

This opening appeal brief was filed at the 10th Circuit Friday April 30, 2004. Sue Tyburski, Scott Poland, Cliff Barnard and Anabel Dwyer have put a huge amount of work into this brief and are hopeful of some good result. The US has 33 days from April 30 to reply and may ask for another 30 day extension. After that the Sisters have 14 days for a reply brief. Two to three months later the 10th Circuit will give us 30 to 40 days notice of oral argument in Denver.

Case Nos. 03-1351, 03-1345, 03-1347

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,  
*Plaintiff-Appellee*

-vs-

ARDETH PLATTE,  
CAROL GILBERT and  
JACKIE MARIE HUDSON,  
*Defendants-Appellants*

On Appeal from the  
United States District Court  
for the District of Colorado

**BRIEF OF APPELLANT**

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## TABLE OF CONTENTS

|   | <u>Page</u> |
|---|-------------|
| Table of Contents   | i           |
| Table of Authorities  | ii          |
| Certificate of Interested Persons   | iii         |
| I. Statement of Jurisdiction  | 1           |
| II. Statement of the Issues   | 1           |
| III. Statement of the Case  | 2           |
| IV. Statement of the Facts  | 2           |
| V. Summary of the Arguments   | 5           |
| VI. Arguments   | 6           |
| A. The trial court's definition of "national defense" and "national defense materials" was unconstitutionally vague and overbroad   | 15          |
| B. The record is devoid of evidence establishing the requisite specific intent to commit the crime of sabotage  | 10          |
| C. The sisters were entitled to a good faith jury instruction when they had interposed the defense of good faith, had requested a good faith instruction, and there was sufficient evidence to support that defense | 17          |
| VII. Conclusion   | 32          |
| VIII. Request for Oral Argument   | 33          |
| Certificate of Compliance   | 35          |
| Certificate of Service  | xx          |

## **TABLE OF AUTHORITIES**

### **Cases**

### **Statutes**

### **Other Authorities**

## **CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following individuals have an interest in the outcome of this case:

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I hereby certify that, to the best of my knowledge, the preceding list is a complete list of all parties having an interest in the outcome of this case.

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Clifford J. Barnard  
Attorney for Appellant Hudson

IN THE UNITED STATES COURT OF APPEALS  
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Case Nos. 03-1351, 03-1345, 03-1347

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

ARDETH PLATTE,

CAROL GILBERT and

JACKIE MARIE HUDSON,

Defendants-Appellants. |

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO Case No. 02-CR-509-BO

## **JOINT BRIEF OF APPELLANTS**

THE APPELLANTS, Sister Ardeth Platte, Sister Carol Gilbert and Sister Jackie Marie Hudson, by and through their respective attorneys, hereby submit the following *Joint Brief of Appellants* in the above-captioned matter.

### **I. STATEMENT OF JURISDICTION**

The District Court had jurisdiction to hear this matter pursuant to 18 U.S.C. \* 2155 (Sabotage) and 18 U.S.C. \* 1361 (Injury to Government Property).

This Court has jurisdiction to hear this matter pursuant to 28 U.S.C. \* 1291, as there has been a final adjudication on the merits by a United States District Court.

Sister Platte's *Notice of Appeal* was timely filed a on August 5, 2003 and Sister Gilbert's and Sister Hudson's *Notices of Appeal* were timely filed on August 7, 2003, pursuant to F.R.A.P. Rule 4(b)(1).

### **II. STATEMENT OF THE ISSUES**

A. Whether the trial court's definition of "national defense" was unconstitutionally vague and overbroad.

B. Whether the evidence presented at trial was insufficient to establish the Sisters' requisite specific intent to commit the crime of sabotage in violation of 18 U.S.C. \* 2155.

C. Whether the Sisters were entitled to a good faith jury instruction when they had interposed the defense of good faith, had requested a good faith instruction, and there was sufficient evidence to support that defense.

### **III. STATEMENT OF THE CASE**

Sisters Gilbert, Platte and Hudson were each charged in a two count indictment with sabotage in violation of 18 U.S.C. \* 2155 and injury to government

property in violation of 18 U.S.C. \* 1361. The Sisters were convicted on both counts after a six day jury trial ending on April 7, 2003.

On July 25, 2003, Sister Gilbert was sentenced to 33 months imprisonment in the U.S. Bureau of Prisons, Sister Platte was sentenced to 41 months and Sister Hudson was sentenced to 30 months. (Tr. at 78:4-14.)<sup>1</sup>

Sister Platte's *Notice of Appeal* was timely filed a on August 5, 2003 and Sister Gilbert's and Sister Hudson's *Notices of Appeal* were timely filed on August 7, 2003. This appeal follows.

#### IV. STATEMENT OF THE FACTS

Sisters Carol Gilbert, Jackie Hudson and Ardeth Platte belong to the Dominican Order of Preachers, within the Catholic church. (Tr. at 717:24 - 718:18.) All three Sisters have spent decades devoting their lives to serving people in need, and working for social justice. The Dominican Order, which is a preaching order, was founded by St. Dominic. Their charism, or divine gift, is veritas, which means truth. (Tr. at 718:5-7.) Sister Gilbert explained, "[w]herever we find ourselves, we attempt to speak truth." (Tr. at 718:11-12.)

On October 6, 2002, Sisters Carol Gilbert, Jackie Marie Hudson and Ardeth Platte traveled to an area in northeastern Colorado which contained a nuclear missile on high-alert, the Minuteman III, known as November-8(N-8). This site was within plain view of public highway 14 in a farmer's field. (Tr. at 881:11-12.) The Sisters traveled to this site to expose the truth of the United States' illegal and criminal threat or instant use of a first-strike 355 kiloton nuclear weapon twenty times the size of the Hiroshima bomb, "a weapon of genocide and of mass extermination." (MH Tr. at 108:10-14.) The Sisters understood that the Minuteman III, N-8 was primed to be fired within 15 minutes of a Presidential order (MN Tr. at 109:1-3) at a time of specific threat of preemptive war (MH Tr. at 71:2-11) against named countries (MH Tr. at 106:7-21; Tr. at 906:2-4). Sister Hudson explained, "We must do something with the knowledge that we have. And learning the evils of nuclearism, that was part of the burden of knowledge that brought me to do the symbolic action." (Tr. at 855:12-13.)

N-8 is only one of 200 nuclear missile sites in this part of the country. (Tr. at 318:25 - 319:6.) The nuclear warheads carried by these 200 missiles are weapons of grotesque mass destruction, which are incapable of discriminating between combatants and non-combatants. (Tr. at 326:21; Tr. at 328:15 - 329:6.) From their extensive reading and study, the Sisters understood that any threat or use of even one of these horrific weapons was illegal and criminal under the rules and principles of humanitarian law, the laws of war, and as codified in both treaties and the U.S. criminal code. (Tr. at 904:8-14; *see also* exhibits attached to Doc. 42, Defendants' *Brief in Support of Motions to Dismiss*.)

The three Sisters went to the site of missile N-8 in order to unmask the horrors of this nuclear weapon to the world. The Sisters went with a very reverent, prayerful and faithful intent and attitude. They did not carry any weapons or bombs. (Tr. at 843:21-24.) When they arrived near the missile site, they snipped a single chain securing a lock on an outer farmer's fence, and then snipped a single chain securing a lock on an inner fence surrounding the missile. (Tr. at 847:4-6.) They entered this way in an effort to cause as little damage as possible. (Tr. at 767:8-13.)

Upon entering the missile site, the Sisters saw the 110 ton concrete missile silo cover, and the metal rails on which this cover would move in the event of a missile launch. They tapped on the metal rails with small ball peen hammers, symbolically beating swords into plowshares. (Tr. at 894:13-17.) The Sisters poured four baby bottles of their own blood in the shape of crosses on the missile silo cover and on the ground, in memory of all of the victims of war, "to mark that site for what it is" (Tr. at 764:12-13), and "to open this up and stop this crime" (Tr. at 766:15). They then looked for those sections of the inner fence surrounding the missile site which did not have cross bars on top. They found three such sections of fence, and snipped the chain links on either side, in order to symbolically open the site up to the world's view and consciousness. (Tr. at 767:8-13.) Because they had previously repaired fences, they knew that these three sections of fence could easily be repaired by replacing the links on either side. (Tr. at 767:14-22.)

Sister Platte explained the Sisters' intent by stating that, we actually wanted to reveal this Minuteman III 8, that it was present there on alert, in our belief from our readings and study an illegal weapon of mass destruction that was on high alert, that if it were ever used, and it was threatened to be used, which is according to our belief, and from our study, illegal weapon of mass destruction and criminal in the threatening to be used, sad to say that our government does do things that are not legal and are criminal.

Tr. at 881:20 - 882:3. The purpose of the Sisters' symbolic acts was not to impair the national defense or the ability of the missile to launch, but rather to unmask the horror of the bomb's destructive power, which the United States is ready to unleash at a moment's notice. Sister Gilbert explained:

You know, our President had been asking that weapons of mass destruction be destroyed, that we inspect them, that we find out what's there and so I felt as a citizen of the United States that I had a duty to expose this, so I wanted to open it up so that the world community would come in.

Tr. at 766:25 - 767:5.

