

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

UNITED STATES OF AMERICA

v.

**JOHN A. HOUSTON, and
MICHAEL HENSON,**

Defendants

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CRIMINAL NO. AW-09-CR-0232

**GOVERNMENT’S MOTION IN LIMINE REGARDING
AFFIRMATIVE DEFENSES OF COERCION, DURESS AND NECESSITY**

The United States of America, by and through its undersigned attorneys, and pursuant to Fed.R.Crim.P. 12(b), respectfully moves the Court *in limine* to prohibit the Defendants, individually and jointly, from presenting the affirmative defenses of coercion, duress, or necessity to defend or otherwise authorize their illegal acts.

LEGAL STANDARD

“All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by [the Federal Rules of Evidence], or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.” Fed.R.Evid. 402. “‘Relevant evidence’ means 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. Relevance is a question for the trial judge to decide. Fed.R.Evid. 104. In determining whether evidence is relevant, however, the trial court “may not consider the weight or sufficiency of the evidence. Its consideration should be limited to whether the evidence has any tendency to support a

consequential fact.” *United States v. Fulcher*, 188 F.Supp.2d 627, 634 (W.D.Va. 2002) (citations omitted). “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of...confusion of the issues, or misleading the jury.” Fed.R.Evid. 403.

The United States believes that both Defendants may claim, individually or jointly, that they, in some so far unexplained fashion, committed the charged felonies because of coercion or duress inflicted by a coconspirator and/or other yet unknown individual or out of necessity. Under controlling case law, these Defendants are not entitled to offer this defense, individually or jointly, unless they proffer evidence establishing each of the elements of the defense. *United States v. Bailey*, 444 U.S. 394, 409 (1980).

In *Bailey*, the Court reasoned that juries should not be burdened with testimony relating to duress and necessity in cases where the asserted defense fails as a matter of law, noting pointedly that such cases “present a good example of the potential for wasting valuable trial resources.” 444 U.S. at 417. Procedurally, “[i]n order to have [an affirmative] defense submitted to a jury, a defendant must first produce or proffer evidence sufficient to prove the essential elements of the defense.” *United States v. Montgomery*, 772 F.2d 733, 736 (11th Cir. 1985). Where “an affirmative defense consists of several elements and testimony supporting one element is insufficient to sustain it even if believed, the trial court and the jury need not be burdened with testimony supporting other elements of the defense.” *Bailey*, 444 U.S. at 416. Accordingly, where the defendants’ individually or jointly proffered evidence is insufficient as a matter of law to support an affirmative defense the trial judge should exclude that evidence. *United States v. Johnson*, 416 F.3d 464, 468 (6th Cir. 2005). “When, as in this case, the issue is raised in a pretrial motion, the rule is to be applied just the same: if the defendant’s proffered evidence is

legally insufficient to support [an affirmative] defense, the trial judge should not allow its presentation to the jury.” *Id.* (citing *United States v. Villegas*, 899 F.2d 1324, 1343 (2d Cir. 1990) (citing Fed.R.Crim.P. 12(b))). Moreover, under the Federal Rules of Evidence, proffered evidence which cannot properly be considered by the jury is by its very nature “evidence” whose “probative value is substantially outweighed by the danger of unfair prejudice” and must be excluded under Fed. R. Evid. 403. *United States v. Stanfa*, 685 F.2d at 89 (3rd Cir. 1985). Here, the Defendants to date have presented no evidence, either individually or jointly, sufficient to satisfy any elements of the coercion, duress or necessity defenses.

