decision therein may be determined.
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25 APPLICATION FOR WRIT OF REVIEW
 OF DISTRICT COURT DECISION,
 MOTION FOR STAY IN OF THE
 PROCEEDINGS IN DISTRICT COURT,
 AND AFFIDAVIT IN SUPPORT
 OF APPLICATION
 Page | 3

Lawrence H. Haskell, Prosecuting Attorney
Spokane County Prosecuting Attorney's Office
1100 W. Mallon Ave. – Spokane, WA 99216

1 DATED this 30th day of March, 2018.

2 LAWRENCE HASKELL
3 Spokane County Prosecuting Attorney

4 By and thru:

Rachel E. Sterett
5 Rachel E. Sterett, WSBA #27141
6 Deputy Prosecuting Attorney

7 SUBSCRIBED AND SWORN to before me this 30th day of March.



Julie T. Bowman
15 Notary Public in and for the State of
16 Washington, residing at: *Spokane*

J. Julie T. Bowman
17 My Commission Expires: *9/1/19*

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25 APPLICATION FOR WRIT OF REVIEW
OF DISTRICT COURT DECISION,
MOTION FOR STAY IN OF THE
PROCEEDINGS IN DISTRICT COURT,
AND AFFIDAVIT IN SUPPORT
OF APPLICATION

Page | 4

Lawrence H. Haskell, Prosecuting Attorney
Spokane County Prosecuting Attorney's Office
1100 W. Mallon Ave. - Spokane, WA 99216

APPENDIX D —

Ex Parte Order for Issuance of Writ and Stay of District Court Proceedings
in *State ex rel. Haskel v. Spokane County District Court*,
Spokane County Superior Court No. 18-2-01418-7

FILED

MAR 30 2018

Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

CN: 201802014187

SN: 2

PC: 3

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON, Ex Rel
LAWRENCE H. HASKELL

Petitioner,

vs.

SPOKANE COUNTY DISTRICT COURT,
JUDGE DEBRA R. HAYES,

Respondent,

GEORGE E. TAYLOR,

Defendant,

No.

18201418-7

ORDER FOR ISSUANCE OF WRIT
AND STAY OF DISTRICT
COURT PROCEEDING

This matter having come on upon the application of the petitioner, and affidavit in support thereof, for a Writ of Review directed to the Spokane County District Court requiring that District Court to certify to this court a transcript and record of the proceedings in *State of Washington vs. George Taylor*, District Court cause no. 6Z0117975, upon grounds stated in the affidavit that the court erred in allowing the necessity defense, and it appearing to the court that this is proper cause for the issuance of such writ, Now Therefore,

ORDER FOR ISSUANCE OF WRIT
AND STAY OF DISTRICT COURT PROCEEDINGS

Page | 1

Lawrence H. Haskell, Prosecuting Attorney
Spokane County Prosecuting Attorney's Office
1100 W. Mallon Ave. - Spokane, WA 99216

1 IT IS HEREBY ORDERED that a Writ of Review issue out of and under seal of this court to
2 Spokane County District Court commanding it forthwith to certify fully and return to this court at the
3 office of the clerk thereof, on or before 20 days from the date of this order a full and complete transcript
4 of the records and proceedings in said cause: the entire records of the pre-trial hearings in this case,
5 with the intent that the same be reviewed by this court as to the claim by petitioner that said proceedings
6 and decision were erroneous:

7 IT IS FURTHER ORDERED:
8

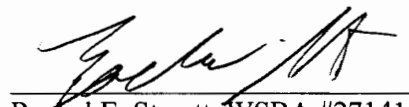
- 9 1. That a copy of said Writ, when issued by the clerk of this court, shall be served on Spokane County
10 District Court at least 20 days before the return dated above designated, in the manner required by
11 law for the personal service of Summons upon an individual;
- 12 2. That the transcript shall be prepared in the usual manner as for a RALJ appeal;
- 13 3. That on or before the return date above designated, petitioner shall pay to Spokane County the cost
14 of preparing and copying the record and transcripts to be returned;
- 15 4. That on or before the return date above designated, the parties shall agree in writing to a briefing
16 schedule and file a copy of the same with the court;
- 17 5. *State of Washington vs. George Taylor*, District Court cause no. 6Z0117975, is stayed pending the
18 disposition of said review by this court.
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1 DATED this 30th day of March, 2018.

2 3:30PM

3 
4 SUPERIOR COURT JUDGE
5 **HAROLD D. CLARKE III**

6 Presented by:

7 
8 Rachel E. Sterett, WSBA #27141
9 Deputy Prosecuting Attorney
10 Attorney for Petitioner
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APPENDIX E —

Notice Re Disqualification of Judge in *State ex rel. Haskell v. Spokane County District Court*, Spokane County Superior Court No. 18-2-01418-7

CN: 201802014187

SN: 5

PC: 1


FILED

APR 04 2018

Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

(Copy Receipt)

(Clerk's Date Stamp)

 <p>SUPERIOR COURT OF WASHINGTON COUNTY OF SPOKANE</p>
<p>State of WA, Ex Rel Lawrence Haskell, Plaintiff/Petitioner</p> <p>vs.</p> <p>George Taylor Defendant/Respondent</p>

CASE NO. 18-2-01418-7

NOTICE RE:
DISQUALIFICATION OF JUDGE

Clerks Action Required (ORCJ)

TO THE CLERK AND TO: Prosecuting Attorney's Office, Rachel Sterett, DPA

I. Certificate

1.1. I am: George Taylor, Defendant in the above entitled action;
(Name and Title)

1.2. I believe that a fair and impartial trial in this case cannot be had before: Judge Harold Clarke
(Judge)

1.3. No discretionary rulings as defined in RCW 4.12.050 have been made by the Judge I am disqualifying.
(and no notice provided)

1.4. I have not previously filed a disqualification of judge in this case.

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

4/4/2018 Spokane, Washington George Taylor
(Date and Place) Signature (moving)

A copy of this Notice Re: Disqualification of Judge shall be directed to the Court Administrator's Office and the Disqualified Judge. Pursuant to RCW 4.12.040 and 4.12.050 the Court Administrator's Office shall assign a new Judge for hearings in this matter.

