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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff, vs. LOUIS VITALE; STEPHEN M. KELLY, Defendants.	Case Nos. CR-07-00576-TUC-HCE (CVB); CR-07-00575-TUC-HCE (CVB) GOVERNMENT'S REPLY TO DEFENSE MOTION IN OPPOSITION TO GOVERNMENT'S MOTION IN LIMINE TO PREVENT CERTAIN DEFENSES. June 11, 2007

RELIEF SOUGHT:

Pursuant to the Court's extension of time for the parties to respond to motions, L.R.Cr. 12.1, and L.R.Civ. 7.2(d), Plaintiff, United States of America, by its attorneys, Daniel G. Knauss, United States Attorney, and Evan R. Seamone, Special Assistant United States Attorney, moves for the Court to consider the following additional precedents and legal theories in support of its motion in limine to preclude the Defense from raising various defenses including necessity, justification, and international law.

STATEMENT OF LAW AND ARGUMENT:

I. DEFENDANTS LACK STANDING TO RAISE DEFENSES ON BEHALF OF UNNAMED, HYPOTHETICAL DETAINEES OR MILITARY INTERROGATORS.

To litigate an issue in a Federal Court, a party must show the existence of a case or controversy pursuant to U.S. Const. art. III, 2, cl. 1. As noted in Bennett v. Spear, 520 U.S. 154, 162 (1997), this provision of the Constitution requires a party to show "that he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the [other party], and that the injury will likely be redressed by a favorable decision." (citations omitted) This "injury in fact" must touch the individual raising the claim and be "'distinct and palpable,' as opposed to merely 'abstract,' and the alleged harm must be actual or imminent, not 'conjectural' or 'hypothetical.'" Whitmore v. Arkansas, 495 U.S. 149, 155 (1990). (citations omitted) The Ninth Circuit has applied these standing requirements to defendants who have raised defenses of necessity and international law in trespass cases. *E.g.*, United States v. May, 622 F.2d 1000, 1009-10 (9th Cir.), cert. denied, 449 U.S.984 (1980). The court, in May, held:

> "We do not sit to render judgments upon the legality of the conduct of the government at the request of any person who asks us to because he happens to think that what the government is doing is wrong. He must be able to show some direct harm to himself, not a theoretical future harm to all of us that may or may not occur."

Id. at 1009. May further held that allowing such a defense would permit defendants to have a "back door" to evade standing requirements—a back door the court refused to provide. Id. In other instances, the Ninth Circuit has similarly disallowed such defenses on the basis of lacking standing. *See* United States v. Cottier, 759 F.2d 760, 763 (9th Cir. 1985) ("The doctrine of standing and justiciability set forth in Schlesinger v. Reservists to Stop the War, 418 U.S. 208, 41 L. Ed. 2d 706, 94 S. Ct. 2925 (1974), properly applies in the court's refusal to admit the evidence. This ruling is consistent with our reasoning on the same issues raised in ... Lowe. 654 F.2d at 566 ..."). *Cf.* United States v. Allen, 760 F.2d 447, 453 (2d Cir. 1985) ("In short, because appellants can show only a 'theoretical future harm to all of us,' ... from the alleged international law violation, they would not have standing to bring an action

challenging the nuclear weapons program.") (addressing the context of conspiracy and destruction of property).

Fr. Vitale and Rev. Kelly have completely failed to show any personal injury based on training occurring at Fort Huachuca. They have failed to meet any of the threshold requirements for standing to raise defenses of necessity, justification, or international law. Furthermore, the position that some rogue future interrogator will independently violate military law and engage in torture of detainees is a 'conjectural' and 'hypothetical' occurrence that offends the principles underpinning the Constitution's standing requirements.[1]

II. DEFENDANTS LACK THIRD-PARTY STANDING TO RAISE DEFENSES ON BEHALF OF UNNAMED, HYPOTHETICAL DETAINEES OR MILITARY INTERROGATORS.

Generally, courts prefer litigants to assert their own rights and interests, rather than those of third parties. Powers v. Ohio, 499 U.S. 400, 410 (1991). However, third-party standing is viable when parties satisfy three essential criteria: "The litigant must have suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute[;] the litigant must have a close relation to the third party[;] and there must exist some hindrance to the third party's ability to protect his or her own interests." Id. (citations omitted) The Ninth Circuit recently applied these standards in the context of attorneys, clergy members, and others who sought to file a habeas corpus petition on behalf of all "Persons Held Involuntarily at Guantanamo Bay Naval Air Base, Cuba." Coalition of Clergy v. Bush, 189 F. Supp. 2d 1036, 1038 (C.D. Cal. 2002), aff'd in part, vacated in part, 310 F.3d 1153 (9th Cir. 2002), cert. denied, 538 U.S. 1031 (2003). After denying next-friend standing (inapplicable in the instant case), the appellate opinion denied third-party standing for the plaintiffs to represent detainees' interests on the following basis:

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[1] Defendants' attempt to stop the instruction of trainees necessarily limited their concerns to the future actions of potential interrogators, as all trainees would first be required to: (1) fulfill all training and fitness requirements; (2) graduate from the course; (3) and then be stationed in a unit that provided direct access to detainees, all of which were conditions that none of the trainees had satisfied by the time of the Defendants' trespass on Fort Huachuca. For these reasons, the issue is not ripe for adjudication. Thomas v. Anchorage Equal Rights Comm'n,

> "Even if we were to assume satisfaction of the third requirement, a hindrance to the detainees' ability to assert their own claims, we would nevertheless conclude that the Coalition lacks third-party standing because neither it nor its members can demonstrate either the first requirement of an injury in fact or the second requirement of a close relationship. As to the first, the Coalition makes no allegation of a personal injury to its members, and as to the second, it has alleged no relationship to the detainees."