After performing these symbolic acts of exposure and inspection of a weapon of mass destruction, the Sisters sat down, prayed and sang. (Tr. at 901:6-19.) The Sisters' clear intent was to illustrate accepted non-violent methods of open declaration and inspection of the missile site. (Tr. at 904:16-19; Tr. at 768:13-16; Tr. at 849:23 - 850:6.) The Sisters did not bring any explosives, weapons or instruments of destruction to the site. (Tr. at 296:23-24; Tr. at 299:11-14; Tr. at 407:9-11; Tr. at 453:19 - 454:1.) Airman Jennifer Schmidt, who searched one of the three Sisters, confirmed that "[t]hey had nothing harmful on them." (Tr. at 432:17-19.) Instead, the Sisters brought religious objects, including a crucifix, rosary and written prayers. The Sisters also brought books they had read about nuclear weapons and the sanctity of all God's creation. None of these objects could possibly impede the operation of the missile or injure, interfere with or obstruct the national defense.

Operations Group Commander Colonel Frank Gallegos testified that one of the Air Force's "prime directives" is "that if the President should ever decide to launch one of these nuclear missiles, then we have to be able to launch that missile and produce a nuclear yield at the time and place of his choosing." (Tr. at 463:5-8.) Colonel Gallegos explained that the term "nuclear yield" means "a nuclear detonation that would destroy and damage whatever site we chose;" and that "everything" within the radius of such a blast "would be completely destroyed." (Tr. at 484:10-16; Tr. at 484:24 - 485:1.) In response to a defense objection to the relevance of this testimony (Tr. at 463:16-19), the government asserted and the court concurred that the gravamen of the charge of sabotage was the "national defense" mission described by the government's witnesses. The court thus found that the "national defense" mission at issue in this case was! to be ready and able to launch the Minuteman III, N-8 at a moment's notice, finding this evidence directly relevant because of the alleged "intent to obstruct that mission by these defendants." (Tr. at 463:20-22.) However, the prosecution never solicited any testimony or presented any evidence that the Sisters had any intent to obstruct, interfere with or injure this nuclear mission, or injured any materials in an attempt to complete such a mission.

Colonel Gallegos confirmed that the Sisters did no damage of any kind to the missile site. (Tr. at 473:6-9.) He further confirmed that lowering 32 feet of the fence surrounding the site in no way impeded the Air Force from carrying out its "prime directive" of launching the nuclear missile at N-8, if so ordered by the President. (Tr. at 473:15-20.)

Lt. Colonel Timothy Adam also testified that the Sisters' actions did not impair the national defense:

Q. All right. Let's just take the banging on the rails with a ball-peen hammer, little hammer. Would that in and of itself inhibit and interfere with the national defense?

A. Not that I am aware of.

Q. All right. Now, would the pouring of blood on the concrete silo inhibit the national defense?

A. I don't believe so.

Tr. at 304:18-24. Lt. Colonel Adam further verified that the Sisters' spilled "blood didn't damage anything." (Tr. at 313:21-23.) He verified that the Air Force was fully prepared to launch a nuclear weapon on October 6, 2002, if commanded. (Tr. at 333:15-18.)

The Sisters explained that their intent was to "reveal this Minuteman III, N-8 that [we knew from our readings and study was] an illegal weapon of mass destruction on high alert." (Tr. at 881:21-23.) The Sisters made no attempt to hide or to act surreptitiously. As Sister Gilbert explained, they were exposing the commission of a crime to the world, "and we wanted to be able to be there to report it to the people that would come." (Tr. at 768:13-16.)

When the three Sisters were confronted by the Air Force personnel on the missile site, they completely complied with the instructions they were given. (Tr. at 384:19-21; Tr. at 453:17-18.) Airman Brendon Dietz confirmed that, from the time he first saw the three Sisters until they were apprehended, they were non-hostile. (Tr. at 375:22 - 376:2.) Airman Michael Stonemetz similarly confirmed that the three Sisters were non-hostile, and seemed to be singing peace or religious songs. (Tr. at 405:12.) Airman Matthew Zahn testified that one of the three Sisters turned to him and said, "[W]e are not hostile towards you." (Tr. at 453:4-5.) Airman Zahn stated that the Sisters "were pretty much singing the whole time." (Tr. at 453:8.) Airman Jennifer Schmidt confirmed that the Sisters "were compliant" and "non-hostile." (Tr. at 432:20-23.)

On October 6, 2002, N-8 and the other nuclear missiles in this area were on "high alert." (Tr. at 321:11-15.) In explaining the policy of "mutually assured destruction," Lt. Colonel Adam verified the Sisters' understanding of the horrific destructive force of the nuclear missiles: That no one could possibly survive a nuclear attack on the other, and that if one was so initiated, that it would insure the destruction of the offender. (Tr. at 297:16-18.)

The Sisters' symbolic actions merely exposed the fundamental immorality, illegality and criminality of any threat or use of a weapon of mass extermination, such as N-8. The Minuteman III missile is a "grotesque" (Tr. at 326:21) "weapon of mass extermination" (MH Tr. at 102:13-15) which, on

October 6, 2002, was on "high alert." (Tr. at 321:13, Tr. at 333:15-18.) On October 6, 2002, the Sisters possessed authoritative and unrefuted public evidence that the threat or use of a 335 kiloton nuclear weapon was illegal. (*See The Criminality of Nuclear Deterrence* by Francis Boyle, Ex. \_\_\_\_, Tr. at 883:25; Exs. 1-5 attached to *Defendants' Brief in Support of Motions to Dismiss*.) The Nuns relied, *inter alia*, on the finding of the International Court of Justice (Tr. at 882:19) that the Minuteman III N-8 is a "fundamentally" illegal weapon that "cannot be contained in space or time ... would affect health, agriculture, natural resources and demography over a very wide area ... and would be a serious danger to future generations." (*See Ex. 2 to Brief in Support of Defendants' Motion to Dismiss*, pars. 35,78.)

Sister Gilbert explained that the threat of the nuclear missile, an offensive weapon of mass destruction, was illegal because "this weapon does not distinguish between combatants and non-combatants ... and that is not legal." (Tr. at 733:4-6.) The Sisters' knowledge and understanding was corroborated by expert testimony. Professor Boyle testified that the Minuteman III is a weapon for genocide and mass extermination with no legitimate military purpose. (MH Tr. at 91:6-11; MH Tr. at 130:24-25; Tr. at 331:14-19.) Professor Boyle explained and the Sisters understood that, "Since it would be a war crime to actually use the Minuteman III, N-8, it is also a war crime to threaten to use a Minuteman III." (MH Tr. at 112:7-22; Tr. at 882:1.)

The United States government is fully prepared to use this uncontrollable weapon of mass extinction. (Tr. at 328:15-20; Tr. at 333:15-18.) Indeed, preparedness to launch this missile at a moment\*s notice was identified as the key mission of the Air Force personnel guarding and maintaining this missile field. (Tr. at 333:15-18; Tr. at 463:5-8; Tr. at 484:10 - 485:1.) The Sisters were well aware that any use of the Minuteman III missile would cause uncontrollable mass destruction and inter-generational suffering, and would indiscriminately target civilians as well as military personnel. (Tr. at 109:6-16.)

In engaging in their symbolic, non-violent actions at the N-8 missile site, the Sisters intended to alert authorities to U.S. threats or commissions of war crimes or genocide. All the Sisters testified that they did not intend to, and could not, injure, interfere with or obstruct the national defense of the United States. (Tr. at 781:16-25.) They knew that symbolically hammering on the tracks with a small ball-peen hammer, pouring blood on the site in the shape of crosses, and clipping the links in the surrounding fence would cause no damage to the Minuteman III missile. (Tr. at 782:2 - 783:15.) Their non-violent actions were purely symbolic. They could not anticipate that carefully lowering 32 feet of perimeter fence, or marking the missile silo cover with a little blood, could possibly be construed as demonstrating the intent to interfere with, obstruct or

injure the national defense. Instead, as Sister Gilbert explained, ! the Sisters were simply "carrying out [their] Dominican vocation" to speak the truth about these horrific weapons. (Tr. at 784:5-8.)

The Sisters said simply and openly that they found a weapon of mass extermination on high alert in Colorado:

So here it is. Let's open this. Let's inspect it. Let's show the public and the world that it's here and this specific weapon must be disarmed. And we went there to symbolically disarm it so that other people could demand the same.

Tr. at 882:4-7. Sister Gilbert testified that the thought that she could actually or physically inhibit the national defense in any way never entered her mind. (Tr. at 852:5-8.) Sister Platte similarly confirmed that she "could never think of going to, you know, meddle with defense - national defense." Tr. at 904:15-16. The undisputed facts establish that the Sisters went to the N-8 missile site to unveil the horrible truth of this horrific weapon of mass extinction. Such an intent is very different from the specific intent to actually injure, interfere with, or obstruct the national defense required for a sabotage conviction under 18 U.S.C. \* 2155(a). In addition, the Sisters went to N-8 with the good faith belief that such a weapon constituted a crime against humanity under well established principles of international law. Denial of the good faith defense under these circumstances constitutes reversible error.

## V. SUMMARY OF THE ARGUMENTS

The trial court erred by applying an unconstitutionally vague and overbroad definition of "national defense" without legally proscribed limits as articulated by the United States Supreme Court and further defined by Congress in war crimes and genocide statutes. By refusing to place any limits on what constituted "national defense" \* which would have made 18 U.S.C. \* 2155 charge consistent with Congress's having placed this offense in the sabotage chapter of the criminal code \* the court transformed sabotage under \* 2155 into nothing more than as simple injury-to-any-government-property felony without even requiring the government to prove injury of more than \$1,000, as required for the felony charge of depredation of property in violation of 18 U.S.C. \* 1361.

