No.

IN THE
SUPREME COURT OF THE UNITED STATES

Robert Atchinson

PETITIONER

vs.

District of Columbia

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
DISTRICT OF COLUMBIA COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

Mark L. Goldstone, Esq.
Counsel of Record
D.C. Bar No. 394135
1496 Dunster Lane
Rockville, MD 20854
(301) 346-9414
mglaw@comcast.net
Counsel for Petitioner

QUESTION PRESENTED FOR REVIEW

Whether the D.C. Court of Appeals erred by affirming the pre-trial denial of Mr. Atchinson's necessity defense, which was supported by expert testimony, in a non-jury trial, in a nonviolent civil disobedience action addressing the existential threat of global climate change, thereby violating his constitutional right to present a complete defense.

PARTIES TO THE PROCEEDINGS

Petitioner is Robert Atchinson, the Defendant in the Superior Court of the District of Columbia and the Appellant in the District of Columbia Court of Appeals.

The Respondent is the District of Columbia.

RELATED PROCEEDINGS

District of Columbia v. Atchinson, 2022 CDC 005972

Atchinson v. District of Columbia, Case No. 24 CT 320, judgment entered [November 21, 2024]

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

CASES

CONSTITUTION AND STATUTES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert Atchinson respectfully petitions for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals.

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals is reprinted in the Appendix to the Petition ("Pet. App.") at App. 1.

JURISDICTION

The Court of Appeals entered its judgment on November 21, 2024. This Court has jurisdiction to review the decision of the Court of Appeals under 28 U.S.C. § 1257(a) and 28 U.S.C. § 1257(b).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law …."

The Sixth Amendment to the U.S. Constitution provides in pertinent part: "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

D.C. Code § 22-1307 states:

> **(a)** It is unlawful for a person, alone or in concert with others:
> **(1)** To crowd, obstruct, or incommode:
> **(A)** The use of any street, avenue, alley, road, highway, or sidewalk;
> **(B)** The entrance of any public or private building or enclosure;
> **(C)** The use of or passage through any public building or public conveyance; or
> **(D)** The passage through or within any park or reservation; and
> **(2)** To continue or resume the crowding, obstructing, or incommoding after being instructed by a law enforcement officer to cease the crowding, obstructing, or incommoding.

INTRODUCTION

It is foundational to our legal system and commanded by our federal Constitution that a criminal defendant have the opportunity to present a complete defense at trial. Here, the D.C. Court of Appeals decision deprived Mr. Atchinson of his Fifth Amendment due process right to present a complete defense by preventing him from advancing a necessity defense pre-trial in a non-jury trial. The Court of Appeals decision also violated Mr. Atchinson's Sixth Amendment compulsory process right by prohibiting him from calling an expert witness crucial to his defense. Magistrate Judge Dorsey Jones erroneously reasoned that the protesters, including Mr. Atchinson, were not in imminent danger, that there were available legal alternatives beyond protesting, and that the protestors' actions did not correlate to addressing climate change issues. Following Superior Court Judge Deborah Israel's affirmance of Magistrate Judge Dorsey Jones's decision, the defendant took a conditional guilty plea, was sentenced, and appealed. The D.C. Court of Appeals affirmed. This petition followed.

The National Climate Assessment is the U.S. Government's preeminent report on climate change impacts and risks. The Assessment has found that global warming poses an increasingly serious risk to the United States; therefore, efforts to combat climate change are more pressing now than ever before. Justice Elena Kagan, in *West Virginia v. EPA,* 597 U.S. 697, 754 (2022) wrote: "[c]limate change's causes and dangers are no longer subject to serious doubt. Modern science is 'unequivocal that human influence'—in particular, the emission of greenhouse gasses like carbon dioxide— 'has warmed the atmosphere, ocean and land.'" In other words, climate change is not speculative, nor are the threats it poses. As Justice Kagan stated, "[t]he rise in temperatures brings with it increases in heat-related deaths, coastal inundation and erosion, more frequent and intense hurricanes, floods, and other extreme weather events, drought, destruction of ecosystems, and potentially significant disruptions of food production." *Id.* (internal quotation marks omitted). Further, "if the current rate of emissions continues, children born this year could live to see parts of the Eastern seaboard swallowed by the ocean. Rising waters, scorching heat, and other severe weather conditions could force mass migration events, political crises, civil unrest, and even state failure. And by the end of this century, climate change could be the cause of 4.6 million excess yearly deaths." *Id.* (internal quotation marks and citations omitted). As multiple members of this Court have recognized there is no longer any doubt that climate change is destroying our world and the resources we need to survive.

Mr. Atchinson has the right to present a necessity defense due to the imminent and serious danger posed by climate change. Mr. Atchinson, a long-time environmental and climate change activist, believes that participating in non-violent civil disobedience is necessary to prevent imminent harm to the public and himself due to climate change. Concededly, Mr Atchinson's actions posed a danger to himself and passing motorists — but these dangers pale in comparison to those posed by climate change's current and confirmed dangers, as well as further dangers in an unforeseen future, one would see that climate change is of a significant magnitude worse. The United States has a revered history and tradition of allowing peaceful protests that address urgent issues. Mr. Atchinson follows those who came before him, yet is denied the right to present a complete defense.

The petition warrants this Court's review for several reasons. First, the pretrial denial of the opportunity to present a necessity defense violates Mr. Atchinson's Fifth Amendment right to due process, in violation of this Court's holding in *Chambers v. Mississippi*, 410 U.S. 284 (1973). Second, the pretrial denial violates Mr. Atchinson's Sixth Amendment right to a fair trial, including compulsory process for obtaining witnesses in his favor. Denying Mr. Atchinson's right to present his theory of the case, evidence, and expert testimony cannot be squared with this Court's decision in *Crane v. Kentucky, 476* U.S. 683 (1986). There, this Court found the exclusion of testimony regarding the defendant's confession violated his Constitutional right under the Sixth Amendment to a "meaningful opportunity to present a complete defense." *Id.* at 690. The court here erroneously

denied Mr. Atchinson the same right. By precluding Mr. Atchinson from presenting his expert's testimony on the harm and imminent danger caused by climate change, the court undercut Mr. Atchinson's ability to present a necessity defense and thus deprived him of a "meaningful opportunity to present a complete defense." *Cf. id* at 690 (explaining opportunity to present a complete defense would be empty if "the State were permitted to exclude competent, reliable evidence . . . when such evidence is central to the defendant's claim.").

