

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 18-0233

STATE OF MONTANA,

Plaintiff and Appellee,

v.

LEONARD HIGGINS,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Twelfth Judicial District Court,
Chouteau County, The Honorable Daniel A. Boucher, Presiding

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TABLE OF CONTENTS

TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STANDARD OF REVIEW	1
ARGUMENT	2
I. <u>SUMMARY DENIAL OF NECESSITY/COMPULSION DEFENSE DENIED MR. HIGGINS’ SIXTH AMENDMENT RIGHT TO COMPLETE DEFENSE</u>	2
A. <u>Montana’s statutory amalgamation of the necessity defense does not preclude this Court from applying the common law necessity defense, nor does its existence allow this Court to abrogate the Sixth Amendment.</u>	7
B. <u>The Washington and Minnesota Courts of Appeals have allowed the necessity defense in cases identical to this one.</u>	10
C. <u>Pretrial motions <i>in limine</i> seeking pretrial exclusion of defendants’ evidence are subject to heightened scrutiny.</u>	15
II. <u>THE DISTRICT COURT ERRED IN FINDING PROOF BEYOND A REASONABLE DOUBT FOR FELONY CRIMINAL MISCHIEF</u>	16
A. <u>The State failed to prove damages in excess of \$1,500.</u>	16
B. <u>The Court erred on several evidentiary matters at trial.</u>	18
CONCLUSION	20
CERTIFICATE OF SERVICE	22
CERTIFICATE OF COMPLIANCE	23

TABLE OF AUTHORITIES

Cases

<i>Chambers v. Mississippi</i> , 410 U.S. 284 (1973).....	3
<i>City of Helena v. Lewis</i> , 260 Mont. 421, 426, 860 P.2d 698, 701 (1993)..	1, 7, 8, 15
<i>City of Missoula v. Asbury</i> , 265 Mont. 14, 873 P.2d 936 (1994).....	8
<i>Duncan v. Louisiana</i> , 391 U.S. 145 (1968).....	2
<i>Folsom v. City of Livingston</i> , 2016 MT 238, ¶ 11, 385 Mont. 20, 381 P.3d 539...	15
<i>Holmes v. South Carolina</i> , 547 U.S. 319 (2006).....	2
<i>United States v. Bailey</i> , 444 U.S. 394 (1980).....	4
<i>United States v. Brodhead</i> , 714 F. Supp. 593 (D. Mass. 1989).....	15
<i>United States v. Cramer</i> , 532 F. App'x 789 (9th Cir. 2013).....	4
<i>State v. Daniels</i> , 2011 MT 278, ¶ 11, 362 Mont. 426, 265 P.3d 623.....	1
<i>State v. Greenwood</i> , 237 P.3d 1018 (Alaska 2010).....	4
<i>State v. Heavygun</i> , 2011 MT 111, ¶ 7, 360 Mont. 413, 253 P.3d 897.....	1
<i>State v. Homer</i> , 2014 MT 57, ¶ 13, 374 Mont. 157, 161, 321 P.3d 77.....	3
<i>State v. Jackson</i> , 2009 MT 427, ¶ 50, 354 Mont. 63, 80, 221 P.3d 1213.....	1
<i>State v. Johnson</i> , 289 Minn. 196, 199, 183 N.W.2d 541, 543 (1971).....	13
<i>State v. Klapstein</i> , A17-1649, 2018 WL 1902473 (Minn Ct App Apr 23, 2018), <i>rev den</i> (July 17, 2018).....	1, 10, 11, 12
<i>State v. Leprowse</i> , 2009 MT 387, ¶¶ 14-15, 353 Mont. 312, 221 P.3d 648.....	5
<i>State v. Nelson</i> , 2001 MT 236, 36 P.3d 405, 307 Mont. 34 (2001).....	8
<i>State v. Pyette</i> , 2007 MT 119, ¶ 11, 337 Mont. 265, 268, 159 P.3d 232.....	1
<i>State v. Rein</i> , 477 N.W. 2d 716, 717 (Minn. App 1991), <i>rev. den.</i> (Minn. Jan. 30,	