NOTICE RE: DISQUALIFICATION OF JUDGE
(07/2017)

PAGE 1 OF 1

APPENDIX F —

Order Denying and Striking the Disqualification of Judge in *State ex rel.*
Haskel v. Spokane County District Court,
Spokane County Superior Court No. 18-2-01418-7

CN: 201802014187

1 **SN: 11**

2 **PC: 2**

FILED

MAY 07 2018

**Timothy W. Fitzgerald
SPOKANE COUNTY CLERK**

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7 **IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE**

8 STATE OF WASHINGTON, Ex Rel)
LAWRENCE H. HASKELL)

9)
10) **Petitioner,**)

11 **v.**)

12 SPOKANE COUNTY DISTRICT COURT,)
JUDGE DEBRA R. HAYES,)

13) **Respondent.**)

14 GEORGE E. TAYLOR,)

15) **Defendant.**)
16)

No. 18-2-01418-7

PA# 16-6-90725-2

**ORDER DENYING AND STRIKING THE
DISQUALIFICATION OF JUDGE**

17 **I. BASIS**

18 The Court set a hearing for April 16, 2018 to review Defendant Taylor's Notice of
19 Disqualification of Judge filed April 4, 2018 on the above captioned matter to determine if the
20 notice was untimely.

21 **II. FINDING**

22 After reviewing the case record to date, and the basis for the motion, the court finds that:

- 23 (1) On March 30, 2018, this Court granted Petitioner's application and ordered the issuance of
24 the Writ and stay of proceedings without further notice or hearing as requested.

25 **ORDER DENYING AND STRIKING THE DISQUALIFICATION OF
JUDGE**

Page 1

SPOKANE COUNTY PROSECUTING ATTORNEY
COUNTY CITY PUBLIC SAFETY BUILDING
SPOKANE, WA 99260 (509) 477-3662

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(2) Defense counsel was not given notice of the hearing in which the Writ was presented to the Judge, nor was defense counsel advised of which Spokane County Superior Court Judge would preside over the ex parte proceeding.

(3) The only notice received by defendant or defense counsel was a telephone call from the prosecuting attorney on March 30, 2018 at 2:59 p.m.

(4) The prosecuting attorney recalls that she advised defense counsel that a Writ would be filed that afternoon in Superior Court.

(5) Defense counsel recalls that the prosecuting attorney advised defense counsel that a Writ had already been filed that afternoon in Superior Court.

(6) On April 4, 2018, Defendant Taylor filed a Notice of Disqualification of Judge Harold Clarke III.

(7) Defendant Taylor's Notice of Disqualification is untimely because this Court had already made a discretionary ruling prior to the filing.

III. ORDER

IT IS ORDERED that: Defendant Taylor's Notice of Disqualification is denied and struck as untimely and the matter shall continue to be heard by this Court.

DATED this 7th day of May, 2018.

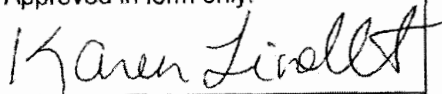


JUDGE HAROLD CLARKE III

Presented by:


RACHEL E. STERETT

Deputy Prosecuting Attorney
WSBA # 27141

Approved in form only:


KAREN S. LINDHOLDT

Attorney for Defendant
WSBA # 24103

APPENDIX G —

Order in *State ex rel. Haskel v. Spokane County District Court*,
Spokane County Superior Court No. 18-2-01418-7

CN: 201802014187

SN: 25

PC: 4

FILED

NOV 15 2018

**Timothy W. Fitzgerald
SPOKANE COUNTY CLERK**

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

STATE OF WASHINGTON, Ex Rel.,)	
LAWRENCE H. HASKELL,)	
)	
Petitioner,)	CASE NO. <u>2018-02-01418-7</u>
vs.)	
)	ORDER
)	
SPOKANE COUNTY DISTRICT COURT,)	
JUDGE DEBRA R. HAYES,)	
)	
Respondent,)	
)	
GEORGE E. TAYLOR,)	
)	
Defendant.)	

This matter came before the Court on Friday, October 26, 2018 upon the Writ of Review entered on March 30, 2018 in this matter. The Petitioner and the Defendant were present through counsel. The following attorneys were present: Samuel Comi for the State of Washington; Karen Lindholdt, Alana Brown, and Rachael Osborn for the defendant, George Taylor. These parties had submitted briefing before the hearing pursuant to a schedule and delivered their oral argument on the 26th. The Court then took the matter under advisement.

Relevant Procedural History

On September 23rd, 2016, the defendant, George Taylor, was arrested in Spokane County for trespassing onto property owned by the Burlington Northern Santa Fe Railroad. Mr. Taylor was charged with two misdemeanors, trespassing and obstructing a train. Mr. Taylor filed a motion

to allow the affirmative defense of necessity. The District Court conducted hearings in June and August of 2017 pursuant to the Defendant's motion. Following those hearings, the District Court gave an oral decision in the fall of 2016 granting the motion, and issued Findings and Conclusions and an Order (contained in those Findings and Conclusions) on March 13, 2018 confirming the decision to grant the motion. On March 30, 2018 the Petitioner requested a Writ of Review. This Court granted the request the same day.

Writ of Review

The Writ in this matter was issued under RCW 7.16.040. The Writ is available when a district court has exceeded its jurisdiction or acted illegally. A court is considered to have acted illegally when it has committed probable error and the decision alters the status quo or substantially limits the freedom of a party to act. Writs are limited to extraordinary circumstances where there is no plain, speedy and adequate remedy at law.

This Court agrees with the State's position that it has no adequate remedy to address its assignment of error as to allowing the defense of necessity at a pre-trial stage. If the Defendant is found not guilty of the underlying charges at trial after presenting his defense, no appeal rights attach on behalf of the State. In other words, the State would not be able to preserve its objection to the ruling if the verdict is adverse to it. Additionally, this Court holds the decision substantially alters the status quo, in that the trial now centers around not only the alleged criminal law violation but also the defendant's challenge to the position of certain politicians as to climate change.

The Court is aware of the case of *City of Seattle v. Agrellas*, 80 Wa. App. 130, 906 P.2d 995 (1995), which holds the Respondent to the writ is entitled to notice before the writ is entered if speedy trial is implicated. Here, there was no notice to the defendant before the writ was issued. There was an initial hearing held shortly after the Writ was issued, and the Court offered to expedite the hearing on the Writ, but ultimately the parties agreed to a briefing schedule and hearing date of October 26th. No issue was raised as to speedy trial in the briefs or at argument. Thus, that issue is not before this Court.

This Court holds that the Writ is the appropriate procedural remedy for the State to pursue under these circumstances. The remaining issue is whether the District Court decision to allow the necessity defense should be permitted to stand.

Necessity Defense

This Court can review whether the defense is available at this stage of the proceedings, as the District Court has conducted a hearing and entered findings based on that evidence. Accordingly, this Court can ascertain whether the Defendant has presented a sufficient basis for the necessity defense to the jury.

The defense of necessity is available to a defendant when the pressure of circumstances or the forces of nature causes the accused to take an unlawful action in order to avoid a harm that social policy deems greater than the harm resulting from the unlawful action. However, the defense is not available where the circumstances have been brought about by the accused, or where a legal alternative existed. See WPIC 18.02; State v. Gallegos, 73 Wn. App. 644, 871 P.2d 621 (1994).