Conviction under 18 U.S.C. \* 2155(a) requires proof of the Sisters' specific intent to actually "injure, interfere with, or obstruct" the national defense. To establish this crucial *mens rea* element, the government must prove that the Sisters acted with the specific knowledge that injury to, interference with, or obstruction of the national defense would be the almost inevitable result. The

necessary specific intent is lacking unless the government establishes not only that injury to the national defense was highly foreseeable, but that the Sisters knew that such injury to the national defense was almost certain and nonetheless went ahead. The undisputed evidence in the record establishes just the opposite.

A weapons system is "injured" within the meaning of the sabotage statute when the integrity of the weapons system has been directly affected so that the system cannot be immediately utilized for its intended military purposes. The government presented no evidence that the national defense was in any way impaired by the Sisters' actions on the missile site. In fact, as discussed in detail *infra*, government witnesses repeatedly confirmed that Sisters Gilbert, Hudson and Platte did nothing to damage the missile site or impede the ability of the missile to complete its deadly mission. None of the Sisters' purely symbolic actions could possibly stop or in any way interfere with the launch of the missile, and thus had absolutely no effect on the national defense.

To convict the Sisters of sabotage under 18 U.S.C. \* 2155(a), the jury must find that the Sisters acted with the specific knowledge that injury to the national defense would be the almost inevitable result. The relevant inquiry is not into the Sisters' overriding motives or philosophy, but rather into the physical, practical results they intended. The Sisters were well aware that they did not, and could not, actually "injure, interfere with, or obstruct" the national defense. Instead, the Sisters' intent - and, indeed, the practical result - was to bring the deadly reality of a weapon of mass extermination on Colorado soil to the public's attention. Because the record is devoid of any evidence establishing the crucial *mens rea* requirement for sabotage, the Sisters' conviction under 18 U.S.C. \* 2155(a) must be overturned.

The Sisters were entitled to a good faith jury instruction since they had interposed the defense of good faith, had requested the good faith instruction and there was sufficient evidence to support it.

Since the Sisters subjectively believed in good faith that their actions were legal, they could not have had the requisite intent to commit sabotage. The good faith defense seeks to demonstrate the specific intent necessary to commit sabotage was lacking. The trial court erred in refusing to give a good faith instruction. Accordingly, the Sisters' convictions for sabotage in violation of 18 U.S.C. \* 2155 should be reversed and this case should be remanded to the district court for a new trial and the district court should be directed to permit the good faith defense to be presented to the jury.

## VI. ARGUMENTS

### A. THE TRIAL COURT'S DEFINITION OF "NATIONAL DEFENSE" WAS UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

#### 1. Standard of Review and Where the Issue Was Raised and Ruled On

Because this is a question of law, the standard of review is *de novo*. *United States v. Soussi*, 316 F.3d 1095, 1101 (10th Cir.2002) ("[b]ecause whether the Executive Order and related regulations are vague is a question of law, we apply a *de novo* standard of review").

#### 2. Facts Relevant to this Issue

Sister Hudson filed a *Motion to Dismiss Count 1 of the Indictment* (Doc. 46) claiming, *inter alia*, that the government would not be able to prove the requisite *mens rea* for the Count 1 sabotage charge since there was no evidence that the Sisters had intended to interfere with national defense. Sisters Gilbert and Platte filed motions raising similar issues. (Docs. 32, 34 and 58.) In denying these motion, the trial court stated that the court, define[s] the term "national defense" as "a generic concept of broad connotations referring to the military and naval establishments and the related activities of national preparedness." *Gorin*, 312 U.S. at 29.

Additionally, like the *Kabat* court, I conclude that the "specific intent" required by 18 U.S.C. \* 2155(a) is "the intent to interfere with what may commonly be taken as the country\*s activities of national preparedness and not the intent to act to what one subjectively believes to be the detriment of the United States." *Kabat*, 797 F.2d at 587.

PTO at 25. Based on this broad definition, the court denied the Sisters\* motions.

With regard to Count 1 in which it was charged that the Sisters, "with intent to injure, interfere with and obstruct the national defense of the United States, did wilfully injure, attempt to injure and contaminate any national-defense material or national-defense premises of the United States" (Jury Instruction No. 15), the court instructed the jury that,

The term "***national defense***" as used in Title 18, United States Code, Section 2155, regarding the destruction of, interference with, contamination of or obstruction of national defense materials or

premises is *a generic concept of broad connotations referring to military establishments and the related activities of national preparedness.*

...

Jury Instruction No. 16 (emphasis added).

The court also instructed the jury as follows:

[a]lthough the court has permitted testimony and evidence, the lethality, legality, morality, necessity or advisability of nuclear weapons generally or MM III missiles specifically is not an issue in this case. These issues are not for your consideration in this case.

Jury Instruction No. 25.

While the jury was deliberating, it sent the following message to the court: we the jury want to clarify from both the prosecution and defense whether or not the three defendants are being accused of sabotage against the national defense of the US in Count 1.

Tr. at 1069:2-5. The court responded to this question by stating:

[p]lease refer to the introductory paragraph of jury Instruction No. 17. Title 18 of United States Code, Section 2155 is entitled, quote, destruction of national defense materials, national defense premises, or national defense utilities, end quote.

Tr. at 1076:11-15.

### **3. Discussion**

The trial court's application of the sabotage statute, 18 U.S.C. \* 2155, was so vague and overbroad that it denied the Sisters their right to due process of the law as guaranteed by the Fifth and Sixth Amendments to the United States Constitution. Thus, the trial court committed reversible error when it first determined in its *Pretrial Orders In Limine* that "national defense" was to be defined as, "a generic concept of broad connotations referring to the military and naval establishments and the related activities of national preparedness." (PTO at 25.) The trial court then erred again when it applied this definition in its instructions to the jury. (Jury Instruction No. 16.) This definition was unconstitutionally overbroad because it did not include sufficient legal qualifiers or limits. As the Supreme Court has stated, where a statute is so vague and uncertain as to make criminal an utterance or an act which may be innocently said or done with no intent to induce resort to violence or on the other hand may be said or done with a purpose violently to subvert government, a conviction under such a law cannot be sustained.

*Herndon v Lowry*, 301 U.S. 242, 259, 57 S.Ct. 732, 739, 81 L.Ed. 1066 (1936).

First, the trial court over broadly applied the definition of "national defense" to the first prong of the crime of sabotage without any qualifying or delimiting

words or instructions. (Tr. at 957:17-24.) When "national defense" is defined without specific legal qualifiers, it is so overbroad that it can include an intent to interfere with the most trivial activity on any property related to military activity and can include any injury however slight to property on any military establishment.

Secondly, it is impossible to differentiate sabotage (18 U.S.C. \* 2155) from depredation of any government property (18 U.S.C. \* 1361) when no evidence of intent to reveal military secrets, subvert the government or aid the enemy is required.

Furthermore, the trial court's application of \* 2155 was overbroad when, based on its definition of "national defense," it deemed the nature of the alleged "national defense materials" at issue to be "irrelevant." (Tr. at 329:1-3; Tr. at 355:15-19.)<sup>2</sup> According to the court's definition, "national defense materials" could not be distinguished from "any government property" such as the 32 feet of perimeter fence which the Sisters had carefully cut and laid down to expose the nuclear missile to world view for world inspection. Thus, because of this overbroad definition, the jury had no way of distinguishing sabotage in violation of 18 U.S.C. \* 2155 from "depredation of any property" in violation of 18 U.S.C. \* 1361.

The court also erred by refusing the Sisters' requested jury instruction requiring a conjunction between the first element of "intent to injure, interfere with or obstruct the national defense" and the second element that the Sisters did "willfully injure, destroy or contaminate national defense materials." (Tr. at 971:19-21; Tr. at 1080:10-23).

In light of the clear post World War II limits to the war powers accepted by the United States, this Court must find that the trial court's definition of unlimited "national defense" is unconstitutionally vague and overbroad as applied by the trial court in this case. In so broadly defining "national defense," the trial court took the term out of its context in the criminal code; because the term "national defense" was specifically included in chapter 105 of the criminal code entitled "SABOTAGE" (18 U.S.C. \* 2151 *et seq.*), the definition of "national defense" should have related specifically to sabotage.

The Supreme Court has not considered the legal limits to any statutory definition of "national defense" since *Gorin v. United States*, a pre-nuclear weapons case. The Supreme Court in *Gorin*, from which the trial court took the definition in the Sisters' case, found the general definition of national defense in the *espionage statute* not unconstitutionally vague or overbroad because of

the specific qualifying statutory language and because of the specific jury instructions. The *espionage statute* was not unconstitutional because of the, delimiting words in the statute [which required] "intent or reason to believe that the information to be used is to be used to the injury of the United States, or to the advantage of any foreign nation." ... The sanctions apply only when the scienter is established. Where there is no occasion for secrecy, ... there can, of course in all likelihood be no reasonable intent to give an advantage to a foreign government.

*Gorin v. United States*, 312 US 19, 27-28, 61 S.Ct. 429, 434, 85 L.Ed.488 (1941).

The *Gorin* court did not consider nuclear weapons nor the fundamental and positive limits to constitutional war powers recognized and specifically incorporated by Congress, in particular, prohibitions against any threat or commission of war crimes or genocide that are directly involved in this case. The court in the Sisters' case did not use any "delimiting words" relating to sabotage and, therefore, the court's application of the definition of "national defense" did not become sufficiently specific and clear as to pass constitutional muster.

