An Answer to Lawyers who think if Scott Roeder stipulated that he in fact did what the prosecutor charged him with, that would be the same as pleading guilty

In an affirmative defense trial, the defendant affirms the prosecutor's alleged facts, in order to narrow the focus of the trial to the contested issue: the harm which the defendant's actions prevented. It would be irregular to obstruct the defendant's stipulation to those facts.

By Dave Leach (From "Trial By Jury" video series, Part 3)

Obviously there are many things that could go wrong which I haven't thought of yet. But there are a few possibilities I have been warned about already.

Remember that my proposed strategy includes Scott Roeder admitting to the facts written by the prosecutor in the formal charges, about what Scott did to George Tiller. That would make the parade of 182 witnesses, to "prove" what Scott already admitted, irrelevant. That would leave Scott's defense – the Necessity Defense which says Scott's action was necessary to prevent the unthinkably greater "harm" of literally sucking the brains out of several thousand more babies – the only contested issue of the trial. Which would leave the judge without his desperately needed pretense of a Trial by Jury, if he follows state Supreme Court precedent and rules Scott's only defense inadmissible.

If Scott submits to the judge, in writing, a description of the facts he admits are true, and if the description is identical to what the prosecutor alleged in the formal charges, then as nearly as I can tell, that is called a "stipulation", and it relieves the court of the expense and time of having to prove those facts in court. Normally, stipulations are encouraged by judges.

Prosecutor won't join in stipulation? Judge won't accept stipulation? Judge will equate stipulation with plea of guilty and cancel the trial, leaving no possible appeal?

But I've been told that the prosecutor will not agree to stipulate to these facts!

Now I can appreciate how little the prosecutor would like to give up her dog and pony show of 182 witnesses to prove what Scott does not contest. But how can the prosecutor not agree to a "stipulation", unless after Scott says the prosecutor's description is correct, the prosecutor says "No it's not!"?!

This threat is just a little beyond me to visualize! Although should it actually happen, I would consider it the most entertaining event in American history since President Bush called Islam a "religion of peace"!

But should such a bizarre thing happen, I hope the public will understand how irregular that would be, by routine court rules.

Normally, stipulations are encouraged by courts. This is from the definition of "stipulations" found in West's Encyclopedia of Law: (Text over: the following) *"Courts look with favor on stipulations because they save time and simplify the matters that must be resolved.... parties to an action can stipulate as to an agreed statement of facts on which to submit their case to the court."*

The Necessity Defense is called an "Affirmative Defense". Wikipedia explains that the very reason it is called an "affirmative defense" is because the defendant usually must "affirm that the facts

asserted by the plaintiff are correct". If prosecutors could prevent a defendant from pleading an Affirmative Defense simply by not agreeing with the facts which she herself has already asserted in the charges, then I suppose it would be impossible for anyone to ever plead a defense of any kind, but that would make the prosecutor look pretty ridiculous!

However, I haven't heard that it is impossible, yet, in America, for defendants to assert Affirmative Defenses, despite the fact that every prosecutor would surely *make* it impossible, were it within their power!

I've also been told that the judge won't *accept* the stipulation; that the judge will equate admission to the alleged facts with admission of guilt, and cancel the trial, leaving no basis for any possible appeal!

Now let me get this straight. *It is so routine, in courts of law, for a defendant to **affirm** the facts as alleged by the prosecutor in the course of presenting mitigating circumstances, that that is where "Affirmative Defenses" get their name? And yet in an abortion prevention trial a judge won't let the defendant assert any kind of Affirmative Defense if he affirms the facts as alleged by the prosecutor?*

This very well could happen in Scott's abortion prevention trial, if the public isn't watching, because legalizing abortion generally requires a suspension of reason and law. But it would be outrageously irregular.

Not only MAY the prosecutor's facts be admitted without foreclosing a trial, but often facts MUST be admitted before there can BE a trial!

Here is how the Journal of the American Academy of Psychiatry and Law Online puts it: (http://www.jaapl.org/cgi/content/full/36/1/143) "an affirmative defense, such as not guilty by reason of insanity or self defense, requires the defendant to admit to the facts of the alleged crime, it nonetheless disputes the prosecution's claim that a crime has been committed. The government still must prove its case beyond a reasonable doubt."

Here's how Wikipedia puts it: "Affirmative defenses operate to limit, excuse or avoid a defendant's criminal culpability...even though the factual allegations of the plaintiff's claim are admitted or proven. In fact, the defendant usually must affirm that the facts asserted by the plaintiff are correct in asserting his own defense; hence, "affirmative" defenses.

Here's how a news article at TheStreetSpirit.org puts it: (http://www.thestreetspirit.org/June%202005/arcata.htm) "To prove oneself not guilty by reason of necessity, the defendant admits he violated the law but proves by a preponderance of the evidence that this happened: (1) to prevent a significant evil, (2) with no adequate alternative, (3) without creating a greater danger than the one avoided, (4) with a good faith belief in the necessity, (5) with such belief being objectively reasonable, and (6) under circumstances in which he did not substantially contribute to the emergency.

A comment on a blog has no authority except to show this understanding is common enough to make it into internet comments, but for what it's worth, here is a comment on a blog: "self-defense is an "affirmative defense" for the charge of murder. Now, in order to make an affirmative defense, one has first to admit to the facts." [http://www.haloscan.com/comments/levi9909/6234109311369731\49/]

Affirmative Defenses are where you tell "the REST of the story". You say, "Judge, everything the prosecutor said I did is absolutely correct. But it is only half the story. Let me tell you about a few more facts which the prosecutor wasn't in the mood to mention."