The court in State v. Parker, 127 Wn. App. 352, 111 P 3d 1152 (2005) interpreted the standard of a legal alternative to be one of a reasonable legal alternative. At page 355 of the opinion the court holds that no reasonable legal alternative means the person asserting the defense has to show he “actually tried the alternative or had no time to try it, or that a history of futile attempts revealed the illusionary benefits of the alternative.”

The Defendant here has interpreted “reasonable” to be synonymous with effective; that is, not whether legal alternatives exist to protest climate change, but whether the attempts to utilize those alternatives to date have been effective. (see Defendant’s brief of October 2nd at Page 17). Additionally, the Defendant has defined reasonable to be defined by a subjective standard; that is, a standard as to whether he believes the alternatives are reasonable, as opposed to a reasonable person standard. (see Conclusions of Law XII of the District Court Findings and Conclusions; Page 17 of Defendant’s brief).

This Court declines to accept that the “reasonable legal alternative” is governed by the subjective view of the person asserting the defense. To adopt this view would mean a defendant could assert the position that they believed they could do nothing else, and the court would be compelled to accept that regardless of the legitimacy of the claim. This Court holds the standard should be a reasonably objective person. This Court also declines to hold the legal alternative must be effective. In the case at hand, the Defendant submits his own belief that because the political process is not currently offering the results he wants, then it’s not effective. This belies the nature of a political system. It is a system of rapid change at times and of no change at other times, either of which can be deemed good or bad, depending on your political point of view. The question before the Court should not be one subjective belief as to the actions of the political system, rather it should be whether one has access to the political process. The evidence in this case is that Mr. Taylor understands and has accessed the political process.

The Court holds the Defendant has not met his burden to present a necessity defense. Specifically, he has not shown, and cannot under the circumstances of this case, that he does not have a reasonable legal alternative to the charged acts as alleged by the State.

The Order of the District Court allowing the Necessity Defense is reversed.

DATED this 15th day of November, 2018.



HAROLD D. CLARKE
SUPERIOR COURT JUDGE

APPENDIX H —

Brief of Law Professors as *Amicus Curiae* in Support of Petitioner in
State ex rel. Haskel v. Spokane County District Court,
Court of Appeals No. 36506-9-III

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

STATE OF WASHINGTON,
Respondent,

v.

SPOKANE COUNTY DISTRICT COURT,
Judge Debra R. Hayes, Defendant

and

GEORGE E. TAYLOR,
Petitioner.

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF
PETITIONER

William P. Quigley*
Professor of Law
Loyola University New Orleans
College of Law
7214 St. Charles Avenue
New Orleans, LA 70118
T: 504.710.3074
quigley@loyno.edu

Alice Meta Marquardt Cherry
WSBA 52082
Climate Defense Project
2150 Allston Way, Suite 320
Berkeley, CA 94704
T: 847.859.9572
alice@climatedefenseproject.org

*Admitted to practice in the State
of Louisiana

Attorneys for Amici Curiae

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INTRODUCTION

This appeal has a simple focus: may a jury see and hear relevant evidence? The trial judge in this case ruled, after a hearing, that the jury could see and hear evidence supporting the defense of necessity at trial. The prosecution seeks to preclude the jury from doing so. The jury's right to view evidence, and its role as finder of fact — particularly as it relates to affirmative defenses in criminal cases — strikes at the core of constitutional law, public policy, and democracy itself.

Mr. Taylor engaged in civil disobedience to address the global emergency caused by the failure to mitigate climate change. Climate change, caused by the emission of greenhouse gases and the combustion of fossil fuels in particular, is already driving widespread destruction, loss of life and property, and business disruption. Scientists warn that continued emissions will drive the world into a state of uncontrollable heating, and that cascading effects could lead to catastrophe.

Civil disobedience has a long tradition in our country dating back to resistance against British tyranny. The ability of nonviolent civil disobedience to strengthen democratic values and institutions is well established, but that ability is thwarted when courts bar testimony regarding its justification and efficacy.

This Court should reverse the decision of the Superior Court and

reinstate the trial court decision allowing Mr. Taylor's proffered defense.

IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae, listed in Exhibit A, are professors who teach and research in the areas of constitutional law, criminal law and procedure, civil rights and civil liberties law, environmental law, and the law of evidence. *Amici* include practitioners with extensive experience litigating in the above areas and in defending the rights of protesters and political activists. They offer their understanding of the public policy values behind the First Amendment, the history and use of the necessity defense, and the constitutional issues raised by the instant appeal. *Amici* believe that the outcome of the appeal will have important consequences for freedom of expression under the First Amendment, the protection of criminal defendants' constitutional rights, and the exercise of civil liberties and political dissent in the state of Washington.

ARGUMENT

- I. THERE IS A STRONG PUBLIC POLICY INTEREST IN ALLOWING CRIMINAL DEFENDANTS TO PRESENT ARGUMENTS AND DEFENSES SUPPORTING THEIR THEORY OF THE CASE.**
 - A. Courts Are Essential Forums for Expression and Debate Under the First Amendment.**

First Amendment jurisprudence has long recognized the public policy interest in the protection of free expression and debate on matters of

public concern. “[C]ommenting on matters of public concern [is a] classic form[] of speech that lie[s] at the heart of the First Amendment” *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 358 (1997). In addition to the pursuit of truth and the fostering of an engaged citizenry, freedom of speech promotes individual autonomy and self-government, both central to American values. Kathryn A. Sabbeth, *Towards an Understanding of Litigation As Expression: Lessons from Guantánamo*, 44 U.C. Davis L. Rev. 1487, 1496-1502 (2011).

Adversarial court proceedings have played an important role as forums for political expression and debate. “[M]uch public interest litigation has as a purpose furthering public education and discourse.” Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. Rev. 477, 490 (2004-2005). Civil rights litigation “has been recognized for over fifty years as core First Amendment activity,” and “attorneys’ communications in support of litigation reflect fundamental First Amendment values tied to political expression.” Sabbeth at 1487.

A long history of political movements seeking legal redress for violations of fundamental rights has allowed courts to serve as a parallel pathway for society to understand the nature of the oppression.

[Public interest] litigation can serve a variety of roles: to articulate a constitutional theory supporting the aspirations of [a] political movement, to expose the conflict between

the aspirations of law and its grim reality, to draw public attention to the issue and mobilize an oppressed community, or to put public pressure on a recalcitrant government or private institution to take a popular movement's grievances seriously.

Lobel, *Courts as Forums* at 480. Enabling these functions is the adversarial, fact-finding process that is the hallmark of our judicial system. *See Sabbeth* at 1498 (noting that “the adversarial model mimics the philosophy of the marketplace of ideas”).