Immediate action is required to mitigate the harshest effects of climate change on humanity. If no action is taken, sea levels will continue to rise and displace millions of people; food and water resources will become increasingly scarce and unstable; and severe weather events will grow in both frequency and scale. Fossil fuel emissions are the primary driver of climate change. Because of this, human action is needed to limit fossil fuel emissions. If fossil fuel-induced warming continues, millions of people will die due to the attendant severe storms, heat waves, wildfires, flash floodings, and droughts. Mr. Atchinson understands both the exigencies posed by climate change and the need for immediate action to prevent continuing harm. The protest at issue in this case was organized and designed to garner an immediate response from then-President of the United States, Joseph R. Biden—specifically, Atchinson sought to prompt Biden to declare a national climate emergency.

2024 was the hottest year on Earth in 125,000 years; further, carbon dioxide (CO2) concentration reached levels not seen in 4 million years. By 2050, the World

Bank estimates that there will be more than 200 million climate refugees worldwide. America is the largest producer and consumer of oil and natural gas, as well as the third largest producer of coal. Given this, immediate executive action, which Atchinson sought to inspire, is necessary. Executive action would allow for rapid manufacturing of clean energy technology, deployment of renewable sources of energy to military bases, the blocking of crude oil exports, and the cessation of offshore drilling. Importantly, through the reduction of greenhouse gases, these changes would save the lives of people worldwide. Mr. Atchinson's actions were done for the greater good of society, using inspiration from past traditions that have employed non-violent civil disobedience that have produced positive results. Examples are the women's rights movement, demanding the right to vote and equality, and the civil rights movement, demanding equal rights for all. Given the imminent dangers posed by climate change, Mr. Atchinson chose the lesser evil by attempting to inspire executive action through his action of blocking traffic.

STATEMENT OF THE CASE

On October 7th, 2022, at 8:41 A.M., Defendant Robert Atchinson and other peaceful protestors sat in the roadway at 400 7th Street S.W., Washington D.C., holding signs that read: "Declare Emergency." Their goal was to urge then-President Joseph Biden to declare a climate emergency and take other executive action to remedy the effects of climate change. Because there is little time left before the deleterious effects of climate change become irreversible, it was reasonable to believe that moderately disruptive protest was necessary to provoke action to abate

the climate threat. After refusing to exit the roadway, Mr. Atchinson was arrested by Metropolitan Police Department officers.

Following his arrest, Mr. Atchinson was charged under D.C. Code § 22-1307 for "crowding, obstructing, or incommoding." This statute criminalizes "a person, who alone or in concert with others, crowds, obstructs, or incommodes: **(A)** The use of any street, avenue, alley, road, highway, or sidewalk… and **(2)** Continues or resumes the crowding, obstructing, or incommoding after being instructed by a law enforcement officer to cease the crowding, obstructing, or incommoding."

Prior to trial before Magistrate Judge Dorsey Jones, Atchinson filed a pre-trial motion to allow for the presentation of a necessity defense. The government opposed this motion. Defense filed a notice of expert witness to support the necessity defense. Magistrate Judge Jones denied the pre-trial motion to allow for a necessity defense on February 2, 2023. He found (1) that Defendant was not in imminent danger; (2) that legal alternatives to protest were available; and (3) that Defendant's actions were not reasonably designed to address the climate change issue. This decision prompted the Defendant to take a conditional guilty plea on his scheduled trial date of February 27, 2023; he was sentenced the same day.

Subsequently, on March 7, 2023, Atchinson filed a motion for review of Magistrate Judge Jones's decision. Judge Deborah Israel of the Superior Court affirmed Magistrate Judge Dorsey Jones's decision on March 14, 2023.

Following Judge Israel's affirmance, Atchinson appealed to the District of Columbia Court of Appeals. There, Atchinson argued that the lower courts erred in

denying his motion for allowing the necessity defense pre-trial, and further argued that the necessity defense insulates Atchinson from being charged under D.C. Code § 22-1307. The D.C. Court of Appeals affirmed the Superior Court's decision on November 21, 2024. This petition followed.

The Court of Appeals ruling failed to address the most critical aspect of Defendant's appeal—that the Magistrate Judge denied the motion and the accompanying proffer of expert testimony pre-trial on the papers without holding an evidentiary hearing to hear and see the evidence and expert on the matter. The D.C. Court of Appeals stated, without a factual basis, that the protest "sought to gain attention rather than address the imminent threat of climate change." The court cited multiple cases in which the Court had denied necessity defenses, including *Reale v. United States*, 573 A.2d 13, 15 (D.C. 1990) (upholding the denial of a request to present a necessity defense to disorderly conduct for shouting in the public galleries of the U.S. House of Representatives where, *inter alia*, the "protest could not have had any immediate impact on the crisis of homelessness"); and *Griffin v. United States,* 447 A.2d at 778 (D.C. 1982) (upholding the denial of a request to present a necessity defense to unlawful entry at two cathedrals where, *inter alia*, it was "clear that [appellants'] actions were designed to focus attention on the plight of the homeless" rather than "to avoid an immediate harm").

Unlike the above cases---and as proffered by defense expert witness Professor Janel Hanrahan's proposed testimony---all of humanity presently faces a significant risk of imminent harm due to climate change. The D.C. Court of Appeals did not

provide an explanation as to why climate change does not constitute an "imminent danger." The issue of climate change is fundamentally different and substantially more dire than the issue of homelessness.