With respect to the affirmative defenses likely to be asserted by the Defendants, to establish a defense of duress¹ “a defendant must show that he acted under an immediate threat of death or serious bodily injury, that he had a well-grounded fear that the threat would be carried out, and that he had no reasonable opportunity to escape or inform the police.” *United States v. Wattleton*, 296 F.3d 1184, 1196 n. 20 (11th Cir. 2002). The immediacy requirement is “a rigorous one[,] and it is clear that fear of future bodily harm. . . will not suffice.” *United States v. Sixty Acres*, 930 F.2d 857, 861-62 (11th Cir. 1991). Indeed, “the apprehension of immediate danger must continue the whole time the crime is committed.” *Id.* Moreover, there must also be “a direct causal relationship between the criminal action and the avoidance of the threatened harm.” *United States v. Wheeler*, 800 F.2d 100, 107 (7th Cir. 1986); *see also United States v.*

¹ Modern cases have blurred the distinction between duress and necessity. As the Court recognized in *Bailey*, “[u]nder any definition of these defenses one principle remains constant: if there was a reasonable, legal alternative to violating the law, ‘a chance both to refuse to do the criminal act and also to avoid the threatened harm,’ the defenses will fail.” 444 U.S. at 410 (citations omitted).

Gant, 691 F.2d 1159, 1162-63 (5th Cir. 1982).

Here, it is inconceivable that either Defendant possessed a reasonable or well-founded fear of *immediate or imminent death or serious bodily harm* from the other or some heretofore unknown person during the entire period of the charged conspiracy and, as it relates to the defendant Michael Henson, during the entire period following the attempt to smuggle the weapons from Iraq to the United States up to and including the time period in which Michael Henson made false statements regarding his involvement in the charged conspiracy to a law enforcement officer from the Defense Criminal Investigation Service on April 6, 2009. Furthermore, should the Defendants admit that they were not threatened with death or serious bodily harm, but contend that they were, individually or jointly, under “duress” because the other co-conspirator and/or some other heretofore unknown individual was threatening them with *economic* injury, their defense must be rejected:

Fear of harm to property is not enough. In order for compulsion or duress to provide a defense, it must be such as to induce a well-founded fear of immediate great bodily harm or death.

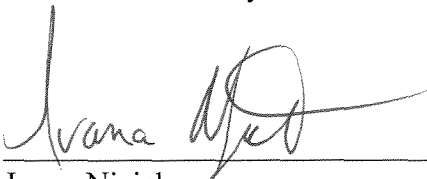
United States v. Palmer, 458 F.2d 663, 665 (9th Cir. 1972) (citations omitted); *see also United States v. Polyrtarides*, 584 F.2d 1350, 1351-52 (4th Cir. 1978). Indeed, even threats to property rising to the level of extortion do not justify crimes or warrant a duress defense. *United States v. Colacurcio*, 659 F.2d 684, (5th Cir. 1981) (citations omitted).

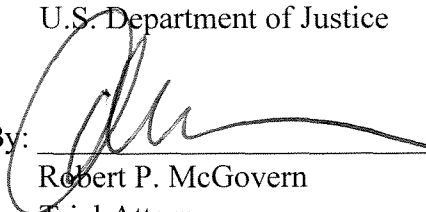
Under these standards, the Court should require each Defendant to make a pretrial offer of proof on any affirmative defenses prior to the time of trial, if they intend to raise those defenses at trial, and to demonstrate that the evidence in support of those defenses is sufficient as

a matter of law to satisfy the essential elements of the defenses. Absent such a proffer by the Defendants as to each element of an asserted defense, the Court should forbid any evidence or argument concerning the affirmative defenses of coercion, duress or necessity.

Respectfully submitted,

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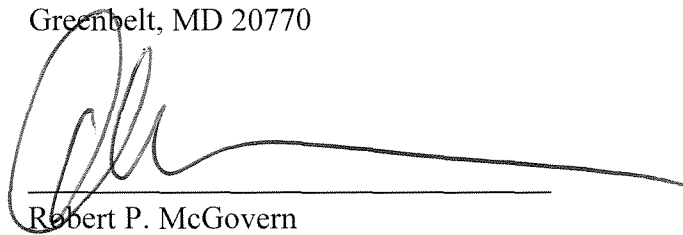
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by First Class postage pre-paid mail on October 15th, 2009 to:

Michael T. Citaramanis, Assistant Federal Public Defender
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and

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A handwritten signature in black ink, appearing to read 'R. McGovern', is written over a horizontal line. The signature is stylized and extends to the right.

Robert P. McGovern
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