Here, the judicial process complements the political process in exposing unjust fossil fuel development that is projected to send the world into runaway heating. As fact-finding forums in which principled rules of evidence govern the truth-seeking process, courts are much-needed sites of argumentation on politicized and urgent civilizational issues such as the impending climate emergency.

B. Presentation of Necessity Defenses in Political Protest Cases Furthers First Amendment Values and Provides a Democratic Check on Abuses of Power.

Part of the function of jury trials is to hold government and other powerful decision-makers accountable. *See William V. Dorsaneo III, Reexamining the Right to Trial by Jury*, 54 SMU L. Rev. 1695, 1696-97 (2001) (noting that “[m]odern commentators generally agree” on the role of juries as extensions of popular sovereignty and guardians against tyranny); 4 William Blackstone, *Commentaries on the Laws of England*

409-10 (1765) (describing the jury as a bulwark of citizen’s liberty in the face of arbitrary governmental power).

This function is sorely needed in today’s political climate, in which money is increasingly a prerequisite for political representation. *See generally* Martin Gilens, *Affluence and Influence: Economic Inequality and Political Power in America* (2014); Lawrence Lessig, *Republic, Lost: How Money Corrupts Congress — And a Plan to Stop It* (2011). Average citizens lack effective access, in particular, to decision-making bodies that control fossil fuel policy. *See, e.g.*, Robert J. Brulle, *Institutionalizing Delay: Foundation Funding and the Creation of U.S. Climate Change Counter-Movement Organizations*, 122 *Climatic Change* 681, 682 (2014) (“[A] number of conservative . . . advocacy organizations are the key . . . components of a well-organized climate change counter-movement . . . that has . . . confound[ed] public understanding of climate science [and] delayed meaningful government policy actions to address the issue.”).

Juries have provided a check not only on governmental power but also on that of judges. Professor William Quigley writes:

Juries were always thought to be an important counterweight to judges. The right to trial by jury was a cornerstone of this country; judges, as an appointee of government and naturally partisan to the prosecution, were intended to be kept in check by the jury and to take up their proper role as referee

The Necessity Defense in Civil Disobedience Cases: Bring In the Jury, 38 New Engl. L. Rev. 3, 76 (2003) (citing Leonard W. Levy, *The Palladium of Justice: Origins of Trial by Jury* 36, 40 (1999)). *See also id.* at 69 (“The Supreme Court has repeatedly stressed the importance of juries and has warned judges to retreat from attempts to limit the authority of juries.”)

Indeed, “[the right of trial by jury] was so important to early Americans that it was the only procedural right included in the original Constitution. . . . [P]rotection against overbearing . . . judges was one of the main arguments of the proponents of jury trials when the Bill of Rights w[as] enacted.” *Id.* at 69 (internal citation and quotation marks omitted).

[E]ven after establishing direct representation and an independent judiciary, colonists continued to fear potential executive and legislative overreaching as well as arbitrary exercises of power by judges, whom they believed would tend to favor the government. The founders therefore allocated juries considerable power to assure community oversight over potential misuses of governmental power.

Kristen K. Sauer, *Informed Conviction: Instructing the Jury About Mandatory Sentencing Consequences*, 95 Colum. L. Rev. 1232, 1248 (1995) (citations omitted).

The necessity defense puts these guiding values into action by allowing the jury to interpret a defendant’s actions in the political, scientific, and moral context in which they took place, *see* Steven M. Bauer & Peter J. Eckerstrom, *The State Made Me Do It: The Applicability*

of the Necessity Defense to Civil Disobedience, 39 Stan. L. Rev. 1173, 1187-88 (1987) (describing role of jury in necessity cases) — and to act as the “conscience of the community,” John Alan Cohan, *Civil Disobedience and the Necessity Defense*, 6 Pierce L. Rev. 111, 112 (2007). Hearing Mr. Taylor’s climate necessity defense, jurors would receive evidence of climate disruption that they can translate to their own lives and property.

Real-life climate protest cases featuring necessity defenses have shown the civic and democratic value of such defenses. In 2008, an English judge found that six activists had averted more property damage than they had caused in a protest against coal-fired power plants, and former Vice President Al Gore used the occasion to urge the public to take similar action. Jonathan Mingle, *Climate-Change Defense, The* (Dec. 12, 2008), N.Y. Times Magazine, <http://www.nytimes.com/2008/12/14/magazine/14Ideas-Section2-A-t-004.html>. Similarly, earlier this year an English jury decided that climate activists’ spray-painting of a building was a proportionate response to the climate emergency. Sandra Laville, *Extinction Rebellion Founder Cleared Over King’s College Protest* (May 9, 2019), The Guardian, <https://www.theguardian.com/environment/2019/may/09/extinction-rebellion-founder-cleared-over-kings-college-protest>.

In 2016, following a trial of individuals who had blocked coal and oil trains in Everett, Washington, three jurors stated that they appreciated what they had heard and felt more motivated than they had before trial to participate in climate advocacy. Stephen Quirke, *Delta 5 Defendants Acquitted of Major Charges* (Jan. 28, 2016), Earth Island Journal, http://www.earthisland.org/journal/index.php/elist/eListRead/delta_5_defendants_acquitted_of_major_charges/.

C. Special Policy Considerations in Criminal Cases, Particularly Politically Sensitive Cases, Weigh Against Barring Defendants' Proffered Defenses.

The public interest in the full airing of arguments from both sides is particularly important in criminal prosecutions, in which the defendant's liberty is at stake. And yet a very large proportion of criminal cases now end in plea bargains rather than proceeding to trial. *See* U.S. Dept. of Justice Exec. Office for U.S. Attorneys, *United States' Attorneys Annual Statistical Report, Fiscal Year 2013* at 9, <https://www.justice.gov/sites/default/files/usao/legacy/2014/09/22/13statrpt.pdf> (noting that 97 percent of defendants convicted at the federal level in 2013 took a plea bargain); Washington Courts, *Superior Court Annual Caseload Reports*, Criminal Tables, 2018, <https://www.courts.wa.gov/caseload/?fa=caseload.showIndex&level=s&freq=a&tab=criminal> (showing that over 97 percent of criminal cases in Spokane County ended without trial in 2018, of which

nearly two-thirds ended in guilty pleas). In our criminal legal system, prosecutors have largely supplanted both judges and juries.

Even when defendants proceed to trial, prosecutors control which charges are brought, and the most common defenses, rather than offering a justification, contest the sufficiency of the evidence, the alleged mental state, or the procedural grounds. In most cases, defendants exercise lesser influence over the arguments and overall trial narrative, and the necessity defense is among the few tools available to expose abuses of political power. *See* Bauer & Eckerstrom at 1176 (differentiating the necessity defense from other strategies and noting that it provides a “structure for publicizing and debating political issues in the judicial forum”).

