

Judge Richard A. Jones

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

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| UNITED STATES OF AMERICA, | ) | NO. CR15-391RAJ                             |
|                           | ) |   |
| Plaintiff,                | ) | DEFENDANT’S MOTION                          |
|                           | ) | REGARDING JUSTIFICATION                     |
| vs.                       | ) | DEFENSE INSTRUCTIONS AT TRIAL               |
|                           | ) |   |
| SCHULYER P. BARBEAU       | ) | <b>Note for: March 4, 2016</b>              |
|                           | ) | <b><i>EVIDENTIARY HEARING REQUESTED</i></b> |
| Defendant.                | ) |   |

The defendant, Schulyer Barbeau, through counsel, Assistant Federal Public Defender Dennis Carroll, submits this Motion and Declaration in support of his request that the fact-finder be given instructions regarding justification (i.e. defense of self and others) at trial.

**I. Procedural History.**

On December 16, 2015, Mr. Barbeau was indicted on one count of Possession of an Unregistered Firearm (a short barreled rifle), in violation of 26 U.S.C. §§ 5861(d) and 5845(a)(3). The Government has informed defense counsel that it plans to seek a superseding indictment charging Mr. Barbeau with an additional offense, Possession of a Machine Gun, in violation of 18 U.S.C. § 922(o). Both counts will be addressed herein. Trial is currently scheduled for May 2, 2016.

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1           **II. Factual Background.**

2           Federal agents received information from a confidential source that Mr. Barbeau  
3 owned a short barreled rifle. Mr. Barbeau gave the rifle to the confidential source so the  
4 source could sell it. Agents obtained the rifle from the confidential source and verified  
5 that it is an unregistered, fully automatic, short barreled rifle.

6           Mr. Barbeau is not a felon. In fact, he has no prior criminal convictions. He is  
7 not a drug user, nor has he been adjudicated as mentally ill. Indeed, he served four years  
8 in the United States Marine Corps, after which he was honorably discharged. He then  
9 served four years in the National Guard.

10           There is no dispute that Mr. Barbeau knowingly possessed the above firearm or  
11 that he was aware of its basic characteristics (short barreled rifle and fully automatic).

12           Mr. Barbeau submits the attached declarations in support of his request for jury  
13 instructions regarding a justification defense. *See* Exhibit 1 (Declaration of Mr.  
14 Barbeau) and Exhibit 2 (Declaration of Allen Aenk). These declarations set forth the  
15 reasons that Mr. Barbeau believed that he was under an unlawful and present threat of  
16 death or serious bodily injury, that he did not recklessly place himself in such a  
17 situation, that he had no reasonable legal alternative, and that he possessed the firearm  
18 to protect himself and others from the threatened harm. If the Court determines that  
19 these declarations are insufficient to present a justification defense at trial, Mr. Barbeau  
20 requests an evidentiary hearing prior to trial to supplement the record.<sup>1</sup>

21           In his declaration, Mr. Barbeau explains the reasons why he possessed this  
22 particular type of firearm. A fully automatic, short barreled rifle provides the necessary  
23 maneuverability and firepower to meet the threats that he, and most citizens, face in this  
24 country. Exhibit 1. These threats come from criminals, terrorists, foreign forces, and  
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26 <sup>1</sup> Mr. Barbeau intends to present the same type of information in support of his motion to  
dismiss based on the Second Amendment which will be filed separately from this motion.

1 sometimes domestic authorities. *Id.* All of these threats are comprised of individuals  
2 who have access to powerful weapons. *Id.* In order to effectively defend himself and  
3 others, Mr. Barbeau reasonably believed that a fully automatic, short barreled rifle was  
4 necessary. *Id.*

5 Mr. Barbeau asks that this issue be heard in advance of the actual trial. If the  
6 Court determines that his offer of proof is insufficient to warrant a necessity defense  
7 and also denies Mr. Barbeau's other pretrial motions, then he will likely request a  
8 stipulated facts trial in order to preserve his issues for appeal.

9 **III. Based on his proffer, this Court should find that Mr. Barbeau is**  
10 **entitled to present a justification defense at trial.**

11 In *Heller*, the Supreme Court explained the Second Amendment safeguards the  
12 "inherent right to self-defense" by protecting from undue government interference the  
13 right of citizens to protect themselves, their abodes, and their property—"to use arms in  
14 the defense of hearth and home." *Id.* at 652, 679. While acknowledging that rights  
15 secured by the Second Amendment are not unlimited, the *Heller* Court stressed that  
16 government restrictions on the right to possess firearms are especially suspect when  
17 applied to "the home, where the need for defense of self, family, and property is most  
18 acute." *Id.* at 628.