1992).....	13
<i>State v. Scarborough</i> , 2000 MT 301, 366 (Mont. 2000).....	3
<i>State v. Ward</i> , 438 P.3d 588, 592 (Wash Ct App 2019), <i>rev den</i> , 193 Wash 2d 1031 (2019).....	<i>passim</i>
<i>Stodghill v. State</i> , 892 So.2d 236 (Miss. 2005).....	4
<i>United States v. Maxwell</i> , 254 F.3d 21 (1st Cir. 2001).....	4
<i>United States v. Gant</i> , 691 F.2d 1159 (5th Cir. 1982).....	4
<i>Washington v. Texas</i> , 388 U.S. 14 (1967).....	3

Statutes & Authorities

MCA § 45-2-212	7, 8
Mont. Const, Art. II, Sec. 17	2
Mont. Const, Art. II, Sec. 24	2
U.S. Const., 6th Am.	<i>passim</i>
<i>Wharton’s Criminal Law</i> § 39 (C. Torcia 14th ed. 1978).....	3
William P. Quigley, <i>The Necessity Defense in Civil Disobedience Cases: Bring it to the Jury</i> , 38 New England L. Rev 3, 66 (2003).....	5

STANDARD OF REVIEW

A trial court's decision to exclude a defendant's proffered defense is ordinarily reviewed for abuse of discretion. *City of Helena v. Lewis*, 260 Mont. 421, 426 (Mont. 1993). However, questions of constitutional law are given plenary review. *State v. Jackson*, 2009 MT 427, ¶ 50, 354 Mont. 63, 80, 221 P.3d 1213, 1225. Such questions include the denial of a defendant's constitutional rights by a trial court, *see, e.g., State v. Heavygun*, 2011 MT 111, ¶ 7, 360 Mont. 413, 416, 253 P.3d 897, 900–01; *State v. Pyette*, 2007 MT 119, ¶ 11, 337 Mont. 265, 268, 159 P.3d 232, 235 (“When the constitutional issue of denial of due process as a matter of law underlies the action, our review is plenary”), including in the form of evidentiary rulings, *see State v. Daniels*, 2011 MT 278, ¶ 11, 362 Mont. 426, 431, 265 P.3d 623, 628 (applying plenary review to court's rulings on admissibility of character evidence as violation of due process rights).¹

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¹ This exception to the general application of the abuse of discretion standard is mirrored by a similar exception governing evidentiary questions that involve questions of law. *See State v. Mackrill*, 2008 MT 297, ¶ 37, 345 Mont. 469, 482, 191 P.3d 451, 460 (“We generally review a district court's evidentiary rulings for an abuse of discretion. . . . Notwithstanding this deferential standard, however, judicial discretion must be guided by the rules and principles of law; thus, our standard of review is plenary to the extent that a discretionary ruling is based on a conclusion of law.”) (internal citations omitted).

ARGUMENT

I. Summary Denial of Necessity/Compulsion Defense Denied Mr. Higgins’ Sixth Amendment Right to Complete Defense.

Criminal defendants have a constitutional right to offer a complete defense to a jury when they meet a minimal burden of producing evidence legally sufficient to establish the defense’s availability. The trial court erred in the wholesale exclusion of defendant’s relevant evidence and testimony prior to its presentation at trial.

The United States Constitution guarantees the right of criminal defendants to trial by an impartial jury. U.S. Const. amend. VI.

A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. . . . Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. . . . Fear of unchecked power . . . found expression in . . . this insistence upon community participation in the determination of guilt or innocence. It has long been settled that due process protects persons charged with criminal conduct by permitting them to present exculpatory evidence to the jury.

Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968). The Montana Constitution likewise protects the right of criminal defendants to a fair jury trial. Mont. Const. art. II, §§ 17, 24.

As the State concedes, a criminal defendant must be given a “meaningful opportunity to present a complete defense,” *Holmes v. South Carolina*, 547 U.S.