The trial court relied exclusively on *United States v. Kabat*, 797 F.2d 580 (8th Cir. 1986), *cert. den.* 107 S.Ct. 1958, 481 U.S. 1030, 95 L.Ed.2d 530 (1987) and *Gorin v. United States* in denying the Sisters' motion for judgment of acquittal. (Tr. at 698-713.) Because of the specific jury instructions given in that espionage case, the *Gorin* court found that the espionage statute was not vague or overbroad, with the jury instructions limiting "national defense" to relate to, all matters directly and reasonably connected with the defense of our nation against its enemies. ... [T]hese places or things **must directly relate** to the efficiency and effectiveness of the operation of said places or things as instruments for defending our nation. ... The **connection** must not be a strained nor an arbitrary one. The **connection** must be reasonable and direct.

*Gorin*, 312 U.S. at 30-31, 61 S.Ct. at 435-36 (emphasis added). The *Kabat* court majority also qualified the *Gorin* courts general definition by stating that, [t]he **term "national defense" thus would refer to a tangible set of functions and policies which would remain constant as to all actors** and the government would only have to prove a subjective intent to interfere with what **objectively would be known to be the nation's capacity to wage war and defend attacks.**

*Kabat*, 797 F.2d at 586 (emphasis added). There was no such limiting instructions in the Sisters' case.

The trial court also improperly applied as *stare decisis* the Eighth Circuit's dictum in *Kabat*. In *Kabat*, the Eighth Circuit considered only whether the defendants consciously interfered with the functioning of "established" military systems. *Kabat*, 797 F.2d at 587. The *Kabat* court's 2-1 majority's findings on the relevance of motive to criminal intent were inapposite and did not address the necessity for objective legal limits to "national defense" raised by prosecution for sabotage. The *Kabat* court did not consider the issue of whether the legal definition of "national defense" is unconstitutionally overbroad if it includes active threat or use of mass extermination in violation of specific rules and principles of humanitarian law as codified in binding treaties and the United States criminal code.

In addition to the lack of context and definition of the essential elements of the crimes charged, the vagueness and over breadth of the definition of "national defense" were further compounded by continuous confusion about "the nature and cause of the accusation" in violation of the Sisters' Sixth Amendment rights. From the start, the Sisters objected to the unclear nature of the charges, objecting to the apparent lack of completeness of the grand jury testimony. (MH Tr. at 22:4-16.)

The prosecutor often repeated that the \* 2155 charge was not sabotage. (MH Tr. at 23:8-19.) In his opening statement, the prosecutor said, [t]hey are not charged with sabotage. They are charged with willfully injuring, destroying or contaminating any national defense material or national defense premises of the United States.

Tr. at 213:22-25. During trial, the prosecutor also referred to the charges as trespass ( Tr. at 795:5) and "protest and entrance on that site" (Tr. at 798:14-15). Repeatedly, the Sisters objected (Tr. at 795:12-13) and expressed their lack of understanding of what they had been charged with because they had not been protesting or committing sabotage, but, rather, had been non-violently resisting the threat or commission of war crimes or genocide by the United States. (MH Tr. at 23:8-19; Tr. at 783:3-6; Tr. at 892:14 - 893:2).

The trial court erred in its answer to the jury question regarding whether 18 U.S.C. \* 2155 was sabotage by continuing to refuse to place \* 2155 in the context of the sabotage chapter of the criminal code. The court found that the subtitle, "that Congress has affixed to Section 2155 has nothing to do with sabotage." (Tr. at 1075:11-13, *et seq.*) Having read the statute and having seen it placed in the chapter entitled "sabotage," the Sisters were unable to understand exactly what charge they were facing at trial.

In its *Pre-Trial Orders in Limine*, the trial court denied the Sisters' motions to dismiss the charges relying primarily on inapposite cases regarding charges not brought in this case, including "vandalism" (PTO at 3,7,10 and 23), "trespass" (PTO at 3,7,10 and 23) and "political protest" (PTO at 3,8,10 and 23). None of those cases relied upon by the court were relevant to this case.

The trial court, in its *Pretrial Order*, used a legally unqualified definition of "national defense," stating that because Congress had enabled "development and deployment" (PTO at 14,22-23) of the Minuteman III missiles, "negative judgments" regarding national defense matters would be, "a political or policy judgment about a course of action ... that ... are not the province of judge (or jury) under the separation of powers established by our Constitution." (PTO at 13.) Furthermore, the court prohibited all evidence that, "impugns, *inter alia*, the lethality, legality, morality or political wisdom of the Minuteman III missile system" (PTO at 31) because the court wrongly found that there were no positive limits to national defense and no positive limits to constitutional laws of war. The court found these to be "irrelevant" to the legal or factual definition of "national defense materials." (PTO at 26.) In applying such a broad definition of "national defense," the court was saying that there were no limits to what the government could call "national defense" and for which the government could choose to prosecute peaceful resisters for sabotage.<sup>3</sup>

In drawing these conclusions, yet denying the Sisters' motions to dismiss the sabotage charge, the trial court relied on erroneous presumptions. The Sisters' well substantiated facts and law showed that, on October 6, 2002, the Minuteman III, N-8 was on high-alert, fully prepared and intended as a ready threat for instant, uncontrollable annihilation. The grim reality of the high-alert status of a 335 kiloton nuclear weapon was not benign "deployment and development" (PTO at 14, 22-23) or "theoretical future harm" (PTO at 14). In addition, the specific, identifiable laws of war, including *inter alia*, the war crimes (18 U.S.C. \* 2441) and genocide (18 U.S.C. \*\* 1091-93) statutes fundamentally limited congressional war powers by Congress' own acts and prohibited any such threat or use.

Thus, the trial court committed reversible error with its novel theory of transforming sabotage in violation of 18 U.S.C. \* 2155 into a "greater-included" felony offense of simple destruction of "any property," indistinguishable from depredation of property in violation of 18 U.S.C. \* 1361. This could not be the intent of Congress in placing these two crimes in separate chapters of the criminal code or in devising more severe penalties for sabotage than for felony depredation.

### **3. Conclusion**

No one could reasonably anticipate that \* 2155's "intent to injure, obstruct or interfere with the national defense" language could include the non-violent, symbolic acts of the Sisters. The Sisters merely pointed out the contradiction between the United State's open and intended threats or present and immediate commission of war crimes or genocide with the Minuteman III, N-8 on high-alert and the United State's formal recognition of legal limits to national defense, specifically the universal prohibition against any such threat or commission of war crimes or genocide.

Because the trial court in this case did not use any qualifying or delimiting words in defining "national defense," the sabotage statute, 18 U.S.C. \* 2155, was so vague and overbroad as applied as to violate Sister Gilbert's, Sister Platte's and Sister Hudson's Fifth and Sixth Amendment rights to due process of the law. Thus, the Sisters' convictions for sabotage must be reversed and they should be granted a new trial on this charge.

## **B. THE RECORD IS DEVOID OF EVIDENCE ESTABLISHING THE REQUISITE SPECIFIC INTENT TO COMMIT THE CRIME OF SABOTAGE.**

### **1. Standard of Review and Where the Issue Was Raised and Ruled On**

This Court has set forth the following standard of review for claims of insufficiency of the evidence:

We review the record *de novo* when reviewing both the sufficiency of the evidence to support a conviction and the denial of a motion for judgment of acquittal. *United States v. Vallo*, 238 F.3d 1242, 1246 (10th Cir.2001). The jury's verdict will be upheld if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

*United States v. Monts*, 311 F.3d 993, 1000 (10th Cir.2002).

### **2. Discussion**

The U.S. Supreme Court has held that, by definition, a crime ordinarily requires the conjunction of an act and a culpable mental state. *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978). A culpable mental state is required if it is an element of the criminal offense. *Morisette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed.2d 288 (1952). Unlike an offense where the government must prove only that a defendant acted with the general intent to do the acts charged, the government bears a

heavier burden in prosecuting offenses which require specific intent. The government cannot simply prove that the Sisters committed certain acts, and from those actions assume the requisite intent to commit sabotage. *United States v. Johnson*, 24 M.J. 101, 105-106 (1987). Because sabotage is a specific intent crime, conviction under 18 U.S.C. \* 2155(a) requires proof of the Sisters\* specific intent to actually "injure, interfere with, or obstruct" the national defense. *Id.*

The crucial element which elevates mere damage to national defense material, premises or utilities to the crime of sabotage is the specific intent to "injure, interfere with or obstruct" the national defense. *United States v. Johnson*, 15 M.J. 676, 678 (AFCMR 1983), citing, *inter alia*, *United States v. Reyes*, 30 CMR 776 (1960). Destruction of national defense material without the requisite intent is insufficient to support a conviction under 18 U.S.C. \* 2155(a). *United States v. Melville*, 309 F. Supp. 774, 780 (S.D.N.Y. 1970).

To convict the Sisters of sabotage under 18 U.S.C. \* 2155(a), the jury must find that the Sisters acted with the specific knowledge that injury to the national defense would be the almost inevitable result. The relevant inquiry is not into the overriding motives or philosophy - the ultimate end sought - of the Sisters, but rather into the intended, immediate, practical results of their actions. *Kabat*, 797 F.2d at 587. The necessary specific intent is lacking unless the government establishes not only that injury to the national defense was highly foreseeable, but also that the Sisters knew that such injury to the national defense was almost certain and nonetheless went ahead. *Johnson*, 24 M.J. at 105-106.

