UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	No. 3:12-CR-107
	)	
v.	)	JUDGES PHILLIPS/SHIRLEY
	)	
MICHAEL R. WALLI,	)	
MEGAN RICE, and	)	
GREG BOERTJE-OBED,	)	
	)	
Defendants.	)	

GOVERNMENT'S REPLY TO THE DEFENDANTS' SUPPLEMENTAL BRIEF OPPOSING THE GOVERNMENT'S MOTION TO PRECLUDE CERTAIN DEFENSES

Comes now the United States of America, by and through the United States Attorney for the Eastern District of Tennessee, and files this Reply to the Defendants' Supplemental Brief Opposing the Government's Motion to Preclude Certain Defenses (Doc. 74, 74-1).

INTRODUCTION

The defendants claim that due to the nature of Count One of the Superseding Indictment, which charges the defendants with injuring the national defense, they must be allowed to present defenses regarding the illegality of nuclear weapons under international law at trial. (Doc. 74-1 at 2-3.) The defendants contend that because the Government must prove that the defendants acted with intent to injure the national defense of the United States, their motive and reasons for committing the crime are relevant. (*Id.* at 3.) Therefore, the defendants argue that they should be permitted to discuss at trial the law of necessity, international law, the Nuremburg principles, the First Amendment, the immorality of nuclear weapons, religious, moral and political beliefs regarding nuclear weapons, and the United States policy regarding nuclear weapons. *Id.*

ARGUMENT

1. *The defendants' motives for committing the offense in Count One of the Superseding Indictment are immaterial and irrelevant as to a defense.*

The defendants claim that Count One of the Superseding Indictment "cement[ed] the relevance and importance of the very defenses which [the United States] seeks to preclude." (Doc. 74-1 at 4.) In support of such claim, the defendants quote *United States v. Kabat*, wherein the district court in the trial of that 18 U.S.C. § 2155(a) case permitted "testimony on the destructive power of nuclear weapons, the 'offensive' nature of the newer nuclear missiles, the alleged escalation of risks from the availability of nuclear weapons and the nuclear buildup, the role in history of civil disobedience, international law, and the defendants' beliefs that, based upon the statements of religious leaders, they were required by the higher law of God to prevent the crime against humanity and destruction of God's world represented by the nuclear threat." 797 F.2d 580, 583 (8th Cir. 1986). Because the district court in *Kabat* allowed such testimony, the defendants assert that they are "likewise entitled" to present similar evidence to the jury. (Doc. 74-1 at 4.)

The defendants fail to include the qualifying sentence immediately following the above quotation: "The court, however, instructed the jury that neither good motive alone nor moral, religious, or political belief was a defense to crime and that it would be a violation of their duty as jurors if they were to pass judgment on U.S. nuclear weapons policy." *Kabat*, 797 F2d at 583. Further, the defendants may have misconstrued the extent to which the defendants in *Kabat* were able to present a defense based on international law. The opinion explicitly states, "All defendants on appeal argue that . . . the district courts erred in refusing to permit them to rely on international law defenses." *Id.* at 584. In fact, a different district court judge refused to permit Holladay, a *Kabat* co-defendant, to argue or present any evidence of international law in his trial.

Id. at 584. The Eighth Circuit found that there was no error in the district court's rejections of the international law and necessity defenses. *Id.* at 590.

Significantly, in *Kabat*, the court concluded "that the 'specific intent' required by section 2155 is only the intent to interfere with what may commonly be taken as the country's activities of national preparedness and not the intent to act to what one subjectively believes to be the detriment of the United States." *Id.* at 587-88. Once criminal intent is proven, it is "immaterial that a defendant may also have had some secondary, or even overriding, intent. *Id.* "If the intent is overriding – that is, it reflects the ultimate end sought which compelled the defendant to act – it is more properly labeled a 'motive.'" *Id., see also United States v. Cullen*, 454 F.2d 386, 391 (7th Cir. 1971).

The court in *Kabat* found that nuclear protestors' ultimate motive – that of saving innocent lives, "does not replace or negate the intent which the statute requires – that of interfering with U.S. defense functions, facilities, and policies." *Kabat*, 797 F2d at 588. "An argument to the contrary merely tries to read back into the statute a requirement of a subjective desire to interfere with the country's best interests, an interpretation that we have already rejected." *Id.*

Similarly, the Tenth Circuit in *United States v. Platte*, 401 F.3d 1176, 1181 (10th Cir. 2005), found that the "high-minded motives of the defendants do not negate their intent." *Id.* The Tenth Circuit further stated, "[i]f the law being violated is constitutional, the worthiness of one's motives cannot excuse the violation in the eyes of the law." *Id.* Thus, what *Platte* and *Kabat* made clear is that it is immaterial that the defendants had ulterior motives or ultimate goals because such motives and goals do not negate the intent to injure, interfere with or obstruct national defense.