The ability of the necessity defense to act as a corrective against abuses of power is especially important when political activists face harassment or retaliation by those whose policies they oppose, as has been the case for climate protesters in recent years. *See, e.g.,* Antonia Juhasz, *Paramilitary Security Tracked and Targeted DAPL Opponents as ‘Jihadists,’ Docs Show*, Grist (June 1, 2017), <http://grist.org/justice/paramilitary-security-tracked-and-targeted-nodapl-activists-as-jihadists-docs-show/>; Susie Cagle, “*Protesters as Terrorists*”: *Growing Number of States Turn Anti-Pipeline Activism Into a Crime*, The Guardian (July 8, 2019), <https://www.theguardian.com/environment/2019/jul/08/wave-of->

[new-laws-aim-to-stifle-anti-pipeline-protests-activists-say.](#)

In the last several decades, courts have reinterpreted aspects of the criminal legal process as violations of defendants' rights. *See, e.g., Gideon v. Wainwright*, 372 U.S. 335 (1963) (defendants possess right to counsel in state felony cases); *Blackledge v. Perry*, 417 U.S. 21, 28 (1974) (statutory right to trial de novo may be exercised free of threat of vindictive prosecution); *United States v. Caro*, 997 F.2d 657, 659 (9th Cir. 1993) (package deal plea agreements pose risk of coercion and should be scrutinized). In this evolving context, courts are called upon to remain vigilant in safeguarding the system's protections. The treatment by courts of defendants such as Mr. Taylor has consequences for all criminal defendants and for the vitality of the justice movements that have improved our legal system as well as society at large.

II. THE NECESSITY DEFENSE IS APPROPRIATE IN CASES OF CIVIL DISOBEDIENCE, INCLUDING CLIMATE PROTEST.

A. For Decades, Political Protesters Have Coupled Civil Disobedience with the Necessity Defense To Create Political Change and Drive Social Progress.

Civil disobedience is “a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government.” John Rawls, *A Theory of Justice* 374 (1971). People engaging in civil disobedience “intend[] to

bring . . . increased public attention to issues of social justice by appealing to a higher principle than the law being violated” Quigley at 17.

Civil disobedience and other forms of protest are widely recognized as a “legitimate part of democratic society,” Article 19, *The Right to Protest Principles: Background Paper* at 4 (2016), <https://www.article19.org/data/files/medialibrary/38581/Protest-Background-paper-Final-April-2016.pdf>, and nonviolent civil disobedience is more effective than violence in bringing about significant political change, Erica Chenoweth & Maria J. Stephan, *Why Civil Resistance Works: The Strategic Logic of Nonviolent Conflict*, 33(1) *International Security* 7 (2008). Numerous historical examples demonstrate the value of civil disobedience as a driver of social progress:

[C]ivil disobedience in various forms, used without violent acts against others, is engrained in our society and the moral correctness of political protestors’ views has on occasion served to change and better our society. Civil disobedience has been prevalent throughout this nation’s history extending from the Boston Tea Party and the signing of the Declaration of Independence, to the freeing of the slaves by operation of the underground railroad in the mid-1800’s. More recently, disobedience of “Jim Crow” laws served, among other things, as a catalyst to end segregation by law in this country, and violation of selective service laws contributed to our eventual withdrawal from the Viet Nam War.

United States v. Kabat, 797 F.2d 580, 601 (8th Cir. 1986) (Bright, J., dissenting). One scholar has dubbed civil disobedience “a singular hallmark of a free country.” Cohan at 113.

Since the 1970s, those engaging in civil disobedience have frequently raised necessity defenses in court. Their causes have included antiwar and anti-apartheid protests as well as protests against nuclear weapons, United States policy in Central America, corruption among local elected officials, and advertising by alcohol and tobacco companies. *See* Quigley at 27-37. While in many instances such defendants have won acquittal, this has not always been the case, demonstrating jurors’ capacity to judge the facts in each instance *Id.* at 71. An individual who presented a climate necessity defense in Skagit County was convicted earlier this year. *See* Skagit County Superior Court case no. 17-1-01148-6.

Just adjudication of political protest cases, including civil disobedience cases, requires bearing in mind the public interest, whether the conduct was expressive in nature, whether or not the protest included violent acts, the extent of damage or harm caused, and whether the protest sought societal improvement rather than personal gain. *See* Article 19, *The Right to Protest Principles* at 21-22. The necessity defense provides a ready-made structure for integrating these considerations while properly tasking the jury with the ultimate determination of a defendant’s guilt.

B. The Doctrinal Argument for the Necessity Defense in Climate Civil Disobedience Cases is Strong.

When supported with evidence, necessity defenses by climate protesters are doctrinally appropriate. Harms from climate change — rising seas, flooding, wildfires, droughts, and crop losses, to name a few — are more severe, pervasive, and irreversible than many of the harms targeted by political protesters in successful necessity defense cases. *See* Quigley at 27-37; *supra* at Part IIA. A 2012 report commissioned by 20 governments found that climate change was “already a significant cost to the world economy,” and that “inaction on climate change” was a “leading global cause of death.” Dara International, *Climate Vulnerability Monitor: A Guide to the Cold Calculus of a Hot Planet* 16 (2012), <https://daraint.org/wp-content/uploads/2012/10/CVM2-Low.pdf>.

Over 11,000 scientists recently issued a stark warning to the world’s political leaders, urging the replacement of fossil fuels. Emma Tobin & Ivana Kottasova, *11,000 Scientists Warn of “Untold Suffering” Caused by Climate Change*, CNN (Nov. 5, 2019), <https://www.cnn.com/2019/11/05/world/climate-emergency-scientists-warning-intl-trnd/index.html>. Leading climate scientist James Hansen has warned that rapid reduction of carbon emissions is “urgently needed” to avoid “profound and mounting risks of ecological, economic and social collapse,” Decl. Dr.

James E. Hansen Supp. Pls.’ Compl. Declaratory and Injunctive Relief at 3, *Juliana v. U.S.*, 217 F.Supp.3d 1224 (2016).

As carbon emissions continue to rise, the world’s political leaders have not risen to the occasion. *See, e.g.*, Tobin & Kottasova, *11,000 Scientists* (quoting scientists’ report in stating that, “[d]espite 40 years of global climate negotiations . . . [policymakers] have generally conducted business as usual and have largely failed to address this predicament”). Through misinformation campaigns, lobbying, and other activities, the fossil fuel industry has gained purchase over government decisions so as to protect and expand fossil fuel production. *See* Kathy Mulvey et. al., *The Climate Deception Dossiers*, Union of Concerned Scientists (July 2015), <https://www.ucsusa.org/sites/default/files/attach/2015/07/The-Climate-Deception-Dossiers.pdf>. Hawaii Senator Brian Schatz recently admitted that the industry has “structural control” of Congress. Justin Mikulka, *Senate Hearing Calls out the Influence of Dark Money in Blocking Climate Action*, DeSmog Blog (Oct. 29, 2019), <https://www.desmogblog.com/2019/10/29/dark-money-climate-senate-hearing-whitehouse>.