The "specific intent" required by the federal sabotage statute is the intent to interfere with what may commonly be taken as the country's activities of national preparedness. *Kabat*, 797 F.2d at 587. The legislative purpose of the sabotage statute is to assure that the national defense establishment is ready to protect the country against aggression. *United States v. Ortiz*, 24 M.J. 164, 169 (1987). A weapons system is "injured" within the meaning of the sabotage statute when the integrity of the weapons system has been directly affected so that the system cannot be immediately utilized for its intended military purposes. *Id.*

Military courts have overturned sabotage convictions where the requisite *mens rea* was not established. In *Johnson*, the court overturned a defendant's conviction of sabotage, where the defendant actually caused \$26,000 worth of damage to an aircraft, but testified that he had "no intention to interfere with or destruct the national defense." *Johnson*, 15 M.J. at 678. Although the U.S. Court of Military Appeals ultimately upheld this reversal on other grounds, it emphasized that a sabotage conviction was not justified unless the defendant

possessed the requisite "practical certainty as to the result" of injuring, interfering with or obstructing the national defense. *Johnson*, 24 M.J. at 107. A similar sabotage conviction was overturned where a defendant threw a pipe and a chain into the air duct of a jet engine in the presence of a supervisor, and then told the supervisor what he did. The court ruled that, if the defendant had been intent on actually interfering with the national defense, he would have acted in a more surreptitious manner, and not so openly. *United States v. Stewart*, 19 USCMA 417, 42 CMR 19, 21 (1970). *See also, United States v. Banks*, 7 M.J. 501 (AFCMR 1979) (the court suggested that there was a significant question as to whether a defendant intended to actually damage the national defense when he glued together a drag parachute in a desire to cause a work stoppage as an act of revenge against the Air Force).

The Sisters' actions do not even begin to approach the violent and damaging actions involved in these other cases. In contrast to the military personnel in *Johnson*, *Stewart* and *Banks*, *supra*, the Sisters did not actually damage anything other than the fence surrounding the missile site. Government witnesses repeatedly confirmed that Sisters Gilbert, Hudson and Platte did nothing to damage the missile site or impede the ability of the missile to complete its deadly mission. Instead, the Sisters' primary motive was to expose the existence of this deadly weapon - and their good faith belief in its criminality - to public scrutiny. (Tr. at 763:1-8; Tr. at 766:23 - 767:1-13; Tr. at 784:5-8; Tr. at 882:4-7.) In *Stewart*, the openness of the defendant's actions negated the specific intent element required for sabotage. Just as Stewart threw a pipe and chain into a jet air duct in front of his supervisor as an act of protest, *Stewart*, 42 CMR at 21, the Sisters symbolically opened the missile site to public inspection, waited for military personnel to arrive, and fully cooperated with their arrests.

In addition, the applicable cases involving sabotage under 18 U.S.C. \* 2155(a) involve military personnel who are charged with the knowledge that, *e.g.*, throwing a bolt into an aircraft engine would interfere with the operation of that plane and therefore interfere with the national defense. *See e.g., Johnson*, 24 M.J. at 105-6; *Ortiz*, 24 M.J. at 169. As the Eighth Circuit in *Kabat* explained: "When the need is to protect the functioning of established military systems, it makes sense to attach the label and penalty of 'sabotage' to the conduct of any person who consciously interferes therewith ..." *Id.* at 587. Even though the Sisters did not have the expertise of the military personnel in *Johnson* and *Ortiz*, they knew that their peaceful, symbolic actions could not possibly interfere with the national defense. (Tr. at 781:16 - 25; Tr. at 782:2 - 783:15; Tr. at 852:13-15; ! Tr. at 904:15-16.)

Prior to these three Sisters, the only successful prosecution of civilians for sabotage are the defendants in *Kabat*. This case is clearly distinguishable on its facts. In *Kabat*, the defendants rented a jackhammer, a compressor, and other tools, and brought them into a missile site. These tools were used to damage three radar devices, various electrical cables, two locks controlling access to the missile for maintenance, and the concrete lid over the missile. Repairs were estimated at \$29,073.60. *Id.* at 582. In addition, one of the defendants specifically testified about their intent to disarm the missile, explaining that they "attempted to actually disarm in every way possible, everything that we could do that would render this weapon unusable was done to the best of our humble and whatever ability." *Id.* at 585. While one of the defendants in *Kabat* took a simple household hammer as a purely symbolic image, the other tools brought by the defendants to the missile site were used in attempts to actually disarm the nuclear weapon. *Id.*

In contrast to the defendants in *Kabat*, the Sisters took no tools capable of disarming the missile, and made no statements of intent to physically disarm the nuclear weapon at N-8. The Sisters did not bring any explosives, weapons or instruments of destruction. (Tr. at 296:23-24; Tr. at 299:11-14; Tr. at 407:9-11; Tr. at 453:19 - 454:1.) Airman Jennifer Schmidt, who searched one of the three Sisters, confirmed that "[t]hey had nothing harmful on them." (Tr. at 432:17-19.) Instead of destructive tools, the Sisters brought religious objects, including a crucifix, a rosary, and written prayers. They also brought books they had read about the illegality and criminality of any threat or use of nuclear weapons, and about the sanctity of all God's creation. They brought baby bottles filled with their own blood (Tr. at 764:12-13), and small ball peen hammers used to symbolically hammer on the tracks along which the heavy concrete missile cover would slide when it was launched (Tr. at 762:23 - 763:8). Although the Sisters possess deeply held beliefs concerning the sanctity of life and the illegal status of the U.S. nuclear arsenal, they denied that they intended to disarm these weapons or actually impede the national defense. (Tr. at 781:16-21; Tr. at 782:2 - 783:15; Tr. at 852:13-15; Tr. at 904:15-16.) Their expressions of belief that these weapons should be disarmed by our government is not equivalent to an \_\_ expression of intent to physically disarm them through their actions on October 6, 2002. *See Kabat*, 797 F.2d at 587.

The government not only failed to prove that the Sisters intended to interfere with the national defense, it presented no specific evidence that the national defense was in any way affected by the Sisters' peaceful and symbolic actions. In fact, government witnesses Lieutenant Colonel Timothy Adam and Colonel Frank Gallegos, who were in charge of the 1,500 person missile complex, including the missile site the Sisters entered, testified to the contrary. Both Adam and Gallegos unequivocally testified that the Sisters' actions - painting

crosses of their blood on the concrete silo cover, symbolically tapping the metal rails with ball peen hammers, and cutting a small section of the outer fence - did not injure or interfere with the national defense, nor did it interfere with the Minuteman III missile mission. Adam and Gallegos further testified that if the President gave the order to launch the missiles, the Sisters' actions at the missile site would not interfere with the missile's deadly mission.

Operations Group Commander Colonel Frank Gallegos specifically described the national defense mission with which he was charged. He testified that one of the Air Force's "prime directives" is "that if the President should ever decide to launch one of these nuclear missiles, then we have to be able to launch that missile and produce a nuclear yield at the time and place of his choosing." (Tr. at 463:5-8.) Colonel Gallegos explained that the term "nuclear yield" means "a nuclear detonation that would destroy and damage whatever site we chose;" and that "everything" within the radius of such a blast "would be completely destroyed." (Tr. at 484:10-16; Tr. at 484:24 - 485:1.)

In response to a defense objection to the relevance of this testimony (Tr. at 463:16-19), the government asserted and the court concurred that the gravamen of the charge of sabotage was the "national defense" mission described by the government's witnesses. The court thus found that the "national defense" mission at issue in this case was to be ready and able to launch the Minuteman III, N-8 at a moment's notice, finding this evidence directly relevant because of the alleged "intent to obstruct that mission by these defendants." (Tr. at 463:20-22.) However, the prosecution never solicited any testimony, or presented any evidence, demonstrating how this specific nuclear mission was actually impaired by the Sisters. In fact, under cross examination, Colonel Gallegos admitted that the Sisters' actions did not impair this crucial national defense mission. (Tr. at 473:15-20.)

Colonel Gallegos confirmed that the Sisters did no damage of any kind to the missile site. (Tr. at 473:6-9.) He further confirmed that the damage to the fence surrounding the site in no way impeded the Air Force from carrying out its "prime directive" of launching the nuclear missile at N-8, if so ordered by the President. (Tr. at 473:15-20.) Lt. Colonel Timothy Adam also testified that the Sisters\* actions did not impair the national defense:

Q. All right. Let's just take the banging on the rails with a ball-peen hammer, little hammer. Would that in and of itself inhibit and interfere with the national defense?

A. Not that I am aware of.

Q. All right. Now, would the pouring of blood on the concrete silo inhibit the national defense?

A. I don't believe so.

Tr. at 304:18-24.

Lt. Colonel Adam further verified that the Sisters' spilled "blood didn't damage anything." (Tr. at 313:21-23.) He verified that the Air Force was fully prepared to launch a nuclear weapon on October 6, 2002 if commanded. (Tr. at 333:15-18.)

The government presented absolutely no evidence that the Sisters intended actual interference with the national defense, or that they knew that their actions would result in such injury or interference. To the contrary, the Sisters' actions were expressly intended to be purely symbolic and absolutely incapable of affecting the national defense in any way. The Sisters knew that their books, blood and prayers would not, and could not, damage the operability of the missile in any way; and that they would not, and could not, actually "injure, interfere with, or obstruct" the national defense. Because the record is devoid of any evidence of this crucial *mens rea* requirement, the Sisters' conviction under 18 U.S.C. \* 2155(a) must be overturned and the charges dismissed.