Coalition of Clergy, 310 F.3d at 1163. Absent satisfaction of these three cornerstone requirements for third-party standing, the instant Defendants must be denied the opportunity to advocate the interests of unnamed and hypothetical detainees or interrogators.

III. CRIMINAL TRESPASS IN VIOLATION OF 18 U.S.C. § 1382 IS NOT A SPECIFIC INTENT CRIME, AND MAKES DEFENDANTS' MOTIVE AND INTENT COMPLETELY IRRELEVANT.

Much of the Defendants' argument supporting a defense of necessity, justification, and international law rests on the mistaken belief that 18 U.S.C. § 1382 features an essential element of intent. *See* Defendants' Motion in Opposition, at p. 4, Part II ("The Crime Charged Involves Intent"; "Under the explicit words of the statute at issue, the government must prove that the acts were done with criminal intent."). A careful reading, of the type urged by the Defendants in their Motion, was, in fact, conducted by the Ninth Circuit in the case of United States v. Mowat, 582 F.2d 1194 (9th Cir.), cert. denied, 439 U.S. 967 (1978). In Mowat, the court looked at the language of the statute and found that "specific intent need not be proven." Id. at 1203. In fact, the court concluded "Congress clearly did not make motive or intent a factor in determining guilt, and on these facts the absence of Mens rea does not invalidate the statute." Id. at 1204.

Citing to Mowat, the First Circuit case of United States v. Parilla-Bonilla explained that the statute "does not indicate a requirement that the defendant harbor a 'specific intent' to violate a particular regulation, or that he act with a 'purpose' that is in contravention to the

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220 F.3d 1134, 1139 (9th Cir. 2000), cert. denied, 531 U.S. 1143 (2001) (identifying the same constitutional considerations for standing and ripeness).

regulations." 648 F.2d 1373, 1377 (1st Cir. 1981). Hence, when the basis of a prosecution is unauthorized entry, it need only be shown that "the defendant had knowledge or notice that such entry was, in fact, prohibited." Id. *See also* Cottier, 759 F.2d at 762 ("Where entry alone is the basis of the violation, knowledge that the entry is unauthorized is an essential element of a section 1382 offense .... The importance of this knowledge arises in that only innocent trespassers are excluded from the purview of 18 U.S.C. § 1382.").

It does not matter what motivated Fr. Vitale and Rev. Kelly to enter onto Fort Huachuca. The desire to stop training of interrogators has nothing to do with whether they were aware entry was prohibited. Likewise, the fact that some military members, on occasion, have unfortunately violated military law relating to the treatment of detainees has absolutely no relation to whether Fr. Vitale or Rev. Kelly heard repeated warnings from officers that they had to stop moving forward. Indicative of the irrelevance of Fr. Vitale's and Rev. Kelly's motives, the Ninth Circuit has repeatedly held the following:

> "justification and necessity are insufficient to establish a defense to a violation of 18 U.S.C. § 1382. United States v. May, 622 F.2d 1000, 1008 (9th Cir.), cert. denied, 449 U.S. 984, 101 S. Ct. 402, 66 L. Ed. 2d 247 (1980); United States v. Lowe, 654 F.2d 562 (9th Cir. 1981). Furthermore, it is not necessary for the judge to hear arguments on evidence already held legally insufficient by this court. United States v. Lowe, 654 F.2d at 567."

Cottier, 759 F.2d at 762. Along these lines, arguments about international law, which have repeatedly been found insufficient as defenses to this same statute, are inapplicable to the Defendants. *See e.g,* United States v. Maxwell, 254 F.3d 21, 30 (1st Cir. 2001) ("[A]n individual cannot assert a privilege to disregard domestic law in order to escape liability under international law unless domestic law forces that person to violate international law."); Lowe, 654 F.2d at 566-67; May, 622 F2d at 1009. While the Defense has pointed to a number of these cases to argue that interrogation is different from nuclear proliferation, it misses the point that the use of the Nuremberg Defense has been rejected because it represents the misuse of a theory. *E.g.*, United States v. Montgomery, 772 F.2d 733, 737 (11th Cir. 1985):

> "Defendants in the case before us stand this doctrine on its head in arguing that a person charged with no duty or

> responsibility by domestic law may voluntarily violate a criminal law and claim that violation was required to avoid liability under international law. The domestic law simply did not require defendants to do anything that could even arguably be criminal under international law. The attempt to transfer the Nuremberg defense out of context to the case before us was properly rejected by the district court."

In precisely the same manner, the instant Defendants have attempted to turn the Nuremberg Defense on its head in a manner that is completely out of its proper context.

Furthermore, the argument that domestic law protecting federal property must be disregarded in favor of international law completely avoids the fact that "Congress is not bound by international law" when enacting statutory provisions. Allen, 760 F.2d at 454. (citations omitted)

CONCLUSION:

For the foregoing reasons, the defendants and their counsel should be precluded from raising the articulated common-law defenses relating to the defense of justification or international law.

Respectfully submitted this 11th day of June, 2007.

DANIEL G. KNAUSS
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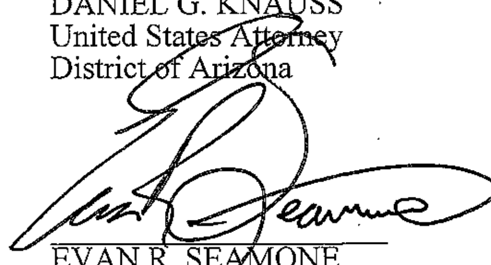

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Copy of the foregoing e-mailed to the attorney listed below, and electronically filed with the Court Clerk this 11th day of June, 2007:

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