19 A criminal defendant has the right to have a jury resolve disputed factual issues.  
20 *United States v. Dorrell*, 758 F.2d 427, 430 (9th Cir.1985). A defendant is entitled to  
21 "instructions relating to a theory of defense for which there is any foundation in the  
22 evidence, even though the evidence may be weak, insufficient, inconsistent, or of  
23 doubtful credibility." *United States v. Lemon*, 824 F.2d 763, 764 (9th Cir.1987).

24 A justification defense is available in firearm possession cases. *See United States*  
25 *v. Wofford*, 122 F.3d 787, 790 (9th Cir. 1997); *United States v. Nolan*, 700 F.2d 479  
26 (9th Cir. 1983). Before a justification defense can be considered, the defendant must

1 demonstrate some evidence of the following elements: (1) he was under unlawful and  
2 present threat of death or serious bodily injury; (2) he did not recklessly place himself  
3 in a situation where he would be forced to engage in criminal conduct; (3) he had no  
4 reasonable legal alternative; and (4) there was a direct causal relationship between the  
5 criminal action and the avoidance of the threatened harm. *See Wofford*, 122 F.3d at  
6 790.<sup>2</sup>

7 Mr. Barbeau's declaration (Exhibit 1) and the supporting declaration of Allen  
8 Aenk (Exhibit 2) provide sufficient evidence that Mr. Barbeau and the Aenk family  
9 were under a present threat of death or serious bodily injury. The Aenks had received  
10 threats against their lives and were the victims of a recent crime. Even apart from the  
11 specific situation faced by the Aenk family, Mr. Barbeau had a reasonable belief that he  
12 faced threats from multiple groups. Those threats (criminals, terrorists, etc.) alone  
13 justify his actions in this case.

14 Mr. Barbeau did not recklessly place himself in a situation where he would be  
15 forced to engage in criminal conduct. Mr. Barbeau, a trained Marine, was asked to  
16 assist friends. Just like any good Samaritan who comes to the aid of others, he should  
17 be allowed to pursue means to protect himself and others.

18 Mr. Barbeau did not have a reasonable legal alternative. As noted above, Mr.  
19 Barbeau should not be required to show that he had no reasonable legal alternative.  
20 Nonetheless, as outlined in his declaration, other types of firearms, which are not  
21 prohibited, would not have been sufficiently maneuverable in close quarters, nor would  
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23 <sup>2</sup> Although Mr. Barbeau believes the evidence would satisfy these elements, he also asserts that  
24 these elements do not sufficiently honor the important liberty interest which the Second  
25 Amendment seeks to protect. Specifically, he should not be required to show that he had no  
26 reasonable legal alternative. The Second Amendment enshrines the rights of citizens to protect  
themselves and others. Citizens should not be required to pursue all other reasonable  
alternatives before possessing a firearm with sufficient capability to protect themselves from  
threats of harm.

1 they have sufficient firepower to provide an adequate defense against the threats faced  
2 by Mr. Barbeau and the Aenks.

3 Finally, there was a direct causal relationship between Mr. Barbeau's criminal  
4 action (possession of the firearm) and the avoidance of the threatened harm. Mr.  
5 Barbeau procured this firearm specifically to address the threats that he, the Aenks, and  
6 citizens in general face in today's society.

7 **IV. CONCLUSION.**

8 For the reasons outlined above, Mr. Barbeau asks this Court for a pretrial ruling  
9 granting his request that he be allowed to present a justification defense at trial with  
10 corresponding jury instructions supporting the defense.

11 DATED this 23rd day of February, 2016.

12 Respectfully submitted,

13  
14 s/ Dennis Carroll

15 Dennis Carroll  
16 Assistant Federal Public Defender  
Attorney for Schuler Barbeau

**CERTIFICATE OF SERVICE**

I hereby certify that on the date below, I filed the foregoing Defendant's Motion  
Re: Justification Defense Instructions at Trial with the Clerk of the Court using the  
CM/ECF system, which will send notification of filing to all parties of record.

DATED this 23rd day of February, 2016.

s/ Kathleen Gilkey  
Kathleen Gilkey, Paralegal

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