**C. THE SISTERS WERE ENTITLED TO A GOOD FAITH JURY INSTRUCTION WHEN THEY HAD INTERPOSED THE DEFENSE OF GOOD FAITH, HAD REQUESTED A GOOD FAITH INSTRUCTION, AND THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THAT DEFENSE.**

**1. Standard of Review and Where the Issue Was Raised and Ruled On**

The standard of review for determining the propriety of an individual jury instruction which was requested at trial is *de novo*. *United States v. Sasser*, 974 F.2d 1544, 1551 (10th Cir.1992) ("[t]o evaluate the adequacy of jury instructions, we examine them as a whole and apply a *de novo* standard of review to determine the propriety of tendering an individual jury instruction").

**2. Facts Relevant to this Issue**

During the jury instruction conference, the Sisters requested a good faith jury instruction be submitted to the jury. (Tr. at 980:4-6.) The trial court refused, relying upon its findings and order contained in the *Pretrial Orders in Limine*. The trial court stated:

The court considered the defendants' offer of proof in relationship to the affirmative defense of mistake of law. Perhaps better and more specifically described as the good-faith exception to the mistake of law defense.

The court, based on the proffer available to it at the time of the pretrial proceedings, rejected that. I have considered all of the evidence presented as an additional proffer or as a supplemental proffer. I remain convinced of the validity of the court's pretrial determination.  
Tr. at 980:11-19.

By way of history, during the pretrial stage of the case, defendant Platte filed a motion entitled Defendant Ardeth Platte's *Motion to Dismiss for Reason That Defendants Had a Bona Fide Reasonable Understanding That Under Existing, Relevant and Controlling Law, They Had a Right, Duty, Privilege or Justification to Non-Violently Expose, Inspect, and Symbolically Disarm a Fundamentally Illegal and Criminal First Right High Alter Weapon of Horrific Mass Destruction, the Minuteman III N8*, which motion implicated the good faith exception to the mistake of law defense. (Doc No. 32.) A *Brief in Support of Defendant Platte's Motion to Dismiss Bona Fide Reasonable Understanding* was also filed. (Doc. No. 33.) During the motions hearing permission was given by the trial court allowing all Sisters to join in all motions filed by co-defendants. (MH Tr. at 13:9-11.)

At the motions hearing, two experts in the field of international law were called by the defense, Professor Ved Nanda (MH Tr. 63:16-19), and Professor Frances Boyle (MH Tr. at 84:9-15). Professor Nanda testified that in his opinion the Sisters were legally justified to act in the manner they did under principles set forth in the United Nations Charter, Nuremberg Judgment and under principles of international law. (MH Tr. at 72:8-21.) Professor Vanda went on to state that individual citizens were obligated to ensure their country does not violate international law. (MH Tr. at 73:1-9.) Professor Nanda completed his testimony as follows:

Q. Do you have an opinion as to whether or not the defendants' actions on October 5th and 6th comported with complying with the law of the land, the law of the international law, the law of the United States?

A. In my opinion, they did.

MH Tr. at 74:1-5.

Professor Boyle also testified as an expert in the field of international law and as author of the book, *The Criminality of Nuclear Deterrence, Could the US War on Terrorism Go Nuclear?*. (MH Tr. at 92-93.) Professor Boyle's testimony is particularly important since he is able, not only to offer his own opinion regarding the legality of the actions of the Sisters and the source and authority for that legality, but he is also able to affirmatively state that he knew

of the study and research which the Sisters had undertaken to reach the conclusion their actions were lawful.

Clearly, your Honor, these three nuns have spent many years researching, investigating and studying all aspects of U.S. nuclear weapon systems, including the legal aspects, the moral aspects, and the religious aspects, and on the basis of their knowledge, judgment and experience, have, in my opinion, reached a more than reasonable good faith conclusion that these weapons systems are criminal, and that they have a moral, religious and ethical obligation to do something about the situation within the limited capabilities that they have.

MH Tr. at 114:9-17.

The trial court concluded the motions hearing by finding, as a matter of law, the Sisters could not have reasonably relied upon their understanding under international law that they had both a right and a duty to act as they did to ameliorate the effects of what they believed in good faith to be the illegal development and deployment of Minuteman III missiles. (PTO at 21-24.) The court, in its pretrial order, concludes its good faith analysis by stating, "[t]his continuing and inherent lack of standing, necessity and causation vitiates the defendants\* claim of reasonable reliance on their understanding of international law and precludes the formation of the *sine qua non* necessary to the mistake of law defense." PTO at 23-24.

At trial, all three Sisters testified in their own defense. 66 year old Sister Platte testified that her intent in taking this action was, in part, to uphold the law:

Q. What was your intention then in doing this action? What did you hope to accomplish?

A. Well, one is to be faithful to God, but the most important one in the sense of, you know, the process was to go there, to \* in upholding the laws that we know to then stop it, and so we went there to express that, to inspect it. We thought that was the logical thing to do because that\*s what the demand is in the world today, especially in the axis of evils nation there will be this inspection to make sure they are keeping their commitment to the non-proliferation treaties. We will name ourselves CIWT, which is a good acronym, and Citizens Inspection Weapon Team, that\*s what we are called.

Tr. at 890:15 - 891:1.

Additionally, Sister Platte testified about the books and written material which she brought with her to the nuclear missile site which were instrumental in forming her opinion concerning the legality of her actions. Included was the book, *Criminality of Nuclear Deterrence* authored by Francis Boyle. (Tr. at 883:21-25); *Weapons in Space*, also authored by Professor Boyle (Tr. at 885:20-25). Sister Platte explained during her testimony that these books and written materials were brought to the site since they formed the basis of their intended action. (Tr. at 886:2-4.) Similar testimony regarding the legality of their actions was offered by Sisters Gilbert and Hudson. Sister Gilbert testified that she had read Professor Boyle's book, *Criminality of Nuclear Deterrents, Could the US War on Terrorism Go Nuclear*. She testified, "this book was left at the missile silo because it was the reason why I went to the ! missile silo. It gave me a legal right to do what we did." (Tr. at 727:8-21.) Sister Hudson explained in her testimony that the Sisters had spent nine months praying, studying, and discerning what actions to take in response to that prayer and study. (Tr. at 838:19-23.) "Well, we left those particular documents at the site to state, in essence, why we were there. We came to stop a crime that was happening." (Tr. at 843:14-16.)

It is important to note during the testimony of the three Sisters, the trial court permitted the Sisters to testify regarding the effect a particular book or written material had on her state of mind, though the court would not allow the witness to quote directly from the book or admit the book or written material into evidence. Curiously, the trial court permitted the Sisters to testify as to the effect a particular document had on them because it was determined to be probative of their state of mind. The Court stated:

I take the position that she may comment generally, and to some extent specifically, the effect of reading this book had on her, and even some conclusions that she formed as a result of that. Because that is probative to state of mind, which, by definition, is a consequential fact but not the consequential fact at issue here. Which way it cuts, that's the decision by trier of fact itself.

Tr. at 730:14-20.

The court allowed a photograph of the cover of the books read by the Sisters which formed the basis of their conclusion they acted legally to be admitted into evidence, but not the book itself. (Tr. at 728:16-22.) The Court stated:

The court will admit the cover of it so the jury can see the nature and tenor of the book. The court has allowed this witness already to comment on those excerpts within this writing which has influenced her in the formation of personal, social, religious and philosophical ideation, but otherwise the book is hearsay, and I would respectfully disagree that

this is an efficient or propitious way in which to bring all of those to the attention of this jury.

Tr. at 745:22-25.

### **3. Discussion: The Trial Court Erred in Denying the Sisters'**

#### **Request for a Good Faith Jury Instruction.**

"As a general proposition, a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Matthews v. United States*, 485 U.S. 58, 108 S.Ct. 883, 887, 99 L.Ed.2d 54 (1988.) A defendant is entitled to a good faith instruction when he has interposed the defense of good faith, has requested the instruction, and when there is sufficient evidence to support it. *United States v. Janusz*, 135 F.3d 1319, 1322 (10th Cir.1998) This Court has held that a good faith instruction is required even if an instruction on willfulness has been given. *United States v. Hopkins*, 744 F.2d 716, 718 (10th Cir.1984) (*en banc*). The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system. *See United States v. Smith*, 5 Wheat 153, 182, 5 L.Ed. 57 (1820) Livingston, J. dissenting. "Based on the notion that the law is definite and knowable, the common law presumed that every person knows the law." *Cheek v. United States*, 498 U.S. 192, 628, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991). However, exceptions to this general rule are recognized. Ignorance or mistake of fact or law is a defense when it negatives the existence of a mental state essential to the crime charged.

In actuality, the basis rule is extremely simple: Ignorance or mistake of fact or law is a defense when it negatives existence of a mental state essential to the crime charged. Indeed it is so simple because, unlike the other defenses discussed in this chapter, it is merely a restatement in somewhat different form of one of the basis premises of criminal law. Instead of speaking of ignorance or mistake of fact or law as a defense, it would be just as easy to note simply that the defendant cannot be convicted when it is shown that he does not have the mental state required by law for the commission of that particular offense. *See generally, LaFave and Scott, Substantive Criminal Law* \*5.1(1986).