319, 324 (2006), including an opportunity to “present [their] version of the facts . . . to the jury so it may decide where the truth lies,” *Washington v. Texas*, 388 U.S. 14, 19 (1967). *See also State v. Homer*, 2014 MT 57, ¶ 13, 374 Mont. 157, 161, 321 P.3d 77, 81; *see Resp.’s Brief at 12.*

The State also concedes that a defendant’s ability to call witnesses in her defense is especially important to the vindication of her constitutional rights. *Chambers*, 410 U.S. at 294; *see also State v. Fish*, 190 Mont. 461, 473, 621 P.2d 1072, 1079 (1980); *Washington*, 388 U.S. at 19; *see Resp.’s Brief at 12.*

The standard for a jury instruction on an affirmative defense is preponderance of the evidence; the defendant bears the burden of proof. *State v. Heit*, 242 Mont. 488, 491 (Mont. 1990); *see also Wharton’s Criminal Law* § 39 (C. Torcia 14th ed. 1978). This burden is not a high one. *State v. Scarborough*, 2000 MT 301, 366 (Mont. 2000) (internal cite omitted). The State does not dispute this standard and instead rests on the incorrect premise that Montana law does not generally employ a common law “necessity defense” (it does), and then wrongly argues that the Court can bar the jury from considering its application in a case of relative first impression. (Defendant’s Memorandum on Necessity 10-11.) Furthermore, Mr. Higgins also met this burden under Montana’s statutory necessity formulation. In the alternative, the specific facts of Mr. Higgins’ case merit an extension of the law to include the broader reading of necessity

encompassed by the common law definition and adopted by many States. *See infra, e.g.*, section I(B), on Minnesota’s and Washington’s allowance of the necessity defense.

The threshold for exercising the constitutional right to present an affirmative defense at trial *prior* to submission of a jury instruction is even lower. Although the initial burden of proof for an affirmative defense is on the defendant, *see, e.g.*, *United States v. Maxwell*, 254 F.3d 21, 26 (1st Cir. 2001); *United States v. Gant*, 691 F.2d 1159, 1165 (5th Cir. 1982); *Stodghill v. State*, 892 So.2d 236, 239 (Miss. 2005), this burden is minimal:

‘Some evidence’ is evidence that, viewed in the light most favorable to the defendant, would allow a reasonable juror to find in the defendant’s favor on each element of the defense. The ‘some evidence’ burden is not a heavy one—as long as the defendant produces some evidence to support each element of the defense, any weakness or implausibility in that evidence is irrelevant and a matter for the jury, not for the court.

State v. Greenwood, 237 P.3d 1018, 1022-23 (Alaska 2010) (citations and internal quotation marks omitted); *United States v. Bailey*, 444 U.S. 394, 414-16 (1980) (defendant need only proffer a “threshold showing” of evidence “[sufficient] to sustain” the defense “if believed”... a “minimum standard”); *see also Maxwell*, *supra* at 29. Both the Ninth Circuit and Montana Supreme Court have adopted this standard. *United States v. Cramer*, 532 F. App’x 789, 791 (9th Cir. 2013); *State v.*

Leprowse, 2009 MT 387, ¶¶ 14-15, 353 Mont. 312, 315-16, 221 P.3d 648, 651. As the *Leprowse* court stated:

[T]he District Court incorrectly concluded prior to trial that Leprowse could not present evidence in support of the affirmative defense of compulsion. Leprowse alleged the required elements for the compulsion defense. She claimed she was compelled to drive due to an imminent threat of serious bodily injury, and that her belief was reasonable. Whether Leprowse was actually compelled to drive the distance of 14 miles, and ostensibly commit a DUI, is at its essence a question of fact based on the circumstances. . . .

Leprowse should be given the opportunity to present evidence which, if accepted by a rational trier of fact, would show that her belief was reasonable and that she was compelled to take the actions that she did. After Leprowse has had an opportunity to present such evidence to the jury, whether she is entitled to receive a jury instruction on her affirmative defense may be decided by the District Court based on the record before it.

Id.