Particularly since the necessity defense is meant to be adapted pragmatically to any circumstance “where injustice would result from a too literal reading of the law,” Quigley at 6, there are compelling reasons to allow it in climate protest cases. *See generally* Lance N. Long & Ted

Hamilton, *The Climate Necessity Defense: Proof and Judicial Error in Climate Protest Cases*, 38 Stan. Envtl. L.J. 57 (2018) (describing the doctrinal strength of typical climate necessity cases).

C. Evidentiary Rules Favor Defendants' Presentation of Arguments and Defenses When Admissibility is Ambiguous.

Both Washington and federal courts employ a presumption in favor of the liberal allowance of evidence. Relevant evidence is generally admissible. *See* Wash. ER 402; Fed. R. Evid. 402, 1972 Proposed Rules Advis. Comm. Notes (observing that “congressional enactments in the field of evidence have generally tended to expand admissibility beyond the scope of the common law rules”), and the test for relevancy is a low bar, *see* Wash. ER 401 (defining as relevant evidence that has “any tendency” to make a fact “more . . . or less probable than it would be without the evidence”) (emphasis added). *Accord State v. Darden*, 41 P.3d 1189, 1194 (Wash. 2002) (“The threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible.”); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 588 (1993) (noting the “liberal thrust” of the Federal Rules and their “general approach of relaxing the traditional barriers to opinion testimony”) (internal quotation marks omitted).

The standard of proof for presenting an affirmative defense at trial *prior to submission of a jury instruction* is also a low bar. Although the

defendant bears the burden of proof, she need only offer a prima facie case on each element of the defense. *State v. Adams*, 198 P.3d 1057, 1060 (Wash. App. 2009) (holding that defendant may raise primary caregiver affirmative defense under Medical Marijuana Act); *State v. Brown*, 269 P.3d 359, 361 (Wash. App. 2012) (holding that defendant may raise medical marijuana affirmative defense). *See also U.S. v. Bailey*, 444 U.S. 394, 414-16 (1980) (noting that defendant must make a “threshold showing” that is “[sufficient] to sustain” the defense “if believed”). Courts in other jurisdictions have echoed this analysis. *See, e.g., U.S. v. Brodhead*, 714 F. Supp. 593, 596 (D. Mass. 1989) (warning, in a case involving justification and international law defenses, that pretrial exclusion of a defendant’s affirmative defense via a motion *in limine* is warranted only when there is “no supporting evidence at all”).

Courts’ evaluation of pretrial necessity defense proffers in protest cases has not always accorded with these evidentiary rules. Laura J. Schulkind, *Applying the Necessity Defense to Civil Disobedience Cases*, 64 N.Y.U. L. Rev. 79, 89 (1989) (noting the “disjunction” between the low standard articulated in “hypothetical evidentiary tests” versus the “extraordinarily high standard” imposed in practice). Here, the Superior Court appears to have made a similar error in contravention of the tests summarized above — tests that Mr. Taylor’s evidence more than satisfies.

III. PRETRIAL EXCLUSION OF PROFFERED DEFENSES IN CRIMINAL CASES TRIGGERS HEIGHTENED CONSTITUTIONAL SCRUTINY.

Courts discussing pretrial exclusion of defenses typically focus on motions *in limine*, since such motions are the usual procedural method for barring evidence prior to trial. However, any effort by a prosecutor to exclude a defense wholesale in a criminal case deserves heightened constitutional scrutiny. The *Brodhead* court summarized these concerns:

The motion *in limine* originated with attempts to [bar] prejudicial evidence from . . . civil litigation. The general approach . . . was that the motion *in limine* should be used, if used at all, as a rifle and not as a shotgun, [singling] out the objectionable material

During the 1960's, however, use of the motion *in limine* expanded to become a prosecutorial tool for excluding evidence perceived to be irrelevant or prejudicial to the government's case. . . . Prosecutors have begun to test the outer limits of judicial receptivity by using the motion to exclude entire defenses

Many of the concerns voiced about the . . . motion *in limine* touch upon the role of the jury in our judicial system. An accused is to be judged by her peers and the lens through which . . . the jury view[s] [her] should be neither overly focused nor distorted by a trial judge.

714 F. Supp. at 595-96 (internal citations and quotation marks omitted).¹

¹ Scholars have voiced similar concerns. See, e.g., Douglas Colbert, *The Motion in Limine in Politically Sensitive Cases: Silencing the Defendant at Trial*, 39 Stan. L. Rev. 1271, 1274 (1987) (“[T]he motion in limine represents a direct attack on the accused’s right to trial by jury. The motion in limine to exclude an entire defense first appeared just after juries had acquitted civil rights protestors, anti-war demonstrators, and black liberation activists in several highly publicized

The Washington Supreme Court has recognized these dangers. In *State v. Ellis*, the Court reversed the pretrial denial of a defendant's diminished capacity defense on the grounds that, once the minimum requirements of admissibility had been met, it was the province of the jury as trier of fact to determine what weight to give to the evidence. 136 Wn. 2d 498, 521-22 (Wash. 1998). Particularly since the state intended in that case to request the death penalty, the Court noted, it was error to exclude the defendant's entire proffered defense via a motion *in limine*. *Id.*

Courts in other jurisdictions have also sounded notes of caution, *see, e.g., State v. Quick*, 597 P.2d 1108, 1112 (Kan. 1979) (noting that “use [of the motion *in limine*] should be strictly limited” to excluding evidence that is both irrelevant and prejudicial), including in cases featuring affirmative defenses, *see, e.g., People v. Brumfield*, 390 N.E.2d 589, 593 (Ill. App. 1979) (motion *in limine* should be used with restraint, particularly in criminal cases), and necessity defenses, *see, e.g., Commonwealth v. O'Malley*, 439 N.E.2d 832, 838 (Mass. App. Ct. 1982) (“In the usual case . . . it is far more prudent for the judge to follow the

trials in the late 1960s and early 1970s. . . . [T]he recent trend in the expansive use of the motion in limine is an attempt by the government to avoid sustaining similar legal defeats, which would . . . cripple its ability to formulate and implement controversial policies. . . . [T]he government thus seeks to prevent the courtroom from operating . . . as a popular referendum on government policies.”); Quigley, *The Necessity Defense* at 66 (“Pre-trial preclusion of the right to admit evidence of the necessity defense strips the protestors’ constitutional right to a jury” and is “contrary to the purpose of a trial by jury.”).