Applied here, if the Sisters subjectively believed in good faith that their actions were legal, *a fortiori*, they could not have had the requisite intent to commit sabotage. It is anathema to the specific intent required to commit sabotage for the actor to believe he or she was acting lawfully. These two concepts cannot legally or logically coexist. The Sisters' good faith belief in the lawfulness of their action voids any claim they acted illegally.

In *United States. v. Overholt*, 307 F.3d 1231 (10th Cir.2002), the defendant was charged with conspiracy to engage in various criminal acts including improper disposal of petroleum-impacted wastewater in violation of the Safe Drinking Water Act (SDWA). The court determined the defendant was not entitled to an instruction on mistake of law or good faith defense absent evidence that the defendant himself personally believed that unlawful injection of chemical waste into disposal wells was actually lawful. The evidence in *Overholt* established only the witnesses\* opinion regarding the law, not the defendant's. The court thus concluded that the defendant failed to satisfy the final element of the *Janusz* test (that there was sufficient evidence to support the instruction) and that the district court was not required to give a mistake of law good faith jury instruction.

Absent from [the defendant's] discussion is any evidence that he personally believed that the unlawful injection of chemical wastes into the Oklahoma disposal wells was actually lawful. Thus, he failed to satisfy the final element of the *Janusz* test and the district court was not required to give a mistake of law/good-faith-defense instruction.

*Overholt*, 307 F.3d at 1247.

It is clear from the testimony of the three Sisters and Professor Boyle they personally believed their actions were lawful and thus satisfied the third element of the *Janusz* test. This Court in *United States. v. Harding*, 879 F.2d 765, 767, 768 (10th Cir.1989) acknowledged the probative value of the defendants\* testimony regarding their subjective belief they acted lawfully.

The trial court concluded that the Sisters lacked standing, necessity and causation which vitiated the good faith upon which they relied for their actions. However, the effect of the Sisters' subjective good faith belief in the lawfulness of their actions voids the *mens rea* necessary to commit the crime of sabotage. How can it be said the Sisters had the specific intent required to commit the crime of sabotage if they subjectively and in good faith believed their actions were lawful, even if they lacked standing, necessity and causation? In *United States v. Hopkins*, this Court in analyzing its decision in *Steiger v. United States*, 373 F.2d 133 (10th Cir.1967) concluded: "that the plan, with the benefit of hind sight at the time of trial may seem to have been somewhat visionary or not completely practical makes no difference if the defendant actually believed the plan would succeed, that the representations would be carried out and the promises were true." *United States v. Hopkins*, 744 F.2d 716, 718 (10th Cir.1984).

In this case, the Sisters not only presented subjective evidence of good faith adherence to binding law, but also objectively relied on well substantiated evidence of facts and law showing they had necessity, standing and causation to act as they did. Necessity: The facts showed that on October 6, 2002, the Minuteman III, N-8 was on high-alert, fully prepared for a preemptive first strike within 15 minutes resulting in uncontrollable heat, blast and radiation 20 times the Hiroshima bomb. (See Exhibits attached to *Defendants Brief in Support of Motions to Dismiss*). The Sisters' necessity to act was thus not only subjectively but also objectively based on their knowledge that the United States with the Minuteman III, N-8 was fully prepared to commit war crimes (18 U.S.C. \* 2441) within minutes. The Sisters also corroborated their understanding that further exigency existed with specific threat of genocide ! (18 U.S.C. \*\* 1091-93) through U.S. threats of preemptive strikes against named nations, as such (MH Tr. at 71:2-11; MH Tr. at 106:7-11) an exigency of the most severe kind.<sup>4</sup>

**Standing**: The Sisters understood that the issue of the positive legal limits to national defense and the facts and law of the particular national defense materials were raised by the government when it brought the charge of sabotage. The trial court found to the contrary that: (1) constitutional war powers of the executive and legislative branches of our government are unlimited by positive law (PTO at 13-20); and (2) that any discussion of national defense was a political question outside the courts jurisdiction because "[n]egative ... political or policy judgments [regarding nuclear weapons] are not the province of judge (or jury) under the separation of powers established by our Constitution" (PTO at 13).

In finding that the constitutional war powers of the Congress and Executive were unlimited, the trial court here relied on inapposite cases (*United States v. May*, 622 F.2d 1000, 1009 (9th Cir.1980) and progeny). These cases have held wrongly that a criminal court has no jurisdiction, "to usurp the war power functions that the Constitution has given to Congress and to the President." The *May* court cited as support United States Constitution, Articles. 1, Sec. 8, clauses 11, 12, 13, 14, 15, 16, 17 and 18 and Article II, Sec. 2, clauses 1 and 2. *May*, 622 F.2d at 1009. However, none of this clauses gives unlimited war powers to Congress or the President either expressly or by implication. Indeed, the U.S. Constitution in Article 1, Section 8, clause 10 gives Congress the power to define and punish "Offences against the Law of Nations" which

Congress has precisely done in passing the war crimes (18 U.S.C. \* 2441) and genocide (18 U.S.C. \*\* 1091-93) statutes. No state immunity was expressed or implied. These offenses, war crimes and genocide, are codifications of the long-standing rules and principles of humanitarian law to which everyone, including Congress and the President, are bound. The Sisters understood these prohibitions to be both positive and fundamental United States law and bindings rules of international law. The Sisters cited and relied upon the most recent and authoritative Advisory Opinion rendered by the International Court of Justice (I.C.J.) of this body of law as applied to the threat or use of nuclear weapons in any circumstance (International Court of Justice, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 8 July 1996, paragraph 78, United Nations, Gen. List No. 95, a/51/150).<sup>5</sup>

The Sisters acted based on the United States' long commitment to the positive rules of law absolutely prohibiting such war crimes and genocide, knowing that universal jurisdiction over and individual responsibility for war crimes and genocide existed in positive United States law even before their direct incorporation into the U.S. criminal code. *See* paragraph 404 of the Restatement Third of Foreign Relations Law of the United States (American Law Institute, 1987, 254).

In addition, the Sisters relied on their well supported understanding that all criminal statutes of the United States must be interpreted and applied consistently with the peremptory and positive laws prohibiting threat or commission of war crimes or genocide. (Restatement Third of Foreign Relations Law of the U.S., paragraphs 114, 115 American Law Institute, 1987). Indeed the Sisters thought it evident that "the integrity of our national security" (PTO at 27) and "workable national security policies and consistent verdicts" (PTO at 27) require universal adherence to the well defined and positive legal limits to national defense that any threat or use of the MMIII, N-8 goes well beyond.

Thus, in relation of laws terms, in the instant context of the threat or use of the Minuteman III, N-8, the "controlling legislative act[s]" (PTO at 21) here are sabotage (18 U.S.C. \* 2155) and depredation of property (18 U.S.C. \* 1361) (both of 1948) **only** in the context of the specific later-directly-incorporated limits set by the war crimes statute (18 U.S.C. \* 2441 of 1996) and genocide statute (18 U.S.C. \*\* 1091-93 of 1997). If the sabotage and depredation statutes cannot be fairly reconciled with the war crimes and genocide statutes, these later war crimes and genocide statutes prevail. (Restatement of Foreign Relations Law of the United States, paragraph 115, American Law Institute, 1987, p.63). This Court can correct the relation of laws problem clearly articulated by the Sisters and preserved throughout all pre-trial and trial proceedings. The crime of sabotage (18 U.S.C. \* 2155) which contains the

elements of "national defense" must be read consistently with the prohibitions against war crimes (18 U.S.C. \* 2441) and genocide (18 U.S.C. \*\* 1091-93). In addition, in the context where the "national defense materials" or "property" at issue is clearly an instrument used and intended to threaten, attempt, plan or conspire or commit war crimes and or genocide, such facts and law are directly relevant to elements of both crimes charged. At a minimum, by reaffirming and directly incorporating the central and directly relevant portions of the treaties cited above the "Constitution, the Laws of the U.S. and the specific treaties" (U.S. Constitution, Article VI, clause 2) must be construed consistently. The United States understands that it no less than all other countries or entities is absolutely prohibited from threatening or committing war crimes or genocide and that nuclear weapons are not exempt from these fundamental prohibitions as confirmed by the U.S. argument before the I.C.J. (I.C.J., Threat or Use of Nuclear Weapons, op.cit, paragraph 86).

The trial court did have discretion to dismiss the charges brought if it felt it could not pursue legal parameters to national defense, but it had no discretion to ignore and/or misapply the binding and peremptory laws of war that specifically limit constitutional war powers. In claiming that the Sisters had no standing to raise the laws of war as applied to "national defense" in general or the public facts of the threat or use of the Minuteman III, N-8, in particular, the trial court based its finding on civil cases stating that the Sisters, "factitiously created circumstances to cast themselves as defendants rather than plaintiffs." (PTO at 15.) If a civil case cannot be brought to challenge the legality of the instant threat or use of the Minuteman III, N-8, then surely criminal charges cannot lie since they directly involved proof beyond a reasonable doubt of each essential element, the "national defense" mission of the threat or use of nuclear weapons in general and the factual realities and legality of the "national defense materials" at issue, the instant threat or use of the Minuteman III, N-8 in particular.