Legal scholars have recognized the constitutional sensitivity of the presentation of affirmative defenses, including the necessity defense, at criminal trials. *See, e.g.*, William P. Quigley, *The Necessity Defense in Civil Disobedience Cases: Bring it to the Jury*, 38 New England L. Rev 3, 66 (2003) (“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”).

Here, the questions at the pre-trial stage were fact-intensive: to determine whether Mr. Higgins made a threshold evidentiary showing, each element of the

common law necessity defense and (in the alternative) compulsion defense should have been analyzed with reference to his circumstances and conduct, and the information contained in his proffer. His preliminary showing was more than sufficient to meet the threshold burden. (Defendant’s Memorandum on Necessity). The District Court instead relied on speculation and improper factual findings to conclude that Mr. Higgins’ motives somehow barred him from presenting his defense, without considering the legal sufficiency of his evidence. (Order Denying Necessity Defense 2) (opining that Mr. Higgins “cringes from the individual responsibility that historically accompanies protest and social change,” that “Higgins expects to attract publicity through his trial, and in turn, to place U.S. energy policy on trial,” and that Mr. Higgins’s proffered expert witnesses sought to “shift responsibility from Higgins to the United States Government”).

Mr. Higgins’ Sixth Amendment rights were violated when he was barred from presenting evidence or expert witness testimony to the jury on his proffered necessity/compulsion defense. The Court did not consider any of the extensive evidence Mr. Higgins offered—either at trial or in a pretrial hearing—to determine the legal availability of his defense. Since the necessity/compulsion defense was a major theory of the case, it was error for the Court to forbid the jury to hear his defense. The prosecution could have tested the sufficiency of the evidence by challenging the defendant’s request for an instruction at close of testimony.

A. Montana’s statutory amalgamation of the necessity defense does not preclude this Court from applying the common law necessity defense, nor does its existence allow this Court to abrogate the Sixth Amendment.

The State incorrectly argues that the common law defense of necessity is unavailable as a matter of law in Montana. As noted in Defendant’s Memorandum on Necessity, Montana law includes two formulations of the necessity defense: the common law defense and the compulsion statute. The court has relied on both in tandem, and has looked to common law cases from other jurisdictions in evaluating the availability of the defense. (Defendant’s Memorandum on Necessity 10-11). Under either the common law or the statutory formulation, Mr. Higgins provided sufficient evidence to create a question for the jury.

In Montana, the common law defenses of necessity, justification, and choice of evils have been statutorily merged, (*see* Mont. Code Ann. §45-2-212), but the Montana Supreme Court nevertheless continues to rely on the common law of necessity in addition to this statute. (Defendant’s Memorandum of Necessity 10). The necessity defense asserted by Mr. Higgins is based on the common law and closely related to Montana’s statutory compulsion defense. (Defendant’s Opening Brief 14). The State argues that the common law defense has been subsumed by Montana’s statute codifying the affirmative defense of compulsion. (State’s Response 13). Though the Court indicated this in *Lewis, supra* at 426, that case is distinguishable here and defendants may still make use of the common law defense

of necessity. *State v. Nelson*, 2001 MT 236, 36 P.3d 405, 307 Mont. 34 (2001); see Defendant's Opening Brief 17-18. When there is informative case law in other states, the defendant's proffer of necessity should be evaluated based on that authority. See *Nelson* 407-08. This is particularly true where doing so is the only way to vindicate defendant's right to a defense. Furthermore, the unavailability of the necessity defense in *Lewis* should not be interpreted to require its unavailability here: *Lewis*, (like *City of Missoula v. Asbury*, 265 Mont. 14, 873 P.2d 936 (1994)), is a case concerning anti-abortion protest. Because abortion is a constitutionally-protected right, anti-abortion protest is not analogous to climate protest.