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.”² In *Commonwealth v. Hood*, 452 N.E.2d 188, 197 n.5 (Mass. 1983), the Massachusetts Supreme Judicial Court stated:

[O]rdinarily a judge should not allow a motion which serves to exclude, in advance of its being offered, potential evidence of the defense. Since a judge is required to instruct on any hypothesis supported by the evidence, in most instances proffer of disputed matter at trial, ruled upon in the usual course, is more likely to be fair and result in correct rulings.

Here, the State’s pretrial appeal sought indiscriminate exclusion of the entirety of Mr. Taylor’s proffered defense, where such evidence would otherwise be presented to a jury. The policies defended by the State — the continued operation of coal and oil extraction and transport — are highly controversial. Particularly since the necessity defense is Mr. Taylor’s primary strategy and theory of the case, it should not be done away with by pre-trial motion before the evidence has been tested.

CONCLUSION

Mr. Taylor accepted serious legal risks for the sake of catalyzing action on a public policy problem of outsized proportions and thereby to

² A motion *in limine* “must not be used to choke off a valid defense . . . or to ‘knock out’ the entirety of the evidence supporting a defense before it can be heard by the jury. Likewise, neither counsel nor the judge should permit a criminal trial by jury to be converted into a trial by motion, with the possible effect of directing a verdict against the defendant.” *O’Malley*, 439 N.E.2d at 838.

preserve the possibility of an Earth habitable for future generations. He now seeks to explain and justify his actions to a jury of his peers. Mr. Taylor stands in the shoes of the American freedom fighters, the abolitionists, the suffragettes, and the civil rights campaigners of the 1960s. The use of the necessity defense in this case is not only doctrinally appropriate but strengthens the foundations on which our legal system rests — including the right to trial by jury, freedom of expression, and a natural environment capable of providing for human needs.

The undersigned *amici curiae* respectfully request that this Court reinstate the trial court decision allowing Mr. Taylor’s proffered defense.

Respectfully submitted this 14th day of January, 2020,

/s/ William P. Quigley
William P. Quigley*
Professor of Law
Loyola University New Orleans
College of Law
7214 St. Charles Avenue
New Orleans, LA 70118
504.710.3074
quigley@loyno.edu

/s/ Alice Meta M. Cherry
Alice Meta Marquardt Cherry
WSBA 52082
Climate Defense Project
2150 Allston Way, Suite 320
Berkeley, CA 94704
T: 847.859.9572
alice@climatedefenseproject.org

*Admitted to practice in the State of Louisiana

Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

I certify that on the date listed below, I served a copy of this amicus brief on counsel for the State of Washington via the electronic filing system, and by email at the address shown below:

Stephanie J. Richards
Deputy Prosecuting Attorney
Spokane County Prosecuting Attorney's Office
County City Public Safety Building
1100 W. Mallon
Spokane, WA 99260
scpaappeals@spokanecounty.org

Dated: January 14, 2020

/s/ Alice Meta M. Cherry
Alice Meta Marquardt Cherry
WSBA 52082
Climate Defense Project
2150 Allston Way, Suite 320
Berkeley, CA 94704
T: 847.859.9572
alice@climatedefenseproject.org

EXHIBIT A

List of amici curiae

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

STATE OF WASHINGTON,
Respondent,

v.

SPOKANE COUNTY DISTRICT COURT,
Judge Debra R. Hayes, Defendant

and

GEORGE E. TAYLOR,
Petitioner.

LIST OF *AMICI CURIAE* IN SUPPORT OF PETITIONER

PROFESSOR AMICI

(The undersigned individuals have signed in their individual capacity and not as representative of their law schools. Institutional affiliations are listed for identification purposes only.)

Nadia Ahmad
Assistant Professor of Law
Barry University School of Law

Deborah Ahrens
Associate Professor
Seattle University School of Law

Amna Akbar
Associate Professor
The Ohio State University Moritz
College of Law

Jessie Allen
Associate Professor
University of Pittsburgh School of Law

Angela Allen-Bell
Associate Professor & Director, Louis
A. Berry Institute for Civil Rights and
Justice
Southern University Law Center

Fran Ansley
Distinguished Professor of Law
Emeritus
University of Tennessee College of Law

Stephen Arons
Professor Emeritus of Legal Studies
University of Massachusetts, Amherst

Frank Askin
Professor Emeritus
Rutgers Law School

Charles I. Auffant
Clinical Professor of Law
Rutgers Law School

Margaret Barry
Visiting Professor
American University Washington
College of Law

Steven W. Bender
Professor of Law
Seattle University School of Law

Emily Benfer
Visiting Associate Clinical Professor of
Law
Columbia Law School

Judith Berkan
Adjunct Professor, Civil Rights Clinic
Interamerican University School of Law

Ira Bloom
Professor of Law
Albany Law School

Eric Blumenson
Research Professor of Law
Suffolk University Law School

Mark Brodin
Professor of Law
Boston College Law School

William Brooks
Professor of Law
Touro Law Center

Eduardo R.C. Capulong
Professor of Law
CUNY School of Law

Leonard Cavise
Professor of Law Emeritus
DePaul College of Law

Faisal Chaudhry
Assistant Professor of Law & History
University of Dayton

Marjorie Cohn
Professor Emerita
Thomas Jefferson School of Law

Kim Diana Connolly
Professor of Law and Director,
Environmental Advocacy Clinic
University of Buffalo School of Law

Jessie A. Cook
Adjunct Professor
Indiana University Maurer School of
Law

Benjamin G. Davis
Professor of Law
University of Toledo College of Law

Frank Edmund Deale
Professor of Law
CUNY School of Law

Charles R. DiSalvo
Woodrow A. Potesta Professor of Law
West Virginia University

Ciji Dodds
Assistant Professor
Albany Law School

Tim Duane
Professor-in-Residence
University of San Diego School of Law

Olympia Duhart
Professor of Law
Nova Southeastern University

Eric Bennett Easton
Professor of Law Emeritus
University of Baltimore School of Law

Frank Emmert
John S. Grimes Professor of Law and
Director, Center for International and
Comparative Law
Indiana University Robert H. McKinney
School of Law

Kathleen Engel
Research Professor of Law
Suffolk University Law School

Jules Epstein
Professor of Law and Director of
Advocacy Programs
Temple Beasley School of Law

Susan Jane Feathers
Assistant Dean
Rutgers Law School

David Finger
Clinic Professor
Loyola University New Orleans College
of Law

Sally Frank
Professor of Law
Drake University

Katherine Franke
James L. Dohr Professor of Law
Columbia Law School

Alexi Freeman
Associate Professor of the Practice
University of Denver Sturm College of
Law

Brian Glick
Clinical Associate Professor
Fordham Law School

Nicole B. Godfrey
Visiting Assistant Professor
University of Denver Sturm College of
Law

