

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION**

UNITED STATES OF AMERICA

v.

CRIMINAL NO. 3:08-cr-00107

**FRANK E. MELTON
MICHAEL RECIO
MARCUS WRIGHT**

**GOVERNMENT’S MOTION *IN LIMINE* TO EXCLUDE
EVIDENCE OF ALLEGED DRUG ACTIVITY**

The United States, by its undersigned counsel, respectfully requests that this Court exclude evidence of, or arguments concerning, any history of drug activity in or around 1305 Ridgeway Street in Jackson, Mississippi, or of any police contacts with people at that address, as well as any reference to the home at 1305 Ridgeway Street being a “crackhouse.” Evidence or arguments concerning drugs being used in, or sold from, this address should be excluded because such evidence is irrelevant, highly prejudicial, and likely to confuse and mislead the jury, and it is aimed solely at a defense effort to convince the jury to ignore the evidence and nullify. Moreover, the evidence is insufficient as a matter of law to support any justification defense.

I. Background

On August 26, 2006, defendant Frank Melton, the Mayor of Jackson, and defendants Michael Recio and Marcus Wright, two Jackson Police Department (JPD) officers who worked as Melton’s full-time bodyguards, drove to 1305 Ridgeway Street in Jackson in the

JPD's mobile command unit, along with several troubled teenaged boys and young men. Melton, Wright, and Recio cleared the home of its occupants. Thereafter, the teenagers and young men – at the instruction of Melton – got out of the mobile command unit and used sledgehammers to destroy the home. As the teenagers and young men knocked down interior walls, broke furnishings, and destroyed an entire exterior wall of the house, Melton used a big stick to break several windows in the home.

The defendants did not have a warrant to enter the home, to search the home, or to arrest anyone in the home. Moreover, the defendants could have sought authorization for the City of Jackson to demolish the home under city ordinances or could have obtained under state law a temporary restraining order by establishing that the home was a “nuisance,” but the defendants did not avail themselves of these procedures. No legal proceedings had authorized the destruction of the home or its furnishings.

On July 9, 2008, a grand jury for the Southern District of Mississippi returned a three-count Indictment against the defendants charging each of them with violating 18 U.S.C. §§ 241, 242, and 924(c) for demolition of the home at 1305 Ridgeway Street. The defendants are charged with conspiring to violate, and with actually violating, the rights of the home's owner and tenant to be free from unreasonable searches and seizures by those acting under color of law, and with violating a federal firearm statute. Trial in the matter is scheduled for November 12, 2008.

Based on prior public statements made by the defendants and their representatives, including arguments raised by the defendants in the state trial, the government anticipates that the defendants will seek to introduce evidence that drugs were sold from and used in the home, and that the defendants will seek to argue that the defendants were justified in

demolishing the home because of the drug activity that had taken place there.¹ For example, on September 1, 2006, Jackson television station WLBT broadcast the following statement by Melton, “I don’t know anything about it [referring to the demolition], but we just know it was a drug house.” In a September 2, 2006, WLBT broadcast, Melton was asked if he was sorry that the home was destroyed. He responded, “No, not if they are selling drugs out there -- and if we find some more people who are selling drugs out of their house, you know, there’s no telling what could happen.” In another WLBT broadcast on September 14, 2006, WLBT reported that Melton told WLBT reporters, in reference to the demolition of the home at 1305 Ridgeway Street, “I am in the middle of a drug war. I have made some mistakes. I have my heart and soul in this fight. I am doing whatever I can to save this city.”

Melton’s attorney in the state trial also made similar statements to local television reporters. On September 15, 2006, the day Melton, Wright, and Recio were indicted on state charges related to the destruction of the home, WAPT reported that, in reference to the allegations in the indictment, Danks stated that “better judgment could have been used” but that it was “a known drug house.” Danks made similar statements during his opening statement at the state trial:

[T]he evidence will show that the house at 1305 Ridgeway Street in Jackson, Mississippi, at the time was widely regarded as a house with a history of past crack use. The evidence will prove that on many occasions in the past police had been called to that particular location for drug violations and drug related activities, and the mayor and these police officers went to the house that night to address these problems not with an evil intent but with a desire to reduce the drug problems at that residence and in Jackson as a whole.