Even if Mr. Higgins were required to prove his case under Montana's compulsion statute, he would still be entitled to the necessity/compulsion defense. The statute provides that "[A] person is not guilty of an offense, ... by reason of conduct that the person performs under the compulsion of threat or menace of the imminent infliction of death or serious bodily harm if the person reasonably believes that death or serious bodily harm will be inflicted upon the person if the person does not perform the conduct." (Mont. Code Ann. §45-2-212.) Mr. Higgins offered extensive evidence on the imminence and intensity of climate change-related harms, noting that if existing fossil fuel reserves are burned—a highly likely event—"life as we know it would be impossible" (Defendant's Memorandum on Necessity 15-16). That the climate crisis is imminent is

scientifically established. That it threatens death or serious bodily harm to Mr. Higgins, as well as to every other human, is obvious. The fact that *other* people are subject to this harm, in *addition* to Mr. Higgins, in no way lessens the threat to Mr. Higgins himself. And whether Mr. Higgins' belief that his actions would prevent or forestall death or serious bodily harm was reasonable, is a fact question for the jury.

In conducting its unusual and prejudicial questioning of Mr. Higgins (see Defense Opening Brief 21-24), the court stated: “[Y]our testimony was that you did this not for you, but for your children and grandchildren?” Though Mr. Higgins responded “Yes, your Honor,” he in fact had not stated this in his previous testimony. The court put these words in Mr. Higgins' mouth. In his only reference to children (aside from establishing that he has children and grandchildren), Mr. Higgins had testified that if the pipeline had remained shut down, it would have met “the obligation we have for our children” for all of 2016 and 2017 (referring to goals set by world leaders within the U.N. Convention on Climate Change's 2016 Paris Agreement). As this framing shows, Mr. Higgins has a strong sense of the duty that his generation owes to younger people. In acknowledging that his primary motivation was not for himself but as a result of his responsibility to others, he was not negating the scientific fact that he is also threatened by climate change. Thus, even if Mr. Higgins were required to meet the elements of

Montana’s compulsion statute—which is not the case—he has presented sufficient evidence to create a question for the jury.

Regardless of whether a statute codifies the necessity or compulsion defense, no state can abrogate the Constitution.

B. The Washington and Minnesota Courts of Appeals have allowed the necessity defense in cases identical to this one.

Mr. Higgins participated in a simultaneous nonviolent action with four other people (the “Valve-Turners”) in four States: Montana, Washington, Minnesota and North Dakota. All asserted a climate necessity defense pretrial, and thus far two of those cases have resulted in rulings upholding a defendant’s right to assert a climate necessity defense at trial.

In addition to *Klapstein*², Mr. Higgins requests this Court to take into consideration *State v. Ward*, 438 P.3d 588, 592 (Wash Ct App 2019), *rev den*, 193 Wash 2d 1031 (2019), another case that pertains to fellow Valve-Turner Kenneth Ward and involves a near-identical protest. After Mr. Higgins’ opening brief was filed, Mr. Ward also won his appeal; the Court of Appeals reversed the trial court’s decision to deny Mr. Ward’s necessity defense prior to trial, and the Supreme Court affirmed that decision. This opinion speaks directly to the key question in this appeal: the guarantees of the Sixth Amendment and a related presumption

² See Defendant’s Opening Brief at 17-18 for discussion of *State v. Klapstein*, A17-1649, 2018 WL 1902473 (Minn Ct App Apr 23, 2018), *rev den* (July 17, 2018).

against wholesale exclusion of a criminal defendant's relevant evidence prior to its presentation at trial.

In fact, the highest courts in Washington *and* Minnesota have now recognized the preeminence of a defendant's due process rights and the applicability of the necessity/compulsion defense in climate protest cases with facts identical to those of the instant case. As in the Minnesota case, Ward (like Higgins) was charged in connection with an act of protest that involved turning off a pipeline shutoff valve carrying Canadian tar sands oil into the United States. *Ward, supra* at 592. In April 2019, the Washington Court of Appeals ruled that the trial court violated Ward's constitutional rights when it prohibited him from presenting the necessity defense, upholding the right of a defendant to present the defense in the context of a protest against "the continued use of tar sands oil, which significantly contributes to climate change, and the inaction by governments to meaningfully address the crisis of climate change." *Id.* at 592.