The District of Columbia Court of Appeals erred by failing to recognize the imminent harm posed by climate change and the resultant justification for a necessity defense. The Court of Appeals should have returned the matter to the Superior Court to conduct a factual hearing on the pre-trial motion to allow the necessity defense and the defense's proffer of the climate change expert witness. Other courts have allowed for a necessity defense on similar facts. *See, e.g.*,*Vermont v. Keller*, 487 A.2d 1074 (Vt. Dist. Ct. 1984) (defendants acquitted under a necessity defense after trespassing in a congressman's office to protest Central American policy); *People v. Gray*, 150 Misc. 2d 852 (N.Y. Crim. Ct. 1991) (defendants acquitted under a necessity defense after protesting against pollution and safety effects of new vehicular lanes). Depriving the Defendant of an opportunity to present his necessity defense violated his constitutional trial rights under both the Fifth and Sixth Amendments. Accordingly, the D.C. Court of Appeals erred when it affirmed the trial court's decision to deny this defense pre-trial without a factual basis or a factual hearing to deny this timely and important defense. A writ of certiorari to the Supreme Court followed this decision by the D.C. Court of Appeals in a timely manner.

REASONS FOR GRANTING THE PETITION

The D.C. Court of Appeals' decision affirming the pre-trial denial of Mr. Atchinson's necessity defense in a non-jury trial raises significant constitutional concerns under the Fifth and Sixth Amendments. By prohibiting Mr. Atchinson from advancing a necessity defense, the lower courts deprived Mr. Atchinson of his fundamental right to present a complete defense. This Court's review is necessary to resolve conflicting interpretations of the necessity defense in cases of non-violent civil disobedience, especially when the defendant seeks to address the ongoing, scientifically validated, existential, and imminent global threat posed by climate change.

I. The Pre-Trial Denial Violates the Fifth and Sixth Amendment Rights to Present a Complete Defense.

The trial court's pre-trial exclusion of Mr. Atchinson's necessity defense, and the attendant denial of the opportunity to present evidence or expert testimony in support of that defense, directly violated the Defendant's Fifth and Sixth Amendment criminal trial rights. Due process guarantees codified in the Fifth Amendment provide that a defendant must have a fair opportunity to defend against the State's accusations. *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). The Sixth Amendment guarantees all criminal defendants the right to present witnesses and evidence central to their defense, giving them a meaningful opportunity to explain their actions and effectively challenge the charges against them.

This Court has consistently held that the Constitution protects a defendant's right and ability to present a complete defense, emphasizing that "the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (D.C., 1986). Pre-trial exclusion of a defense based solely on pre-trial judicial assessment of its strength, without considering the factual premise through listening to the evidence, and judging the credibility of the witnesses, interferes with the fundamental fairness expected of a trial process. This denial deprives a defendant of a meaningful opportunity to robustly challenge the Government's case against him. Judicially imposed barriers to presenting a fulsome defense do not comport with constitutional due process requirements; where the former operates to inhibit a defendant's Fifth Amendment rights, the Constitution has been contravened. *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). Where this occurs, the defendant is deprived of the right to defend against criminal charges fully, and in Atchinson's case, this resulted in him entering a Conditional Guilty Plea and being sentenced because his trial defense was taken away from him pre-trial.

Mr. Atchinson tried to introduce the necessity defense and present a proper legal motion underscoring what the necessity defense is—a legally recognized, long-standing justification for otherwise unlawful actions that were taken to prevent more significant, imminent harm. The factual and legal basis for Atchinson's motion has been accepted by other courts; notably, states such as Massachusetts and Minnesota have permitted the necessity defense in cases involving public health

and environmental threats. In *Commonwealth v. West Roxbury Protestors* (Massachusetts v. West Roxbury Protesters, Climate Change Litigation Database, Sabin Center for Climate Change Law, available at https://climatecasechart.com/case/massachusetts-v-west-roxbury-protesters/ (last visited Jan. 10, 2025)) and *State v. Klapstein* (State v. Klapstein, No. A17-1649, 2018 WL 1976033 (Minn. Ct. App. Apr. 23, 2018), the ruling courts acknowledged that the environmental and public health risks posed by the respective pipelines—and the threat of climate change in particular—rendered civil disobedience legally necessary. These rulings demonstrate that the necessity defense can be applied in cases involving pressing public interest concerns without compromising the integrity of the judicial system.

Mr. Atchinson planned to present expert testimony and proffered a letter from a climate change scientist, Dr. Janel Hanrahan, Associate Professor and Chair of Atmospheric Sciences at Northern Vermont-(Lyndon Campus) University in Lyndonville, Vermont, on the scientifically validated climate crisis to support his contention regarding the urgent need for immediate action to mitigate the irreversible harm of climate change. Dr. Hanrahan's expert letter detailed the scientific consensus that human activity, especially the burning of fossil fuels, has caused an unprecedented and dangerous rise in global temperatures. As detailed on page 2 of Dr. Hanrahan's letter, since the 1950s, human-driven greenhouse gas emissions have been the primary factor driving climate instability, with carbon

dioxide levels rising twenty times faster than during Earth's last major climate shift over 20,000 years ago.

Despite this scientific foundation, the trial court categorically excluded the Defendant from presenting this defense before trial, on the grounds that it was legally invalid and could never form the basis of a defense. As a result, the factfinder did not allow himself—at fundamental harm to the Defendant—to evaluate the defense's factual assertions supporting the key legal elements, including imminence, causation, and the proven ineffectiveness of legal alternatives. These are purely factual questions central to the necessity defense and constitutionally reserved for trial, not a pre-trial preemptive ruling.

The trial court also failed to consider that it was serving as the fact-finder in a non-jury trial. Here, the Judge served as the finder of both law and fact, and was thus, not "wasting" the time of a jury to hear an expert and a defense that may have ultimately been excluded after hearing it. When considering the motion, the court improperly assumed a fact-finding role constitutionally reserved for the actual trial by excluding a valid factual defense pre-trial. The court improperly decided the credibility and merits of the defense before any evidence on the merits of the defense was received. This shortcut in procedure conflicts with the core constitutional principle that the Judge at the trial—not the Judge in pre-trial motions weeks before the scheduled trial date—determines a defense's relevance, validity, and credibility.

The Sixth Amendment's protections are further reinforced by this Court's holding in *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973), where the Court clarified that "few rights are more fundamental than that of an accused to present witnesses in his own defense." Compulsory process rights are, accordingly, a necessary corollary of due process guarantees. By preventing Mr. Atchinson from calling his climate change expert witness, the lower court contravened this Court's holding in *Chambers* that evidentiary bars cannot be used to defeat compulsory process rights, when doing so would burden due process guarantees to a fair trial.