State Trial Transcript, p. 278, 3-13 (Attached as Exhibit A).

¹ In April 2007, a Hinds County jury tried the defendants on state charges related to the destruction of Ridgeway Street home. The jury acquitted the defendants of all charges. The government has filed a separate motion *in limine* to exclude evidence of or referral to the state trial acquittal.

Wright's attorney made similar statements in the state trial during his opening statement: "What brought [Wright] there [to the home] was that 1305 is a known drug haven" State Trial Transcript, p. 283, 6-8 (Attached as Exhibit B); and "[T]his [demolition] was for the good of the community." State Trial Transcript, p. 288, 3 (Attached as Exhibit C).

II. Legal Argument

This Court should exclude all evidence of, and arguments related to, any prior incidents of drug use or sale at or near the home and of any prior police contacts at 1305 Ridgeway Street. The alleged crimes in this case occurred on August 26, 2006, and the relevant issue in the case is whether the defendants violated the Fourth Amendment. Evidence that drugs were used or sold in or around 1305 Ridgeway Street *prior* to August 26, 2006, does not have any bearing on whether there was some legal basis *on* August 26, 2006, for the defendants to enter the home, let alone destroy it. Moreover, this evidence, and arguments related to it, should be excluded because it would be unfairly prejudicial and offered simply to encourage the jury to base its decision on something other than the facts of the case. Finally, evidence or arguments concerning drugs being used in, or sold from, 1305 Ridgeway Street should be excluded because such evidence is insufficient as a matter of law to support any justification defense.

A. Evidence of Prior Drug Activity at the Address Should be Excluded Because it is Irrelevant, Highly Prejudicial, Likely to Confuse the Jury, and is Offered Solely for Nullification.

The evidence the government seeks to exclude is irrelevant and therefore inadmissible pursuant to Federal Rules of Evidence 401 and 402; unduly prejudicial and tending to mislead or confuse the jury, and therefore inadmissible pursuant to Rule 403; and

offered solely for the purpose of nullification, and therefore improper. Under Rule 401, “relevant evidence” is 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.” Fed.R.Evid. 401. In this case, the defendants are charged, under 18 U.S.C. § 242, with willfully violating the Fourth Amendment rights of the home’s owner and tenant to be free from unreasonable seizures by destroying the home and its furnishings without any legal process or basis. The issue at trial will be whether the defendants’ destruction of the home was reasonable.

The complete destruction of a private home by law enforcement officers acting without any judicial or other due process is precisely the kind of conduct that the Fourth Amendment was designed to prohibit. The first step in analyzing whether the Fourth Amendment was violated is determining whether the destruction of a private home by law enforcement officials constitutes a “seizure,” and the second step is determining whether the seizure was reasonable. See Soldal v. Cook County, 506 U.S. 56, 61-2 (1992); United States v. Paige, 136 F.3d 1012, 1017 (5th Cir 1988). Destroying someone’s home clearly constitutes a seizure. See Soldal, 506 U.S. at 61 (stating that a seizure of property occurs when “there is some meaningful interference with an individual’s possessory interests in that property”)(citations omitted). Generally, in the context of law enforcement officers searching or seizing private property, a warrant, supported by a showing of probable cause, is required.² See Freeman v. City of Dallas, 242 F.3d 642, 649-50 (5th Cir. 2001), citing

² A search or seizure can be unreasonable even in the face of a warrant. See Error! Main Document Only. Error! Main Document Only.Mena v. City of Simi Valley, 226 F.3d 1031, 1041 (9th Cir. 2000)(affirming the district court’s finding that police officers acted unreasonably when they damaged a homeowner’s property by damaging two unlocked doors and kicking an open door during the execution of a search warrant).

Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 653 (1995); United States v. Paige, 136 F.3d 1012, 1022 (5th Cir.1998), quoting Minnesota v. Dickerson, 508 U.S. 366, 372 (1993)(“seizures conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment -- subject only to a few specifically established and well delineated exceptions”). A municipality’s seizure and demolition of a private home without a warrant may be reasonable when the home is condemned in accordance with city and state laws for nuisance abatement. See Freeman v. City of Dallas, 242 F.3d at 653-54.

In this case, the defendants clearly violated the Fourth Amendment because they obtained no warrant and sought no other judicial or legislative process prior to entering and destroying the home at 1305 Ridgeway Street. Any evidence of drug activity at the home prior to August 26, 2006, would be offered in an attempt to justify the defendants’ illegal actions after the fact but would not be relevant to whether the defendants had legal authority to enter and demolish the home on August 26, 2006. Similarly, the defendants’ subjective reason for destroying the home – for example, a belief that the citizens of Jackson would be better off without the home standing – has no bearing on whether there was some legal basis on August 26, 2006, for the defendants to enter the home, let alone destroy it. Thus, evidence of prior drug activity is irrelevant and should be excluded pursuant to Federal Rules of Evidence 401 and 402.

Evidence of prior drug activity at this address should also be excluded because any probative value it might have is far outweighed by the dangers of unfair prejudice and misleading or confusing the jury. Rule 403 of the Federal Rules of Evidence states that evidence that is otherwise relevant may be excluded if “its probative value is substantially

outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” Fed.R.Evid. 403. “‘Unfair prejudice’ means an undue tendency to suggest (a) decision on an improper basis, commonly, though not necessarily, an emotional one.” United States v. Grassi, 602 F.2d 1192, 1197 (5th Cir. 1979), rev’d on other grounds, Grassi v. United States, 448 U.S. 902 (1980), quoting Notes of the Advisory Committee on Proposed Federal Rules of Evidence, 28 U.S.C.A. Rule 403 at 102; see also, United States v. McRae, 593 F.2d 700, 707 (5th Cir. 1979)(“[Rule 403’s] major function is limited to excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect. As to such, Rule 403 is meant to relax the iron rule of relevance, to permit the trial judge to preserve the fairness of the proceedings by exclusion despite its relevance.”).

Reference to, or evidence of, prior drug activity at 1305 Ridgeway Street would be unfairly prejudicial because it would serve no purpose other than to suggest to the jury that the defendants were acting in the best interest of the community. Moreover, there is a strong possibility that the jury would be confused or misled by the introduction of, or reference to, evidence of prior drug activity at the home, including police contacts with 1305 Ridgeway Street, particularly since the defendants on August 26, 2006, had no warrant of any kind, much less a warrant that related to drug charges or drug activity at the home, and followed no other legal process. For these reasons, introduction of, or reference to, evidence of prior drug activity at 1305 Ridgeway Street should be excluded under Rule 403.

Reference to or introduction of evidence of prior drug activity at 1305 Ridgeway Street should also be excluded in order to prevent the improper “defense” of jury nullification. Like other circuits, the Fifth Circuit, in an unpublished opinion, has held that a

criminal defendant is not entitled to argue jury nullification. See United States v. Thompson, 253 F.3d 700 (5th Cir. 2001)(unpublished), citing United States v. Gonzalez, 110 F.3d 936, 947-48 (2d Cir. 1997)³; see also, United States v. Funches, 135 F.3d 1405, 1409 (11th Cir. 1998)(criminal defendant is not entitled to admission of evidence for purpose of jury nullification); United States v. Sepulveda, 15 F.3d 1161, 1190 (1st Cir. 1993)(“A trial judge ... may block defense attorneys’ attempts to serenade a jury with the siren song of nullification...”). In this case, reference to 1305 Ridgeway Street as a “crackhouse,” or introduction of evidence of police contacts with that address over the last several years, would be offered solely for the improper purpose of appealing to the emotions of the jury and asking them to ignore the evidence in the case. Thus, this evidence, and any arguments based on this evidence, should be excluded as improper jury nullification.