The Washington opinion, like *Klapstein*, recognized the Sixth Amendment right of defendants in protest cases to a complete defense and suggests that affirmative defenses such as necessity/compulsion are properly considered in cases involving climate protest when the defendant has made a substantial showing of evidence supporting the defense. *Id.* at 594. Mr. Higgins, like the other Valve-

Turners, made such a showing. (Defendant’s Memorandum on Necessity 15-18, Defendant’s Opening Brief 14-16).

Mr. Higgins’ factual case is identical to *Ward* and *Klapstein*, as is the legal basis and evidentiary proof used to substantiate the necessity/compulsion defense. In Washington, Minnesota, and Montana, the defendants asserted common law defenses of necessity in regard to their acts of climate protest. Though the common law of necessity is defined somewhat differently in different jurisdictions, there are also important commonalities. (Defendant’s Memorandum on Necessity 10). The Washington and Minnesota formulations of this defense are similar to each other and to the Ninth Circuit formulation asserted by Mr. Higgins in Montana. The key elements are consistent across all three states. The critical question for purposes of this appeal is the role of the jury in deciding such cases. The answer to this question does not change as a result of the small variations in the necessity (or, in Montana, necessity/“compulsion”) defense across jurisdictions. Significantly, all three states also require a reasonable belief in the efficacy of the defendant’s action—a test that must be measured by the jury, not a judge.

The Washington formulation of the common law necessity defense requires that (1) the defendant reasonably believed the commission of the crime was necessary to avoid or minimize a harm, (2) the harm sought to be avoided was greater than the harm resulting from the defendant’s action, (3) the defendant did

not bring about the threatened harm, and (4) there was no reasonable legal alternative. *Ward, supra* at 592.

In Minnesota, the common law necessity defense requires the defendant to show that “the harm that would have resulted from obeying the law would have significantly exceeded the harm actually caused by breaking the law, there was no legal alternative to breaking the law, the defendant was in danger of imminent physical harm, and there was a direct causal connection between breaking the law and preventing the harm.” *State v. Rein*, 477 N.W.2d 716, 717 (Minn. App. 1991), *rev. den.* (Minn. Jan. 30, 1992). The defense “applies only in emergency situations where the peril is instant, overwhelming, and leaves no alternative but the conduct in question.” *State v. Johnson*, 289 Minn. 196, 199, 183 N.W.2d 541, 543 (1971).

Mr. Higgins was required to prove that: 1) he faced a choice of evils and chose the lesser evil; 2) he acted to prevent an imminent harm, 3) he had a reasonable belief that his action was necessary to avoid or minimize the harm, and 4) he had no reasonable legal alternative. (Defendant’s Memorandum on Necessity 11). Mr. Higgins presented ample evidence to meet these requirements. *Id.* at 15-18.

The commonality between these three state-specific versions of the common law necessity defenses is: (1) Imminent harm that is worse than the harm caused by

defendant's action, (2) Lack of reasonable alternative, and (3) Causation: the defendants' action is linked to avoidance of the harm. The Washington and Minnesota courts determined that the Valve-Turner defendants presented sufficient evidence of these elements to create a question for the jury. It was error for the Montana court to decide otherwise.

Due to the aforementioned commonalities with the Montana version of the defense, and the propriety of Montana courts looking to out-of-state authority on this issue, the Washington and Minnesota courts' analyses are relevant and persuasive as to Mr. Higgins' case.

With respect to the first common element (an imminent harm that is worse than the harm caused by defendant's action), all Valve-Turners presented scientific evidence on climate change and offered expert testimony by climate scientists to prove the imminent harm caused by climate change. The Washington court found that Ward offered "sufficient evidence to show that the harms of global climate change were greater than the harm of breaking into [the pipeline company's] property." *Ward, supra* at 594.

For the second common element (lack of reasonable lawful alternative), all Valve-Turners presented data on climate policy, their own extensive experience as climate advocates, and expert testimony on social movements and the American political system. The Washington court found that Ward "offered sufficient

evidence to create a question of fact on whether there were reasonable legal alternatives.” *Ward, supra* at 595.