This Court's intervention is necessary to clarify that the pre-trial exclusion of a legally-supported defense—especially one grounded in a global threat and documented and supported by expert testimony—violates fundamental constitutional protections. The courts should not be permitted to exclude entire defenses without appropriate fact and credibility findings. The failure of the court to adhere to this requirement erodes defendants' rights to a fair trial by preventing them from fully defending and explaining their actions before the finder of fact.

II. The Scientific Evidence Confirms the Imminent and Ongoing Harm of Climate Change.

The excluded testimony would have shown that climate change is not speculative or distant, but rather a scientifically-validated, ongoing harm already causing widespread devastation. Dr. Hanrahan's proposed testimony accords with the consensus of multiple global scientific bodies, including the American Geophysical Union (AGU). AGU has documented how climate change is actively

causing extreme droughts, flash floods, wildfires, and excessive heat waves that are responsible for millions of deaths. That climate change is already causing untold death and harm can no longer be denied. Extreme weather events, such as frequent hurricanes and floods, have caused extreme financial and physical harm to communities throughout the world. These events also threaten ecosystems across the globe and threaten disruption of the country's food production. All of this is directly traceable to human activity.

Furthermore, the continuous increase in CO2 concentration, without effective natural sinks in the environment to absorb and neutralize the harmful effects of the excess carbon, poses a further threat of irreversible damage. As stated by Dr. Hanrahan, the AGU, representing 130,000 climate experts, has found that climate change impacts "are creating hardships and suffering now, and they will continue to do so into the future in ways both expected and unforeseen." Ex. 1 at 4. The expert testimony excluded from the trial was of paramount importance in showing that climate change is actively harming communities today, thereby satisfying the imminent harm requirement of a necessity defense . Denial of Mr. Atchinson's defense pre-trial, without an evidentiary hearing, deprived Mr. Atchinson of a meaningful opportunity to present evidence in support of the legal basis for his defense. This court should reverse the pre-trial exclusion and remand the case back to the Superior Court for further proceedings conducted in a manner consistent with the Fifth and Sixth Amendments.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

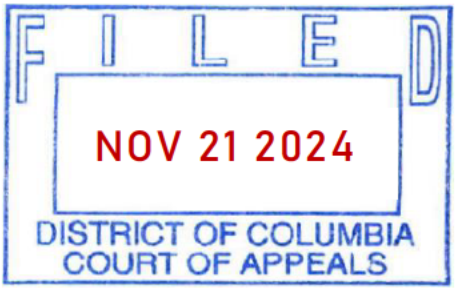
/s/ Mark L. Goldstone
Mark L. Goldstone, Esq.
Counsel of Record
D.C. Bar No. 394135
1496 Dunster Lane
Rockville, MD 20854
(301) 346-9414
mglaw@comcast.net
Counsel for Petitioner

APPENDIX

TABLE OF APPENDICES

Page

District of Columbia
Court of Appeals



No. 24-CT-0320

ROBERT ATCHINSON,
Appellant,
v. **2022-CDC-005972**

DISTRICT OF COLUMBIA,
Appellee.

BEFORE: Easterly and Shanker, Associate Judges, and Ruiz, Senior Judge.

J U D G M E N T

On consideration of appellee's motion for summary affirmance, appellant's brief, and the record on appeal, it is

ORDERED that appellee's motion for summary affirmance is granted. *See Watson v. United States*, 73 A.3d 130, 131 (D.C. 2013). Based on our review of the record, we conclude that the magistrate judge did not err in denying appellant's motion for leave to present a necessity defense to the charge of crowding, obstructing, or incommoding a highway in violation of D.C. Code § 22-1307. *See Cardozo v. United States*, 315 A.3d 658, 673 (D.C. 2024) (en banc) ("The necessity defense, which we have rarely found viable over the decades, does not apply unless 'the harm that would have resulted from compliance with the law would have significantly exceeded the harm actually resulting from the defendants' breach of the law.'" (quoting *Griffin v. United States*, 447 A.2d 776, 777 (D.C. 1982)); *Griffin*, 447 A.2d at 777 (explaining that the defense "is not available where: (1) there is a legal alternative available to the defendant[] that does not involve violation of the law; (2) the harm to be prevented is neither imminent, nor would be directly affected by the defendant['s] actions; and (3) the defendant['s] actions were not reasonably designed to actually prevent the threatened greater harm." (internal citations omitted)); *see also In re J.O.*, 176 A.3d 144, 153 (D.C. 2018) ("While procedurally this appeal is from the associate judge's order, on appellate review of the trial court's final order we look to the findings and conclusions of the fact finder [the magistrate judge] on which that ruling is based." (internal quotation marks omitted)). The record, including appellant's proffered expert testimony, supports the magistrate judge's findings that appellant's actions in this case—blocking rush hour traffic on an interstate highway—were designed to draw attention to the harm

posed by climate change rather than to directly prevent climate change or its harms. *See Reale v. United States*, 573 A.2d 13, 15 (D.C. 1990) (upholding the denial of a request to present a necessity defense to disorderly conduct for shouting in the public galleries of the U.S. House of Representatives where, *inter alia*, the "protest could not have had any immediate impact on the crisis of homelessness"); *Shiel v. United States*, 515 A.2d 405, 409 (D.C. 1986) (upholding the denial of a request to present a necessity defense to unlawful entry at the U.S. Capitol where, *inter alia*, the refusal to vacate leave was "ostensibly designed to convince President Reagan to open up the Capitol Rotunda or some other federal building to the homeless on the night of the State of the Union Address"); *Griffin*, 447 A.2d at 778 (upholding the denial of a request to present a necessity defense to unlawful entry at two cathedrals where, *inter alia*, it was "clear that [appellants'] actions were designed to focus attention on the plight of the homeless" rather than "to avoid an immediate harm"). The magistrate judge therefore reasonably concluded that appellant was not entitled to present a necessity defense because he had failed to put forth sufficient evidence to satisfy the second and third *Griffin* factors. *See Emry v. United States*, 829 A.2d 970, 973 (D.C. 2003) (As an affirmative defense, it is the defendant's burden "to put forth sufficient evidence to satisfy the *Griffin* factors."). It is

FURTHER ORDERED and ADJUDGED that the judgment on appeal is affirmed.