The Sisters' relied on their objective understanding that the constitutional war powers of Congress and the Executive are not unlimited. A minimum of two positive prohibitions limit "national defense" or constitutional war powers and prohibit any threat or use of the Minuteman III, N-8. The most "fundamental" and "intransgressible" rules of humanitarian law are clearly codified and universally binding. "It is especially forbidden ... to employ arms, projectiles or materials calculated to cause unnecessary suffering." (Hague Convention IV 1907, Article 23, specifically cited in 18 USC 2441). There can be absolutely no doubt that legitimate national defense cannot and does not include use of the Minuteman III, N-8 whether in attack or retaliation. In addition, there can be no doubt that any use of an inherently indiscriminate nuclear weapon including the Minuteman III, N-8 is a "grave breach" of the Geneva Conventions (*see e.g.*,

Article, 147 Fourth Geneva Convention for the Protection of Civilian Persons, Aug. 12, 1949) is "incapable of distinguishing between civilian and military targets" (I.C.J. Opinion, *op.cit*, para 78).

Further, since any use of the MMIII, N-8 would constitute a war crime or genocide, "the stated readiness to use it would be a threat prohibited under Article 2, paragraph 4. [of the United Nations Charter]." (I.C.J. Op, *id.*, para. 47,78.) This interpretation is directly consistent with the clear understanding in United States law that any individual, entity or government engaged in such a clear conspiracy, attempt, threat to commit war crimes (18 U.S.C. \* 2441) or genocide (18 U.S.C. \*\* 1091-93), as is the high-alert readiness to unleash the MMIII, N-8, is liable for those crimes. The Army Field Manual 27-10 states this rule as follows:

Any person, whether a member of the armed forces or a civilian, who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment. Such offenses in connection with war comprise: a) Crimes against peace. b. Crimes against humanity. c. War crimes.

United States Department of the Army Field Manual 27-10, Sec. II., paragraph 498, July 1956.

**Causation:** As shown above, the Sisters understood that they had a bona fide, reasonable belief that they had a right, duty or privilege to alert all individuals and authorities, non-violently and symbolically, to the fact that war crimes and/or genocide were being actively threatened by the United States with the Minuteman III, N-8 on high-alert. In addition, on October 6, 2002, the Sisters acted consistently with the U.S. urging of open declaration and inspection of possible weapons of mass destruction sites in Iraq. The Sisters merely agreed that non-violent, declaration and inspection one weapon at a time was a, if not *the*, legal, practical and possible way to achieve obligatory and complete nuclear disarmament. The United States had formally agreed in the Nuclear Non Proliferation Treaty Review Conference of 2000 to an "unequivocal undertaking" to eliminate nuclear arsenals in concurrence with! the I.C.J. Opinion, the I.C.J. found that the obligation for complete nuclear

disarmament to which we are committed in Article VI of the Nuclear Non-Proliferation Treaty has reached beyond the parties to the Nuclear Non-Proliferation Treaty and had become universal and positive law. The I.C.J. found: "There exists an obligation [of all countries] to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control." (I.C.J. Opinion, Threat or Use of Nuclear Weapons, *op cit*, paragraph 105 (2) (F).) The Sisters acted consistently in good-faith accordance with existing and binding U.S. law by non-violent declaration or exposure and inspection of one nuclear weapon on high-alert as a practical step toward non-violent nuclear disarmament.

The Nuremberg Military Tribunals (N.M.T.) found in the Justice Case (Justice Case, 3 Trial of War Criminals Before the Military Tribunals Under Control Council Law No.10 (1951)) that the, "jurists were not justified in punishing private individuals pursuant to domestic law who had acted to impede or escape Nazi programs that were in violation of international law." (As summarized but improperly interpreted as not applying to U.S. resisters to war crimes or genocide in *United States v Montgomery*, 722 F 2d 733, 737 (11th Cir.1985)). Indeed, the court's failure to even permit a good-faith defense in this case undermines the very legitimacy of this nation's judicial system. As the NMT found in trials of German judges:

The prostitution of a judicial system [here mischaracterization and denial about the realities of the MMIII and suppression of non-violent or symbolic resistance] for the accomplishment of criminal ends [threat or commission or war crimes or genocide] involves an element of evil to the State which is not found in frank atrocities which do not sully judicial robes.

The Justice Case. 3 Trials of War Criminals, *op.cit.* at 1086.

It is only fitting to conclude the analysis of the good faith exception by examining the actions of the Sisters. In *Janusz*, this Court found that, [i]t is clear from Mr. Janusz that Mr. Janusz was not entitled to the instruction (good faith) because the evidence did not support it. By admitting his false pretense, Mr. Janusz admitted, as a matter of law, that he did not act in good faith. A defendant's honest belief that a venture will ultimately succeed does not constitute good faith if, in carrying out the plan, he knowingly uses false representation or pretenses with intent to deceive.

*Janusz*, 135 F.3d at 1323.

The salient facts in the case before us make it abundantly clear that the three Sisters acted in good faith. Nowhere in this record is there even a suggestion that the three Sisters were acting for foreign hire. The acts occurred in broad daylight, not under cover of darkness. (Tr. at 363:11.) A hilltop was selected because of its visibility, not its obscurity. (Tr. at 881:13-18.) No bombs or other weapons of any nature were brought to the site, but only instruments or symbols of peace. (Tr. at 843:21-24.) No jack hammer or other tools were used to destroy or attempt to destroy the nuclear missile site, but only household hammers which were used to symbolically beat instruments of war into instruments of peace. (Tr. at 894:13-17.) After entering the site and setting off the alarms, the Sisters did not attempt to flee, but waited in reverential prayer knowing that U.S. prosecutors have a duty to prosecute war crimes or genocide by the U.S. and knowing their non-violent exposure of a U.S. weapon of mass destruction on high-alert in Colorado was merely what the U.S. was asking of other countries as was one constructive step toward nuclear disarmament. (Tr. at 901:6-19.) Great care was exercised cutting through the fence to open the site and to minimize the actual damage to the site. (Tr. at 850:1-6.) Lastly, no injury or contamination of the Minuteman III, N-8 was intended or occurred as these weapons were at all times capable of being used. (Tr. at 473:15-20.) These are not the actions of saboteurs.

The government attempted throughout this trial to morph the Sisters' sincerely held wish for the elimination of nuclear weapons into the specific intent to injure, interfere with or obstruct the national defense by choosing either to ignore specific acts or omissions of the Sisters or by exaggerating their significance.

The good faith defense seeks to demonstrate the specific intent necessary to commit the crime was lacking. Accordingly, the essence of the defense is that the evidence presented by the Sisters, if believed by the jury, would completely rebut evidence that they had the required specific intent. *See United States v. Smith*, 13 F.3d 1421 (10th Cir.1994). The Sisters' good faith is a matter of factual determination for the jury to decide. *United States v. Turner*, 799 F.2d 627,629-630 (10th Cir.1996).

In conclusion, it is clear from this record that the Sisters more than met the three elements of the *Janusz* test and the trial court erred in refusing to give the good faith instruction to the jury. The Sisters request this matter be remanded to the trial court for a new trial with specific instructions that the good faith defense be tendered to the jury.

## **VII. CONCLUSION AND REQUESTED RELIEF**

For all of these reasons, Sisters Gilbert, Hudson and Platte urge the appellate court to reverse the judgment of conviction on all counts and dismiss Count 1 for insufficient evidence. If the Court does not so dismiss Count 1, the case should be remanded to the trial court for a new trial on both counts.

## **VIII. REQUEST FOR ORAL ARGUMENT**

Oral argument is necessary in this case because the important issues involved are ones of first impression in this Circuit. Furthermore, Counsel could provide clarification of the lengthy record to this Court during oral argument.

DATED this \_\_\_\_\_ day of April, 2004.

Respectfully submitted

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I hereby certify that on the \_\_\_\_\_ day of April, 2004, the above and foregoing *Brief of Appellants* was placed in the United States mail, first class postage prepaid, and addressed to:

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<sup>1</sup> The references to the record are as follows: "Doc." refers to the document number on the Docket Sheet, "Tr. at xx:x-x" refers to the March 31, 2003 - April 7, 2003 jury trial transcript followed by the page(s) and line(s) at which the matter is found, and "MH Tr. at xx:x-x" refers to the February 21, 2003 motions hearing transcript followed by the page(s) and line(s) at which the matter is found.

<sup>2</sup> It was ironic that, although the Sisters were charged with sabotage *because of* their involvement with the Minuteman III missile, the trial court found Minuteman III and its destructive capabilities *to be irrelevant* in determining "national defense material."

<sup>3</sup> Although the court found that the Sisters' political views were irrelevant, the court's overbroad definition of "national defense" permitted the government to exercise its political views through the prosecution of these three Dominican Sisters for sabotage.

<sup>4</sup> The trial court, however, presumed for its pre-trial orders unsupported findings of fact not in evidence that the posture of the Minuteman III, N-8 on October 6, 2002 concerned only "development and deployment" (PTO at 14, 22-23) and "theoretical future harm" (PTO at 14). The trial court prohibited the Sisters from raising any of their proffered and exculpatory fact or law evidence. The trial court ordered that, "there will be no evidence ... that impugns, *inter alia*, the lethality, legality, morality or political wisdom of the Minuteman III missile system." (PTO at 31.)

<sup>5</sup> The International Court of Justice acted pursuant to its authority under the United Nations Charter, Article 92 and the integral Statute of the International Court of Justice, Art. 65. The United Nations Charter is a treaty of the United States, ratified by the U.S. Senate July 28, 1945, 59 Stat.1031, 3 Bevans 1153; United Nations Participation Act of 1945, 59 Stat. 619, as amended 22 USC 5287

(1994). The United States participated fully in written and oral arguments before the I.C.J.