With respect to the third common element (causation), both Washington and Montana specifically require that the defendant reasonably believed that their action would make a difference. Again, they presented similar evidence on this point. In assessing the specific valve-turner protest in which both Mr. Ward and Mr. Higgins engaged, the court notes that the actions of Mr. Ward were “not merely symbolic.” Rather, the interruption of the importation of tar sands oil into the U.S. that Mr. Ward caused “was a direct way of preventing a uniquely potent contributor to climate change from entering the United States.” *Id.* at 596. The Washington court found that “Ward presented sufficient evidence that he reasonably believed the crimes he committed were necessary to minimize the harms that he perceived” and that “whether Ward’s beliefs were reasonable was a question for the jury.” *Id.* at 594.

C. Pretrial motions in limine seeking pretrial exclusion of defendants’ evidence are subject to heightened scrutiny.

Trial courts have the inherent power to exclude evidence as necessary to ensure a fair trial, *Folsom v. City of Livingston*, 2016 MT 238, ¶ 11, 385 Mont. 20, 24, 381 P.3d 539, 543, but evidence must be irrelevant, immaterial, or unfairly prejudicial to warrant such exclusion, *Lewis, supra* at 425. In *United States v. Brodhead*, which involved justification and international law defenses, the court

reiterated that pretrial exclusion of a defense via a motion *in limine* is warranted only when there is “no supporting evidence at all.” 714 F. Supp. 593, 596 (D. Mass. 1989).

II. THE DISTRICT COURT ERRED IN FINDING PROOF BEYOND A REASONABLE DOUBT FOR FELONY CRIMINAL MISCHIEF

A. The State failed to prove damages in excess of \$1,500.

The State wrongly asserts that Mr. Higgins argues that pecuniary loss can only include the cash value of the damaged property and not wages, salaries, and mileage reimbursements of Spectra’s employees. Contrary, Mr. Higgins argues that the State failed to *prove* that the wages, salaries, and mileage reimbursements of the Spectra employees working that day were wages, salaries, and mileage reimbursements that the company would not have *otherwise* paid out as a part of the daily routine of ensuring pipeline operations and safety. We are left to assume that pipeline supervisors and employees are only paid when they respond to emergencies, like a tow truck driver or locksmith contrary to the industry’s own safety guidelines.

The State’s citation is helpful in distinguishing between losses suffered *as a result* of a party’s action versus what occurred here. As discussed in *La Tray*, the Defendant was ordered to pay restitution for emergency medical services and a tow truck that responded to his criminal conduct. *State v. LaTray*, 2000 MT 262, 302

Mont. 11, P.3d 116. However, emergency medical responders and tow truck drivers are not employed to maintain roads. Rather, they are deployed in response to individual accidents. Each call for service comes with a separate invoice for the services used. Pipeline maintenance and safety is a regular, continuous operational requirement (including the requirement for Spectra to voluntarily shut down the pipeline when they received the call announcing Mr. Higgins' future action).

The only alleged damage-receipt that Mr. Higgins received was an unauthenticated 'State's Exhibit 6,' which asserted \$937 in repair costs for a damaged chain and actuator. The State provided no invoice at all for *any* services, either by employee or contractors, despite numerous discovery requests and subpoenas over the course of a year. Instead, the State's witness, Mr. Graham, waited until the day of trial to testify to the wages/salaries of himself and his employees, who he admitted were performing the duties for which they were hired and perform in the normal course of business. (Transcript Vol. 2, p. 52). Moreover, despite the State's argument (without evidence) that Spectra suffered loss related to inoperation, no loss of profit was recorded or submitted to the Court; and *Spectra itself reported zero damages* to the Federal Register. (Transcript Vol. 2, p. 1-11).

The heart of this specific issue is whether the State proved damages in excess of \$1,500 beyond a reasonable doubt at trial. They did not. The ambulance/tow truck/locksmith analogies are inapposite because Spectra salaries

and wages were paid as a matter of course to employees performing the duties they were routinely paid to perform that day. Without sufficient proof of economic loss related to this incident, the State arguably proved actual damages of \$937. Clearly the State did not meet its burden of proof to establish each and every element of the offense charged beyond a reasonable doubt in that they failed to prove sufficient damages in this felony criminal mischief case. Therefore, the Court erred in denying Mr. Higgins' motion for a directed verdict.