ENTERED BY DIRECTION OF THE COURT:

Julio A. Castillo

JULIO A. CASTILLO
Clerk of the Court

Copies e-served to:

Honorable Deborah Israel

Honorable Dorsey Jones

Director, Criminal Division

Mark L. Goldstone, Esquire

Caroline Van Zile, Esquire
Solicitor General - DC

Anne Deng, Esquire
Office of the Attorney General

cml

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

UNITED STATES,	:	
	:	Case No. 2022 CDC 005972
	:	Judge Deborah J. Israel
	:	**CLOSED MATTER**
ROBERT ATCHINSON,	:	
Defendant.	:	

ORDER

This matter comes before the Court on Defendant's Motion for Review of Magistrate Judge Decision[1] ("Motion"), filed September 12, 2023, and the District's Opposition to Defendant's Motion ("Opposition"), filed November 8, 2023. On October 8, 2022, Defendant was charged with one count of Blocking Passage/Incommoding in violation of D.C. Code § 22-1307. This charge stemmed from an incident in which Defendant participated in a peaceful protest of government inaction towards climate change by sitting in the northbound lanes of I-395 to block traffic. Defendant was found guilty after a Non-Jury Trial held by Magistrate Judge Dorsey Jones on February 27, 2023.

On November 14, 2022, Defendant filed a pre-trial Motion to Assert the Necessity Defense. This Motion was denied by the trial court on February 2, 2023. In the Motion, Defendant argues this denial was improper and requests that the Court reverse the decision and order the case be re-tried.

LEGAL STANDARD

The judgment or order of a magistrate judge may not be set aside except for errors of law unless it appears that the judgement or order is plainly wrong, without evidence to support it, or an abuse of discretion. *See* Super. Ct. Crim. R. 117, cmt. (2004). A reviewing Court must review

[1] Defendant's Motion was submitted untitled. The Court will refer to the Motion with this title based on the purpose of the Motion and for consistency.

an alleged error of law *de novo*. *See Budoo v. United States*, 677 A.2d 51, 53-54 (D.C. 1996) (reviewing denial of necessity defense as matter of law *de novo*). Absent a showing otherwise, trial judges are presumed to know and apply the proper legal standards. *See Harkins v. United States*, 810 A.2d 895, 901 (D.C. 2002) (citing *Wright v. Hodges*, 681 A.2d 1102, 1005 (D.C. 1996)). A losing party who notes an appeal from such a judgment bears the burden of convincing the appellate court that the trial court erred. *Cobb v. Standard Drug Co.*, 453 A.2d 110, 111 (D.C. 1982) (citing *Harvey v. United States*, 385 A.2d 36, 37 (D.C. 1978); *accord*, *Higgins v. Carr Bros. Co.*, 317 U.S. 572, 57 (U.S. 1943)). In meeting this burden, it is a movant's duty to present this court with a record sufficient to show affirmatively that error occurred. *Id*. at 111.

The defense of necessity exonerates a person who commits a crime under the pressure of circumstances if the harm that would have resulted from compliance with the law would have significantly exceeded the harm actually resulting from defendant's breach of the law. *Griffin v. United States*, 447 A.2d 776, 777 (D.C. 1982) (quoting *State v. Marley*, 509 P.2d 1095, 1109 (Haw. 1973)). The defense is not available where: (1) there is a legal alternative available to the defendant that does not involve violation of the law; (2) the harm to be prevented is neither imminent nor would be directly affected by the defendant's actions; and (3) the defendant's actions were not reasonably designed to actually prevent the threatened greater harm. *Id*. at 778. Necessity is an affirmative defense. Therefore, it is a defendant's burden to put forth sufficient evidence to satisfy each of the elements set forth in *Griffin*. *See Emry v. United States*, 829 A.2d 970, 973 (D.C. 2003).

DISCUSSION

In the Motion, Defendant argues that the trial court's order denying Defendant's Motion to Assert the Necessity Defense was improper because: (1) the order makes "bare recitations of doctrinal elements without any supporting facts;" and (2) the denial of the Motion "was clearly

prejudicial" and jeopardized the fairness of the trial. Mot. at 3-4. The Court holds that neither argument warrants a reversal of the trial court's decision.

i. *Whether Defendant put forth Sufficient Evidence to Satisfy the Elements of the Necessity Defense*

Defendant argues that the trial court made bare recitations of the doctrinal elements of the necessity defense without any supporting facts. Defendant further argues that, if his Motion was not denied, he would have presented evidence of prior legal actions that he exhausted to bring about change in public policy. Mot. at 4. The fact that Defendant "exhausted" some other legal methods of protest does not imply that there were *none* available to him to bring about change in public policy towards climate change. For example, Defendant could have petitioned lawmakers or advocated without disrupting traffic. Further, the Court agrees with the trial court's conclusion that Defendant's actions were not designed to actually stop climate change. No "reasoned support for such a conclusory statement"[2] was necessary because Defendant's protest "could not have had any immediate impact on the crisis" of climate change. *Reale v. United States,* 572 A.2d 13, 15 (D.C. 1990). Defendant did not proffer any facts or even present any theories under which Defendant could conceivably satisfy any of the necessity elements set forth in *Griffin*.

ii. *Whether the Trial Court's Denial of Defendant's Motion to Assert the Necessity Defense before Trial was Improper*

Defendant next argues that the trial court's denial of his pretrial motion "truncated [his] due process right to present a full defense." Mot at 4. This argument likewise fails. The record before the trial court was sufficient to deny Defendant's request to present the necessity defense before trial. Furthermore, much of the supposed "compelling evidence"[3] that Defendant did not

[2] Mot. at 3.

[3] In the Motion, Defendant argues that, if his Motion to Assert the Necessity Defense was not denied, he would have presented compelling evidence in the form of testimony from a climate expert, data on the harms of climate change, and evidence of exhausted prior legal actions to support his necessity defense claim.

have the opportunity to present at trial was proffered in his original Motion. Defendant simply fails to even point to any theory or proffering any facts that could establish (1) there is *no* legal alternative available that does not involve violating the law or (2) that Defendant's actions violating the law would affect the climate of this planet. Defendant's acts of protest, if they had any impact at all, were so remote in furtherance of any solution that they cannot reasonably be said to have actually prevented the greater harm. The climate change to which Defendant refers is a *global* issue. Sitting on I-395 and blocking traffic could not reasonably prevent the greater global harm.