B. Evidence of Drug Activity Should Also Be Excluded Because the Defendants Cannot Establish a Justification Defense.

The government anticipates that the defendants may argue that evidence of drug activity at 1305 Ridgeway Street is relevant because it justifies the defendants’ crime. As defendant Wright’s attorney argued in the state trial, “it was for the good of the community.” This argument, which is tantamount to a justification defense, is improper and must be excluded because the evidence is insufficient as a matter of law to support a justification defense.

Justification defenses can take various forms, including the necessity defense, the duress defense, and self-defense. See United States v. Posada-Rios, 158 F.3d 832, 873 (5th

³ This case was not selected for publication in the Federal Reporter in accord with Fifth Circuit Rule 47.5.4 which provides: Unpublished opinions issued on or after January 1, 1996 are not precedent, except under the doctrine of res judicata, collateral estoppel or law of the case (or similarly to show double jeopardy, notice, sanctionable conduct, entitlement to attorney’s fees, or the like). An unpublished opinion may be cited pursuant to Fed.R.App.P. 32.1(a).

Cir. 1998). Justification defenses are affirmative defenses based on the theory that the defendant's criminal acts were justified by a reasonable belief that the conduct was a choice of a lesser evil. United States v. Bailey, 444 U.S. 394, 409-410 (1980); Posada-Rios, 158 F.3d at 873. Under common law, the necessity defense traditionally covered situations in which natural forces beyond the defendant's control, such as flooding, "rendered illegal conduct the lesser of two evils." Bailey, 444 U.S. at 409-410. See also, United States v. Contento-Pachon, 723 F.2d 691, 695 (9th Cir. 1984)("The defense of necessity is usually invoked when the defendant acted in the interest of the general welfare."). Historically, duress was a defense available to defendants who were under imminent threat of death or serious bodily harm from other human beings. Bailey, 444 U.S. at 409-410. According to the Supreme Court in Bailey, "[m]odern cases have tended to blur the distinction between duress and necessity." Id.

The Supreme Court has recently questioned whether a justification defense is ever proper in a case, such as this one, in which the defense is not specifically permitted by the statute. See United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483, 490 (2001)("As an initial matter, we note that it is an open question whether federal courts ever have authority to recognize a necessity defense not provided by statute."). However, even if a justification defense can be applicable in such cases, it can only be pursued as an affirmative defense if the defendant can meet certain strict criteria. In the Fifth Circuit, a defendant who wishes to avail himself of a justification defense must demonstrate the following four elements:

- (1) that there was an unlawful and "present, imminent, and impending [threat] of such a nature as to induce a well-grounded fear of death or serious bodily injury";
- (2) that defendant had not "recklessly or negligently placed himself in a situation in

which it was probable that he would be [forced to choose the criminal conduct]”;

(3) that defendant had no “reasonable legal alternative to violating the law; a chance both to refuse to do the criminal act and also to avoid the threatened harm”; and

(4) “that a direct causal relationship maybe reasonably anticipated between the [criminal act] action taken and the avoidance of the [threatened] harm.”

United States v. Harper, 802 F.2d 115, 117 (5th Cir. 1986), quoting United States v. Gant, 691 F.2d 1159, 1162-63 (5th Cir. 1982)(citations and footnotes omitted)(brackets in original).

The defendant must prove each element of the affirmative defense by a preponderance of the evidence, United States v. Willis, 38 F.3d 170, 179 (5th Cir. 1994), and if his proffered evidence is deficient with regard to any element, the defense is unavailable and the supporting evidence must be excluded. Bailey, 444 U.S. 416; Gant, 691 F.2d at 1165 (“We emphasize that since the justification defenses are affirmative defenses, defendant must demonstrate each element before he may successfully raise the defense of duress or necessity.”); see also, United States v. Bakhtiari, 913 F.2d 1053, 1057 (2d Cir. 1990)(approving practice of using pretrial hearing to determine whether the evidence of duress or coercion was sufficient to raise a jury issue). The Supreme Court has reasoned that juries should not be burdened with testimony relating to necessity in cases where the asserted defense fails as a matter of law. Bailey, 444 U.S. at 416.

