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**IN THE UNITED STATES DISTRICT COURT,
DISTRICT OF UTAH, CENTRAL DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TIM DeCHRISTOPHER,

Defendant.

REPLY MEMORANDUM IN SUPPORT
OF WRITTEN PROFFER OF
CHOICE OF EVILS DEFENSE
AND REQUEST FOR EVIDENTIARY
HEARING

Case No. 2:09 CR 183 DB

Judge Dee Benson

Tim DeChristopher, by and through counsel, Ronald J. Yengich, Elizabeth Hunt and Patrick A. Shea, hereby submits this reply memorandum in support of his DeChristopher's proffer of the evidence he would submit in presenting his choice of evils defense.

REPLY TO GOVERNMENT'S RESPONSES

AUTHORITY FOR DEFENSE (Government Response 1)

The Government claims that DeChristopher has yet to present authority from a state or federal appellate court demonstrating his entitlement to present a necessity defense. Government response at 1. In making this argument, the Government apparently is of the opinion that DeChristopher must present an appellate court decision wherein such a defense was both presented and successful. Cf. id. By virtue of the Double Jeopardy Clause of the Federal Constitution, the prosecution is not allowed to appeal from acquittals in criminal cases. See, e.g., Arizona v. Washington, 434 U.S. 497, 503 (1978). Hence, the absence of an appellate decision in a case wherein the necessity defense was successfully presented should not prevent this Court from presiding over a criminal trial wherein DeChristopher is permitted to defend himself.

The Government is apparently dissatisfied with the "Kingsnorth 6" verdict of acquittal hailing from the "foreign land" of the England, and with the "Hercules 3" verdict of acquittal from the Third District Court of Salt Lake City. This Court is part of the global legal community, and is fully entitled to consider decisions from international and state courts in reaching its decisions. See, e.g., United States v. Maine, 475 U.S. 89, 99-100 (1986) (relying on case from the United Kingdom in deciding issue of international law); Quorum Health Resources LLC v. Hugh Chatham Memorial Hospital Inc., 552 F.Supp.2d 527, 530 (M.D.N.C. 2007) (recognizing decisions of lower state

courts as persuasive authority).

DeChristopher has demonstrated his entitlement to raise the choice of evils defense under several federal appellate court decisions addressed in his memoranda and identified by the Government as controlling authorities. See DeChristopher's proffer, *passim*. Accordingly, the Court should allow him to present his case to a jury.

RELAXATION OF IMMINENCE REQUIREMENT (Government Response 2)

The Government is in agreement with DeChristopher that the Tenth Circuit did not relax the imminence requirement in United States v. Patton, 451 F.3d 615, 637 (10th Cir. 2006). See Government response at 2, DeChristopher's proffer at 9. The Government has not contested DeChristopher's argument based on *dictum* in Patton that this Court should consider relaxing the imminence requirement in this case. Compare DeChristopher's proffer at 9-10 with Government response, *passim*.

REASONABLE JUROR STANDARD (Government Response 3)

The Government asserts that DeChristopher must satisfy the Court as to each and every element of the necessity defense, and that DeChristopher is confused in arguing that the law requires him to proffer evidence sufficient to satisfy one reasonable juror. Government response at 2, citing DeChristopher's proffer at 16-17. As is explained in pages 3 and 4 of the DeChristopher's proffer, and as may be confirmed by reading the

case cited, United States v. Apperson, 441 F.3d 1162, 1204 (10th Cir. 2006), the Court is not to consider subjectively whether it personally is convinced of the defense, but is to make an objective assessment of whether a reasonable jury could find for the defense. See id. Given that one juror is all that is required to prevent a conviction, the Court should permit the defense because at least one reasonable juror could find in favor of DeChristopher based on the proffer. Cf., e.g., Wiggins v. Smith, 539 U.S. 510, 537 (2003) (reversing capital sentence for ineffective assistance after concluding that if the defense case had been handled competently, there was “a reasonable probability that at least one juror would have struck a different balance.”). The Tenth Circuit’s requirement that the Court accept all evidence most favorable to the defendant in assessing his entitlement to raise an affirmative defense, e.g., United States v. Butler, 485 F.3d 569, 571-72 (10th Cir. 2007), confirms that the inquiry does not focus on what the Court itself would do with the evidence. See id. The reasonable juror standard is the appropriate one for Court to apply, because it best preserves the defendant’s constitutional right to have a jury decide his fate in a criminal case. See, e.g., Barker v. Ukins, 199 F.3d 867, 874-76 (6th Cir. 1999) (reversing appellate court’s harmless error analysis of trial court’s failure to give defense instruction because appellate court weighed the credibility of evidence, and invaded the province of the jury).