Accordingly, it is this 14th day of March 2024 hereby

ORDERED, that Defendant's Motion for Review of Magistrate Judge Decision is **DENIED**.

IT IS SO ORDERED.

Judge Deborah J. Israel
Associate Judge

By CaseFileXpress:

Victoria Shorter
OAG

Mark Goldstone
Defense Counsel

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

District of Columbia
Vs.

ROBERT ATCHINSON
DOB: 10/13/1947

JUDGMENT IN A CRIMINAL CASE
(Probation)

Case No. **2022 CDC 005972**
PDID: **758637**
DCDC No:

THE DEFENDANT HAVING BEEN FOUND GUILTY ON THE FOLLOWING COUNT(S) AS INDICATED BELOW:

Count	Court Finding	Charges
1	Found Guilty - Plea	Crowding, Obstructing, or Incommoding

SENTENCE OF THE COURT

Count 1 Crowding, Obstructing, or Incommoding Sentenced to 7 day(s) incarceration, execution of sentence suspended as to all, *Unsupervised Probation for 6 month(s), $50.00 VVCA, VVCA Due Date 08/27/2023.

Defendant shall by the next business day contact CSOSA's intake unit at (202) 585-7233 or RAP.Help@CSOSA.gov for initial intake/processing. Alternatively, CSOSA has a duty officer present at 633 Indiana Ave, NW for defendants who report in person and/or do not have electronic means to contact CSOSA.

VVCA payable to Superior Court of the District of Columbia, 500 Indiana Ave., N. W. Finance Office in room 4003 on 4th floor. For more assistance with online or by mail payments, email CriminalFinance@dcsc.gov. **Link to electronically pay VVCA https://www.dccourts.gov/services/criminal-matters/e-pay or CRMPay@dcsc.gov**

Defendant is hereby ordered placed on probation - See-Page 2 of this Order for Conditions of Probation; *upon release from either the courtroom or incarceration, Defendant must report to 633 Indiana Avenue, NW, **8th Floor**, Washington, DC, by the next business day after release from jail or prison.*

Total costs in the aggregate amount of $ **50.00** have been assessed under the Victims of Violent Crime Compensation Act of 1996, and ☐ have ☑ have not been paid. ☐ Appeal Rights Given ☐ Gun Offender Registry Order Issued ☐ Sex Offender Registration Notice Given ☐ Domestic violence notice given prohibiting possession/purchase of firearm or ammunition ☐ In addition to any condition of probation, restitution is made part of the sentence and judgment pursuant to D.C. Code § 16-711.

2/27/2023
Date

JUDGE DORSEY G JONES
Magistrate Judge OAG 2

Entered by Clerk pursuant to Criminal Rule 32(f)

2/27/2023
Date

Tiffani Kirby
Deputy Clerk

CASE NUMBER: **2022 CDC 005972**

DEFENDANT: **ROBERT ATCHINSON**

The Defendant is hereby placed on ***Unsupervised Probation** for a term of **6 month(s).**

GENERAL CONDITIONS OF PROBATION

1. Obey all laws, ordinances, and regulations.
2. Report to CSOSA today and then for all appointments scheduled by your Community Supervision Officer (CSO).
3. Permit your CSO to visit your place of residence.
4. Notify your CSO within one business day of (A) an arrest or questioning by a law enforcement officer, (B) a change in your residence, or (C) a change in your employment.
5. Obtain the permission of your CSO before you relocate from the District of Columbia.
6. Do not illegally possess or use a controlled substance or any paraphernalia related to such substances (you may take lawfully prescribed medication). You must not frequent a place where you know a controlled substance is illegally used or distributed.
7. You must drug test at the discretion of CSOSA. In the event of illicit drug use or other violation of conditions of probation, participate as directed by your CSO in a program of graduated sanctions that may include periods of residential placement or services.
8. Participate in and complete CSOSA's employment/academic program, if directed by your CSO.
9. Participate in and complete other CSOSA's programs as identified through CSOSA's risk and needs assessment.
10. Satisfy all court imposed financial obligation(s) (fines, restitution, Victim of Violent Crime Act assessments, etc.) to which you are subject. You must provide financial information relevant to the payment of such a financial obligation that is requested by your CSO. A payment plan will be established by your CSO so that you will be in a position to pay your court imposed financial obligation(s) within 90 days prior to the termination of your probation.

SPECIAL CONDITIONS OF PROBATION

1. Cooperate in seeking and accepting medical, psychological or psychiatric treatment in accordance with written notice from your CSO.
2. Restitution of $ _____ in monthly installments of $ _____ beginning _____

   ☐ The Court will distribute monies to: _____

   _____
3. ☐ See Attached Stay Away Form

You are not to have contact with any of the persons named above. You must remain at least 100 yards away from them, their home, and/or their places of employment. You are not to communicate, or attempt to communicate with any of these persons, either directly or through any other person, by telephone, written message, electronic message, pager, or otherwise, except through your lawyer.

4. **Other Special Conditions**:

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION - TRAFFIC BRANCH

DISTRICT OF COLUMBIA	:	**Case No. 2022 CDC 5972**
	:	
v.	:	**Magistrate Judge Dorsey Jones**
	:	
	:	**Trial Date: February 27, 2023**
ROBERT ATCHINSON	:	
	:	

ORDER DENYING THE DEFENDANT'S MOTION TO ASSERT A NECESSITY DEFENSE

This matter comes before the Court on the defendant's Motion to Assert a Necessity Defense. Having considered the defense motion and the government's opposition the Court issues the following ruling.

On October 7, 2022 at approximately 8;41 a.m. the government alleges that Robert Atchinson and several others sat in the street on I-395 in the northbound lanes before the 3rd St. tunnel. The alleged offenders were blocking traffic from proceeding. Metropolitan police officers arrived and gave verbal directions for the sitters to move; however, the sitters ignored the officers directives and were consequently arrested. The Office of Attorney General filed a Criminal Information charging the defendant with Incommoding. Defense counsel filed a pleading arguing to be allowed to assert a Necessity Defense. The Assistant Attorney General filed an opposition.