The United States must prove beyond a reasonable doubt that: 1) the defendants willfully injured, destroyed, or contaminated any national defense premises of the United States; and 2) the defendants acted with the *intent to injure, interfere with, or obstruct the national defense* of the United States. *See Platte*, 401 F.3d at 1180 (emphasis added). With regard to the second element, the United States must establish only the defendant's intent to interfere with the country's activities of national preparedness. Contrary to the defendants' assertions, the second element does not require the defendants' motives and reasons for their commission of the crime. (Doc. 74-1 at 3.) The defendants' motives for committing the 18 U.S.C. § 2155 offense cannot excuse the violation of the offense, cannot replace or negate the intent required by the statute, and are thus irrelevant and immaterial. The United States submits that defenses involving necessity; international law; Nuremburg principles; First Amendment protections; the alleged immorality of nuclear weapons; good motive; religious, moral or political beliefs regarding nuclear weapons; and the United States government's policy regarding nuclear weapons will serve no legitimate purpose at trial and will only confuse the issues and the jury. With regard to these defenses, Count One is not distinguishable from the other counts. While these defenses masquerade as justification defenses, the real motivation behind them is to obfuscate the issue of whether or not the elements of the charged offense have been proven. They are simply an indirect way to suggest jury nullification, which the Sixth Circuit has recognized is not valid and contrary to the impartial determination of justice based on law. *See United States v. Krzyske*, 836 F.2d 1013, 1021 (6th Cir. 1988).

Therefore, the United States maintains that such defenses should be precluded from introduction by the defendants at trial.

2. *It is improper for a witness to testify regarding legal conclusions.*

The defendants seek to present testimony regarding their perceptions of the law as it pertains to the nuclear weapons policies of the United States. (Doc. 74-1 at 2-5.) The United States objects to any testimony concerning the application of law or any justification defense that a lay witness or expert witness may seek to provide at trial, as such testimony is improper.

According to Rule 701 of the Federal Rules of Evidence:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

According to Rule 702 of the Federal Rules of Evidence:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Neither FRE 701 nor FRE 702 permits testimony as to legal conclusions. The Sixth Circuit has held that "expert testimony as to what constitutes a violation of law is improper." *Polec, et al v. Northwest Airlines, Inc.*, 86 F.3d 498 at 523 (6th Cir. 1996). "It is improper for an expert witness to testify concerning legal requirements, as this 'invades the province of the court to determine the applicable law and to instruct the jury as to that law.'" *Id., citing Torres v. County of Oakland*, 758 F.2d 147, 150 (6th Cir. 1985).

Testimony including terms that demand an understanding of the nature and scope of criminal law may be properly excluded. *See Torres,* 758 F.2d at 151. "[I]f the witness expresses

an opinion using legal terms that follow the statutes, it is more likely to be held that the witness is giving a legal conclusion." *United States v. Safa*, 484 F.3d 818, 821 (6th Cir. 2007). Therefore, the government submits that testimony concerning the law provided by any witness is improper and should be excluded.

Testimony concerning legal applications is irrelevant and should be excluded as it will not assist the trier of fact to understand the evidence or to determine a fact in issue. Moreover, the defendants are not excused from the criminal consequences of their conduct simply because their acts were directed at alleged international law violations. Defense testimony is properly excluded when the evidence has no bearing on the guilt or innocence of the defendants and is inadmissible for impeachment purposes. *See United States v. Williams*, 952 F.2d 1504 (6th Cir. 1991). The defendants do not have a right to present irrelevant evidence. *United States v. Maxwell*, 254 F.3d 21, 26 (1st Cir. 2001). Therefore, testimony that provides legal analysis or draws legal conclusions regarding international law or other justification-type defenses invades the province of the Court and is irrelevant and should be excluded from evidence at trial.

CONCLUSION

WHEREFORE, the United States respectfully requests this Honorable Court to deny the defendants' Supplemental Brief Opposing Government's Motion to Preclude Certain Defenses Based on Superseding Charges (Doc. 74, 74-1).

Respectfully submitted this 1st day of February, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2013, the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's electronic filing system.

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