4. RELIANCE ON JUDGE URBINA'S RULING (Government Response 4)

The Government finds it ironic that DeChristopher relies on Judge Urbina's ruling granting a temporary restraining order in the lawsuit by the Southern Utah Wilderness Alliance, and asserts that the lawsuit exemplifies a lawful means of approaching the harms DeChristopher was combating with his conduct. Government response at 2. At trial, in an effort to defeat a necessity defense, the Government may well try to present evidence of similar alternative means DeChristopher might have used to combat the harms at issue, and DeChristopher must establish that no legal means were available to give him a similar opportunity to combat the harms at issue as the one he took in the offenses charged. See, e.g., Dorrell, 758 F.2d 427, 431 (9th Cir. 1985). At this juncture, DeChristopher is relying on Judge Urbina's ruling to counter the Government's claim that the lease sales would not come to fruition for years if at all, and to demonstrate that the lease sales he stopped were an imminent harm and that he had no legal means available to similarly thwart the auction at the time that the alleged offenses were committed. See DeChristopher's proffer at 2, 16 and Addendum G. Because the ruling and underlying factual basis are evidence upon which a reasonable juror might rely in refusing to convict DeChristopher, this Court should accept the facts asserted therein as true in determining whether DeChristopher is allowed to defend against the Government's charges. See, e.g., Butler, supra.

DUE PROCESS AND THE RULES OF EVIDENCE (Government Response 5)

The Government contends that due process applies to both the prosecution and the defense in a criminal case, and that the rules governing the admission of evidence are designed to insure fairness for all parties. Government response at 3. DeChristopher has no quarrel with these propositions. Cf., e.g., Taylor v. Illinois, 484 U.S. 400 (1988) (affirming trial court's exclusion of defense evidence for defendant's failure to comply with discovery rules). DeChristopher has not done anything and has not asked the Court to do anything to deprive the Government of due process or to violate any rules governing the admissibility of evidence.

The Government's assertion that Federal Rules of Evidence 401 through 403 preclude the evidence necessary to sustain a necessity defense is wholly unsupported by analysis or authority. Rule 401 defines relevant evidence in exceedingly broad terms, stating:

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402 embodies the general inclusionary approach of the federal rules, stating:

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Finally, Rule 403 permits the exclusion of otherwise admissible and relevant evidence

only if its probative value is substantially outweighed by countervailing considerations. It states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The cases upon which the Government relied in submitting its original motion in limine seeking to bar DeChristopher's defense demonstrate that courts routinely admit evidence in support of such defenses, but will not instruct the jury on that defense in the event the evidence is insufficient to justify the instructions. See, e.g., United States v. Bailey, 444 U.S. 394 (1980); United States v. May, 622 F.2d 1000 (9th Cir. 1980); United States v. Turner, 44 F.3d 900 (10th Cir. 1995); United States v. Kabat, 797 F.2d 580 (8th Cir. 1986).

The Government's claim that overwhelming, if not unanimous authority from the United States Supreme Court precludes what DeChristopher wishes to present at trial, is unsupported by citation to authority. DeChristopher's proffer meets the legal elements set forth in Bailey and its progeny. See DeChristopher's proffer.

The Government's concerns that the trial would be unfair and misguided if DeChristopher were allowed to defend himself are unfounded. Our criminal justice system continues to function on the fundamental premise that juries arrive at just verdicts by assessing the evidence and following the guidance provided through legal instructions

of the courts. CSX Transp. Inc. v. Hensley, 129 S.Ct. 2139, 2141 (2009). Allowing DeChristopher's jurors to make a decision after hearing the relevant evidence and receiving the correct law from the Court is the most traditional and time honored route to justice.¹ See, e.g., Duncan v. Louisiana, 391 U.S. 145, 153 (1968) (discussing historical role of jury to protect the accused from unchecked government power); California v. Green, 399 U.S. 149, 162 (1970) (discussing jury's truth finding function). Given the governmental lawbreaking which preceded, surrounded and required DeChristopher's alleged offenses, and given the factual disputes between the Government's and DeChristopher's cases, this prosecution is quintessentially appropriate for a jury to decide. See id.

¹Article III of the United States Constitution provides, in relevant part: The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

The Sixth Amendment similarly provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Federal Rule of Criminal Procedure 23(a) likewise presumes that criminal cases will be decided by a jury.

6. PRIORIETY OF AN EVIDENTIARY HEARING (Government Response 6)

_____The Government would relegate DeChristopher to the “public square,” and claims he should not be permitted even an evidentiary hearing in federal court. While public squares do continue to provide important venues for First Amendment activities, the Government brought this criminal prosecution in federal court, where DeChristopher has very well established constitutional rights to defend himself. See, e.g., Crane v. Kentucky, 476 U.S. 683, 690 (1985). Just as the Government is permitted to go to trial on and prosecute the basis of the words in the Indictment, United States v. Todd, 446 F.3d 1062, 1067-68 (10th Cir. 2006), DeChristopher should be permitted to go to trial and defend on the basis of his written proffer, because the evidence which supports his defense meets the legal standards before the Court, see United States v. Butler, 485 F.3d 569, 571-72 (10th Cir. 2007), *supra*.

In the event the Court rules that the DeChristopher’s proffer is legally insufficient, DeChristopher requests an evidentiary hearing wherein he is allowed to make a full and accurate proffer of his defense, and wherein any misconceptions engendered by the factual assertions underlying the parties’ claims may be clarified through testimony and cross-examination of witnesses.

Respectfully submitted this 3rd day of November, 2009.

YENGICH, RICH & XAIZ
Attorneys for Defendant

By: /s/ Ronald J. Yengich

RONALD J. YENGICH
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PATRICK A. SHEA

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was efiled and served by electronic notice to all parties listed below on this 3rd day of November, 2009:

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