The Necessity Defense is allowed when (1) there is no legal alternative available to the defendant that does not violate the law (2) the harm to be prevented is imminent and would be directly affected by the defendant's action and (3) the defendant's actions were reasonably designed to actually prevent the threatened greater harm. Griffin v. United States, 447 A.2d 776,

777 (D.C. 1982). Further the Necessity defense is foreclosed if there was a reasonable, legal alternative to violating the law, a chance to both to refuse to do the criminal act and avoid the threatened harm. United States v. Bailey, 444 U.S. 394, 410 (1980).

There are numerous cases in which defendants have attempted to assert the Necessity Defense in acts of protest and civil disobedience. In Reale v. United States, 573 A.2d 12 (D.C. 1990), the defendants were convicted of disorderly conduct for loudly protesting homelessness in the public gallery of the House of Representatives. The District of Columbia Court of Appeals held that the defendants could have made their views known to congress in many ways which did not violate the law. Additionally, the Court held that there was not an immediate harm that was being prevented by the protest. Therefore, the Court of Appeals denied that Necessity was a viable defense. In Gaetano v. United States, 406 A.2d 1291 (D.C. 1979) the defendants staged a protest by sitting in a private abortion facility and were arrested for unlawful entry. The defendants asserted a Necessity Defense to prevent abortions and therefore save human fetuses. The District of Columbia Court of Appeals rejected the Necessity Defense and concluded that evidence that abortion terminates the life of a fetus did not support an immediate call to action in violation of the law of the land. The Court also stated in *Gaetano* that the Necessity Defense requires a reasonable and objective, not a moral, basis for their belief.

In the case before the Court there were numerous other legal alternatives available to the defendant that did not violate the law in which he could have spread the message about the dangers of climate change. Further, the harm to be prevented from climate change is not imminent and even if it is imminent is not going to be prevented by sitting in the middle of the road during rush hour traffic. Additionally, the defendants' actions were not reasonably designed to actually prevent climate change. While the defendants' actions were designed to

place citizens on notice of the potential of climate change the action of sitting in the middle road was not designed to actually stop climate change.

There are reasonable, legal alternatives available to the defendant to place citizens on notice of climate change. These alternatives do not involve violating the law. The defendants actions in sitting in the middle of the road during rush hour traffic, arguably placed himself and others in danger. A driver may have not seen the defendant and actually struck the defendant with their vehicle. Alternatively, a driver may have belatedly seen the defendant sitting in the road and swerved to avoid the defendant and therefore lost control of their vehicle and crashed into another car. Therefore, the defendants' actions not only placed himself in danger but placed others in danger as well and he can not assert a Necessity Defense under those circumstances.

WHEREFORE, having considered the defendant's motion and the government's opposition, it is hereby **ORDERED** that the Defendant's Motion to Assert the Necessity Defense is **DENIED.**

Dorsey M Jones

_____

DORSEY JONES
MAGISTRATE JUDGE

cc:

Victoria Shorter, AAG

Mark Goldstone, defense counsel

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division — Misdemeanor Branch

District of Columbia

Case FILE NO.
2022 CDC 005972

v.

ROBERT ATCHINSON
Defendant

Hon. Mag. Judge Jones

PROFFERED TESTIMONY OF PROPOSED DEFENSE WITNESS JANEL HANRAHAN IN SUPPORT OF MOTION IN LIMINE

Attached is the proffered testimony of proposed defense witness Janel Hanrahan in support of the motion in limine.

Mark Goldstone /ss
Mark L. Goldstone, Esq.
1496 Dunster Lane
Rockville, MD 20854
(301) 346-9414
Bar #394135
mglaw@comcast.net

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of February 2023, I e-mailed, a copy of this motion via e-Filing to OAG Victoria Shorter, Office of the Attorney General for the District of Columbia, 400 6th Street, N.W. Washington, D.C. 20001.

Mark Goldstone /ss
Mark L. Goldstone, Esq.
1496 Dunster Lane
Rockville, MD 20854
(301) 346-9414
Bar #394135
mglaw@comcast.net

February, 20th, 2023

To whom it may concern,

I am writing this statement in support of Robert Atchinson's assertion that anthropogenic climate change poses an imminent threat to humanity. Furthermore, in my opinion, while his action of blocking traffic may have posed a danger to himself and the motorists, our continued inaction on climate change is orders of magnitude more dangerous than the situation he created.

I am an Associate Professor of Atmospheric Sciences at Northern Vermont University, where I teach several classes about climatology and climate change. My research expertise is in the area of connecting large-scale climate changes to regional weather patterns through climate modeling, particularly as it relates to the hydrologic cycle. I have been involved with climate research for about 15 years. Based on this experience, I concur with the broader geoscience community which concludes that we are facing a climate emergency, one which will prove catastrophic in the years to come unless extreme mitigation efforts are implemented immediately. Without immediate action, weather will become increasingly severe and unpredictable, sea-level rise will inundate our global coastlines and displace millions, and food and water resources will become increasingly unstable.

Within the scientific community, there is little dispute about whether humans are changing our climate system. Since the 1950s, human activity has been the dominant driver of observed changes. Every year, our climate retains more energy than the last due to elevated, and constantly increasing, greenhouse gases in our atmosphere due to human use of carbon-intensive fossil fuels. For perspective, during Earth's last glacial-to-interglacial transition which was initiated about 20,000 years ago, the North American Ice Sheet retreated carving out the Great Lakes, ocean levels rose 400 feet, and weather patterns changed drastically with the disruption of the ocean's thermohaline circulation. This was a time of extreme change for our planet, driven by variations in Earth's tilt and solar orbit. There are two important metrics from this time, that when compared to current values, illuminate the severity of our current situation. First, during the glacial-to-interglacial transition, atmospheric carbon dioxide (CO_2) increased at a rate of about 0.01 PPM per year. A person who lived during this period of drastic climate change would have observed an increase of less than 1 PPM of CO_2 over their lifetime, but a ten-year old child alive today has already seen an increase of over 20 PPM. Second, Earth's global pre-industrial temperature is only about 4°C warmer than during the most extreme period of the last glacial era. Human activity has already warmed our planet by another 1°C, and we are on track to heating it up another 3–5°C by the time today's children are in retirement. The climate changes associated with such a rapid rise in global energy are simply unimaginable.