Anne B. Goldstein
Professor of Law
Western New England University
School of Law

Carmen G. Gonzalez
Professor of Law
Seattle University School of Law

James M. Grijalva
Friedman Professor of Law
University of North Dakota School of
Law

Catherine M. Grosso
Professor of Law
Michigan State University College of
Law

Peter Halewood
Professor of Law
Ryerson University

Angela P. Harris
Professor Emerita
University of California, Davis School
of Law

Philip Harvey
Professor of Law and Economics
Rutgers Law School

Renee Camille Hatcher
Assistant Professor
Director, Community Enterprise and
Solidarity Economy Clinic
UIC John Marshall Law School

Julia Hernandez
Assistant Professor of Law
CUNY School of Law

Helen Hershkoff
Herbert M. & Svetlana Wachtell
Professor of Constitutional Law and
Civil Liberties
New York University School of Law

Kathy Hessler
Clinical Professor of Law
Lewis & Clark Law School

Sara Hildebrand
Clinical Fellow
University of Denver Sturm College of
Law

Bill Hing
Professor of Law
University of San Francisco

Aila Hoss
Visiting Assistant Professor
Indiana University McKinney School of
Law

Elizabeth Iglesias
Professor of Law
University of Miami School of Law

Tarek Ismail
Associate Professor
CUNY School of Law

Ulysses Jaen
Law Library Director and Assistant
Professor
Ave Maria School of Law

Danielle C. Jefferis
Teaching Fellow
University of Denver Sturm College of
Law

Joshua Aaron Jones
Visiting Assistant Clinical Professor
Indiana University Robert H. McKinney
School of Law

Peter A. Joy
Professor of Law
Washington University in St. Louis
School of Law

Rob Kahn
Professor of Law
St. Thomas University Law School

Helen H. Kang
Professor of Law
Golden Gate University School of Law

Mehmet K. Konar-Steenberg
Professor of Law
Mitchell Hamline School of Law

Douglas Kysar
Deputy Dean and Joseph M. Field '55
Professor of Law
Yale Law School

Christopher N. Lasch
Professor of Law
University of Denver Sturm College of
Law

Jules Lobel
Professor of Law
University of Pittsburgh Law School

Stephen Loffredo
Professor of Law
CUNY School of Law

Lance N. Long
Professor of Law
Stetson University College of Law

Gerald P. Lopez
Professor of Law
UCLA School of Law

Mary A. Lynch
Kate Stoneman Professor in Law and
Democracy
Albany Law School

Beth Lyon
Clinical Professor of Law
Cornell Law School

Mari Matsuda
Professor of Law
University of Hawaii at Manoa

Martha T. McCluskey
Senior Research Scholar and Professor
Emerita of Law
University at Buffalo, State University
of New York

M. Isabel Medina
Ferris Family Distinguished Professor of
Law
Loyola University New Orleans College
of Law

Saul Mendlovitz
Professor Emeritus
Rutgers Law School

Kathryn L. Mercer
Professor
Case Western Reserve University School
of Law

Carlin Meyer
Professor Emeritus
New York Law School

Joel A. Mintz
Professor of Law Emeritus
Nova Southeastern University College of
Law

William Mock
Professor of Law
UIC John Marshall Law School

Gregory Munro
Professor Emeritus
University of Montana Blewett School
of Law

Yxta Murray
Professor of Law
Loyola Law School

Chrystin Ondersma
Professor of Law
Rutgers Law School

Nancy Ota
Professor of Law Emerita
Albany Law School

Talia Peleg
Associate Professor of Law
CUNY School of Law

Zygmunt Plater
Professor of Law
Boston College Law School

Ellen S. Podgor
Professor of Law
Stetson University College of Law

James Gray Pope
Distinguished Professor of Law
Rutgers Law School

David Pratt
Jay and Ruth Caplan Distinguished
Professor of Law
Albany Law School

Ora Prochovnick
Professor and Director of Clinical and
Public Interest Law Programs
John F. Kennedy University College of
Law

Fran Quigley
Clinical Professor
Indiana University McKinney School of
Law

William P. Quigley
Professor of Law
Loyola University New Orleans College
of Law

Alan Ramo
Professor Emeritus
Golden Gate University School of Law

Sara Rankin
Associate Professor of Law
Seattle University School of Law

James D. Redwood
Professor of Law
Albany Law School

Alison Rieser
Professor Emerita
University of Maine School of Law

Allie Robbins
Associate Professor of Law
CUNY School of Law

Anna Roberts
Professor of Law
St. John's University School of Law

Sarah Rogerson
Professor of Law
Albany Law School

Florence Wagman Roisman
William F. Harvey Professor of Law and
Chancellor's Professor
Indiana University Robert H. McKinney
School of Law

Daria Roithmayr
Professor of Law
University of Southern California Gould
School of Law

Michael Rooke-Ley
Professor of Law Emeritus
Nova Southeastern School of Law

Laura Rovner
Professor of Law and Director, Civil
Rights Clinic
University of Denver Sturm College of
Law

Natsu Taylor Saito
Professor of Law
Georgia State University College of Law

Atieno Mboya Samandari
Adjunct Professor
Emory Law School

Amanda Schemkes
Visiting Assistant Professor of
Lawyering Skills
Seattle University School of Law

Alex Seita
Professor of Law
Albany Law School

Anita Sinha
Associate Professor of Law and
Director, International Human Rights
Law Clinic
American University Washington
College of Law

William Snape
Professor and Assistant Dean
American University Washington
College of Law

Karen C. Sokol
Associate Professor of Law
Loyola University New Orleans College
of Law

Amy H. Soled
Assistant Clinical Professor at Law
Rutgers Law School

Robin Walker Sterling
Associate Professor
University of Denver Sturm College of
Law

Rebecca K. Stewart
Associate Professor of Law
Thurgood Marshall School of Law

Jeffrey Thaler
Visiting Associate Professor
University of Maine School of Law

Julia Vazquez
Associate Clinical Professor of Law
Southwestern Law School

Penny Venetis
Clinical Professor of Law, Judge
Dickinson R. Debevoise Scholar, and
Director of Human Rights Clinic
Rutgers Law School

Robert R.M. Verchick
Professor of Law and Gauthier-St.
Martin Chair in Environmental Law
Loyola University New Orleans

Jessica West
Assistant Dean of Academic Success
Programs
University of Washington School of
Law

John Whitlow
Associate Professor of Law
CUNY School of Law

Mary Christina Wood
Philip H. Knight Professor
University of Oregon School of Law

William J. Woodward, Jr.
Professor of Law Emeritus
Temple University

Ellen Yaroshefsky
Professor of Legal Ethics
Maurice A. Deane School of Law
Hofstra University

Mary Marsh Zulack
Clinical Professor of Law
Columbia University School of Law

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