B. The Court erred on several evidentiary matters at trial.

The Court erred by refusing to admit relevant portions of Mr. Higgins testimony and exhibits regarding his state of mind in executing this action, which was a material element of the crimes charged. Moreover, the suggestion that Mr. Higgins "was allowed to testify as to what inspired his protest" is simply inaccurate. (Resp.'s Brief 36). As noted in his opening brief, Mr. Higgins' offer of an exhibit of a graphic of Dr. Hansen's scientific analysis that educated and inspired Mr. Higgins' involvement in this action was denied in error, despite state of mind admissibility. (Transcript Vol. 3, p. 11-12). A defendant is not limited to a single question about their intent. (Resp.'s Brief 37). The rationale behind the Court's denial of this testimony and exhibit extended to the remainder of his exhibits, constituting reversible error on grounds that it resulted in serious

prejudice to the defendant, a miscarriage of justice, and raises a serious question regarding the fundamental fairness of the trial. (App.'s Brief 28-33).

In contrast, admission of State's Exhibit 6 should have been denied because inadequate foundation, authentication, and identification were offered to the Court after Mr. Higgins' timely objection. The State now claims that Spectra's Mr. Graham was "momentarily confused as to which receipt he had been given," despite the incontrovertible fact that there was no other receipt. The State submitted only this one piece of paper from a multi-billion dollar company as evidence of the damages in this year-long criminal case. (Resp.'s Brief 37). The suggestion that there were multiple receipts is misleading at best. The Court erred in failing to sustain Mr. Higgins' objection as to authentication, identification and foundation which resulted in prejudice to Mr. Higgins as to the criminal mischief charge and restitution award.

Finally, the State wrongly contends that Mr. Higgins' failed to challenge the propriety and accuracy of the alleged economic loss at trial. (Resp.'s Brief 38-39). Despite timely and repeated discovery requests and subpoenas, Mr. Higgins was only provided with \$937 in alleged damages and a vague request for economic losses, initially purported to be over a quarter-million dollars. Nonetheless, Ms. Regan's cross-examination actually *did* challenge the propriety and accuracy of the alleged economic loss. (Transcript Vol. 2, p. 53-62). Indeed, the majority, if not all,

of her questions demonstrated that there was no lost profit, salary, wage, or mileage, and that the only damages incurred by Spectra amounted to approximately \$937. *Id.* Further, Mr. Higgins established that this State evidentiary failure directly prejudiced him regarding a material element of the crime (*i.e.*, damages amount over \$1,500). Failure to review this error will result in Mr. Higgins' unjust conviction, a manifest miscarriage of justice, bringing into question both the fundamental fairness of the trial and proceedings, as well as the integrity of the judicial process.

As a result of the above arguments, as well as those included in the Opening Brief, the State also failed to meet their burden of proof in establishing \$3,755 in restitution and said judgment must be reversed.

For the reasons stated above, each of the above-listed errors constitutes reversible error.

CONCLUSION

A criminal defendant's paramount Sixth Amendment right to assert defenses and provide evidence and testimony to a jury of his peers is unassailable. Mr. Higgins provided sufficient evidence to support both the common law defense of necessity and Montana's compulsion defense to create questions for the jury. The trial court erred in denying Mr. Higgins' the right to defend against the charges with competent evidence and to permit the jury to exercise their exclusive fact-

finding function. The State also failed to meet their burden of proof as to each element of the felony criminal mischief charge, and that failure also resulted in an improper restitution judgment.

For all of the foregoing reasons, Mr. Higgins asks this Court to reverse and remand this case for a new trial which allows the defendant to provide testimony and other evidence regarding the climate necessity/compulsion defense, to reverse all convictions, and to reverse the restitution judgment.

Respectfully submitted this 13th day of December, 2019.

/s/ Herman A. Watson, IV
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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 5,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

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