In this case, the Court should preclude the defendants from asserting a justification defense because there is no credible evidence that the defendants or anyone else at 1305 Ridgeway Street was in imminent danger of death or serious bodily harm when the defendants went to the home and destroyed it on August 26, 2006. Evidence that drugs had previously been used or sold at the address does not give rise to a claim of this type of

imminent threat, and the Fifth Circuit has made clear that the defense is not available unless “there is a real emergency leaving no time to pursue any legal alternative.” Posada-Rios, 158 F.3d at 873-874 (rejecting the defendant’s argument that it was not necessary to prove an immediate threat of death or serious bodily injury); see also, Harper, 802 F.2d at 117 (holding that even though defendant’s business had been robbed several times over five months, the defendant, a convicted felon charged with illegally possessing a firearm, was not in danger at the moment he purchased and possessed the gun); United States v. Panter, 688 F.2d 268, 272 (5th Cir. 1982)(holding that the defendant, a convicted felon charged with illegally possessing a firearm, was entitled to a claim of self-defense in a case where the defendant, who was working as a bartender, was attacked by a knife-wielding bar patron, and the defendant reached under the bar for a club and his hand fell upon a pistol placed there by another employee).

The defendants are also precluded from asserting the justification defense because, even if drug use at the address *had* created an imminent threat of death, there were clearly legal alternatives for addressing the danger without summarily tearing down the house. In addition to the obvious legal remedy of arresting any individuals responsible for drug crimes, the defendants had available to them state and local laws that provide civil mechanisms for dealing with property where ongoing drug activity is occurring. For example, state “nuisance laws” permit a municipality to bring a civil action for a temporary restraining order against a property owner where the requisite showing of drug activity is made, and local law permits the City of Jackson to take action, including demolition, against a property that is deemed unsafe. See Miss. Ann. Code § 93-3-1 *et seq.* and City of Jackson Municipal Code, Article II, § 66-44(a). The presence of reasonable legal alternatives is an absolute bar to the

defendants being able to raise the affirmative defense. “One principle of these justification defenses remains constant: if there was a reasonable, legal alternative to violating the law . . . the defense will fail.” Bailey, 444 U.S. at 410. See also, Gant, 691 F.2d at 1164 (holding that to establish no alternative to violating the law, defendant “must show that he had actually tried the alternative or had no time to try it, or that a history of futile attempts revealed the illusory benefits of the alternative”); United States v. Liu, 960 F.2d 449, 454-55 (5th Cir. 1992)(in rejecting the defendant’s justification defense due to the presence of reasonable legal alternatives, the court listed numerous steps the defendant could have taken to exit a conspiracy that involved acquiring fraudulent immigration green cards and stated “the record is a fertile field to find many reasonable legal alternatives to violating the law”).

III. Conclusion

WHEREFORE, the United States respectfully requests that this Court exclude evidence of, or arguments concerning, any history of drug activity in or around 1305 Ridgeway Street in Jackson, Mississippi, or of any police contacts with people at that address, as well as any reference to the home at 1305 Ridgeway Street being a “crackhouse.”

Respectfully submitted,

GRACE CHUNG BECKER
Acting Assistant Attorney General
Civil Rights Division
United States Department of Justice

By: /s/ Mark Blumberg
Deputy Chief
Criminal Section
Civil Rights Division

/s/ Patricia A. Sumner
Trial Attorney
Criminal Section
Civil Rights Division

CERTIFICATE OF SERVICE

I, the undersigned counsel for the United States, hereby certify that on the 29th day of September, 2008, I electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

John Reeves, Attorney for Frank E. Melton

John M. Colette and Matt Baldrige, Attorneys for Defendant Marcus Wright; and

Cynthia Stewart, Attorney for Michael Recio.

/s/ Mark Blumberg