Modeling and observation attribution studies have linked many recent extreme weather events to human-caused global warming. Around the world, millions of people have already perished due to extreme droughts, flash flooding, wildfires, severe storms, and excessive heatwaves. While many of the observed climate changes to date can be attributed to the 1°C of warming that has already occurred, such changes will seem trivial if forecasted warming under unmitigated carbon emissions is realized. The relatively stable climate system, and associated weather patterns, that humanity has come to rely upon will no longer be a reality. Today's children will be forced to navigate a world that is drastically different and unpredictable than the one their parents and grandparents enjoyed. In spite of this, humans

continue to pollute our global atmosphere with excessive amounts of carbon every day. Importantly, the climate changes resulting from our negligence cannot be undone since carbon does not have a natural
sink that works in any meaningful timeframe. Young people today, when they learn about the severity of this situation, are understandably dismayed by our lack of action.

Given the dire consequences of unmitigated climate change, why would humans continue down this path? Why would we go about our daily lives ignoring an impending and enormous crisis, one that will drastically affect our children's lives and all life on our planet? It has been my observation that most people simply do not believe that we are changing our climate, nor do they understand the urgency of the situation. Scientific polls show that most people do not hear about climate change in the media and they don't talk about it on a regular basis. If we are to have a chance at addressing this looming crisis in a meaningful way, we must inform the masses, and we must do it now.

On October 7th, 2022, Bob Atchinson joined a small group of peaceful activists to raise awareness about the climate emergency by blocking traffic on I-395. It is my understanding that the Necessity Defense, which Mr. Atchinson is claiming, is allowed when harm is imminent and would be directly affected by his actions. The catastrophic consequences of global warming are not only imminent, but they are already happening. This is well documented in the scientific literature. The American Geophysical Union, which is made up of 130,000 geoscientists worldwide, states in their position statement on climate change that "impacts are creating hardships and suffering now, and they will continue to do so into the future - in ways expected as well as potentially unforeseen."

Mr. Atchinson displayed great courage by putting himself in front of traffic and by holding his ground when confronted by angry motorists. Did his actions directly stop climate change? Perhaps not, but I cannot help but wonder what might be the result if hundreds, or thousands, or millions of protesters had joined him. Perhaps the reason that his actions were not successful in addressing this imminent threat is that there were too few protesters and that the impact on people's lives was too small. I have no doubt that as more people witness catastrophic climate-related disasters, and begin to realize the severity of our situation perhaps thanks to courageous protesters in our streets, such acts of civil disobedience will only become more frequent and more disruptive. I am hopeful that such disruption will ultimately lead to meaningful climate change solutions, and that this does not happen too late.

Regards,

Janel Hanrahan, PhD
Associate Professor and Chairperson, Department of Atmospheric Sciences
Director, The Climate Consensus Inc.
Northern Vermont University-Lyndon
802-626-6370

January 21, 2023

By Email

Victoria Shorter

Victoria.Shorter@dc.gov

Re: District of Columbia v. Robert Atchinson, 2022 CDC 005972; Notice of Expert

Dear Counsel,

We are writing pursuant to Rule 16 of the Superior Court Rules of Criminal Procedure to inform you that the defense intends to call an expert witness at trial January 25, 2023, by Web Ex, in the above referenced matter; Dr. Janel Hanrahan. Dr. Hanrahan is an expert in the field of climate science. She is an Associate Professor and Chair, Atmospheric Sciences at Northern Vermont-(Lyndon Campus) University in Lyndonville, Vermont. She can be reached at Janel.Hanrahan@NorthernVermont.edu, or at 802-626-6370. Before joining the Department of Atmospheric Sciences in 2012, Janel earned her Ph.D. in Mathematics with a strong focus in Atmospheric Sciences from the University of Wisconsin-Milwaukee. Her doctoral work included the investigation of Lake Michigan-Huron water levels and their connection to natural climate variability and anthropogenic climate change.

Her testimony is for the purpose of establishing the imminent and greater harm caused by climate change that Mr. Atchinson was acting to prevent under the defense of necessity. We have earlier filed a motion to allow the necessity defense with the Court, entitled Motion in Limine for Leave to Present the Affirmative Defense of Necessity, on November 14, 2022, which the Government opposed on December 13, 2022. The Government in the opposition motion stated, "There is no evidence that …Climate change would cause an imminent danger to the Defendant or the public."

Defendant Atchinson strongly disagrees and has arranged for Dr. Hanrahan to testify to set the record straight, that Climate change is an imminent danger both to him and to the public. Right now, in 2023.

In the recently decided Supreme Court case of West Virginia v. EPA, Justice Elena Kagan wrote: "Climate change's causes and dangers are no longer subject to serious doubt. Modern science is 'unequivocal that human influence'—in particular, the emission of greenhouse gasses like carbon dioxide—'has warmed the atmosphere, ocean and land.' The Earth is now warmer than at any time 'in the history of modern civilization,' with the six warmest years on record all occurring in the last decade." The rise in temperatures

brings with it "increases in heat related deaths," "coastal inundation and erosion," "more frequent and intense hurricanes, floods, and other extreme weather events," "drought," "destruction of ecosystems," and "potentially significant disruptions of food production." If the current rate of emissions continues, children born this year could live to see parts of the Eastern seaboard swallowed by the ocean. Rising waters, scorching heat, and other severe weather conditions could force "mass migration events[,] political crises, civil unrest," and "even state failure." And by the end of this century, climate change could be the cause of "4.6 million excess yearly deaths.

If you require any additional information, please contact me. Please also do not hesitate to contact me should you like to arrange a time to speak with the expert.

Respectfully Submitted,

By: Mark L. Goldstone/ss

Mark L. Goldstone, Esq. (#394135)

1496 Dunster Lane

Rockville, MD 20854

(301) 346-9414

mglaw@comcast.net

Counsel for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of January, 2023 a copy of the foregoing was served, via e-filing, to:

Victoria A. Shorter
Assistant Attorney General
Criminal Section
400 6th Street, NW
Washington, DC 20001
(202) 674-9972
Victoria.Shorter@dc.gov