Here is how the Law Encyclopedia puts it: "Any one of these affirmative defenses must be asserted by showing that there are facts in addition to the ones in the [charges] and that those additional facts are legally sufficient to excuse the defendant."

Here is how Wikipedia puts it: "...an affirmative defense requires an assertion of facts beyond those claimed by the plaintiff..."

Here is how Black's Law Dictionary, 4th Edition, puts it: "New matter [facts beyond those

alleged by the prosecutor] constituting a defense; new matter which, assuming the complaint to be [factually] true, constitutes a defense to it." Carter v. Eighth Ward Bank, 33 Misc. 128, 67 N.Y.S. 300

Will the judge indeed answer, "I do not want to *hear* any other facts; ergo, there *are* no other facts. You may now make your pre-sentencing statement"? The judge would have to break a lot of well worn habits. It is routine for a Necessity Defense trial to *begin*, not to *end*, by admitting to the prosecutor's factual allegations.

The legal effect of the mitigating facts is awkward enough to put into words, that nearly opposite descriptions, of the legal effect of the mitigating facts, are correct: from "the defendant must admit his guilt" to "there is no guilt".

So here are two definitions of the operation of the Necessity Defense that sound like they contradict each other. The first is found in a news article. The second is found in Black's Law Dictionary:

"To prove oneself not guilty by reason of necessity, the defendant admits he violated the law but ..." (http://www.thestreetspirit.org/June%202005/arcata.htm)

Black's Law Dictionary, 4th Edition:

"Necessity is not restrained by law; since what otherwise is not lawful necessity makes lawful. Necessitas sub lege non continetur, quia quod alias non est licitum necessitas facit licitum. 2 Inst. 326."

"Necessity overrules the law. Necessitas vincit legem. Hob. 144; Cooley, Const. Lim. 4th Ed. 747."

"Necessity overcomes law; it derides the fetters of laws. Necessitas vincit legem; legum vincula irridet. Hob. 144.

What WILL Happen

I could find no references anywhere that suggest a trial is over once the defendant with an Affirmative Defense admits the prosecutor's factual allegations.

However, I do expect something to happen similar to what these legal minds have told me.

If Scott Roeder admits the prosecutor's factual allegations, or stipulates to them, the judge may say (especially if there is no informed public watching), "Well then there is nothing for the jury to hear. I have already ruled against your defense, in the manner required by appellate precedents. I must now find you guilty."

Scott or his attorney could respond, "First may we present our Offer of Proof?"

An Offer of Proof is evidence you want to put in the court record even if the judge has ruled it inadmissible, so it will be there for the Appellate Judge to consider on appeal. The judge has to allow it.

I don't see how this would eliminate the opportunity for appeal! The Offer of Proof would be part of the trial record for the Appellate court to review. So would all the briefs, and transcripts of the hearings. The pretrial ruling against the Necessity Defense will certainly be appealable.

I don't see anything undesirable about the judge finding Scott guilty without even calling a jury. I think that would be a magnificent public education event. It would be an honest admission that in abortion prevention trials, there is no Right to Trial by Jury of the sole contested issue of the case.

In fact, if public pressure is inadequate to force Scott's judge to uncensor Scott's only trial issue and only defense, dismissal of the jury is the RIGHT thing to pray for. The alternative is a jury "deciding" the admitted facts, which would be DISASTROUS to the cause of abortion, because it would supply the judge with his APPEARANCE of a Trial by Jury, leaving the public to yawn at our technical arguments about the DE FACTO denial of trial by jury. The Status Quo would just have one more notch on its gun. Stare Decisis would dig in a little deeper; in fact, a lot deeper, having successfully withstood the little bit of public exposure we have already achieved.

Notice also all these dictionary definitions talk about mitigating FACTS. It may be routine for judges to rule on the admissibility of defenses, calling them questions of LAW, but they are in fact mitigating facts. Judges ought to allow juries to judge the facts.

I would be misleading if I give the impression that I expect any trial strategy to have a very

predictable outcome. Any time you have to reason with another human being, you are taking a gamble. If you think we Americans in this generation have learned to reason better than our ancestors, just look at our divorce rate.

Our minds get in ruts, and it takes huge effort to pull them out.

The public has been told for 37 years that abortion is legal because the Supreme Court decided it is. For me to come along and say nothing can be more illegal, than what has been necessary all these years to keep abortion "legal", takes a movement of the public mind to even hear the evidence, a thing which seldom happens. But at least the public mind is not in the rut of having assumed all these years that trial by jury ought not to exist in abortion prevention cases. That is a startling new idea. To the contrary, the public mind has been in the rut all these years of assuming abortion prevention defendants have always had a right to trial by jury. So you have two ruts struggling against each other, to pull each other out. So there is hope, with the public. Reasoning with the public is like driving along two ruts four feet apart from each other. Your wheels are six feet apart, so sometimes your left wheels are stuck in the rut while your right wheels are free, and sometimes it's the other way.

But attorneys are a different matter. All four of their tires fit comfortably in their ruts. Not only have they accepted abortion's legality, they have known, and accepted all these years, that in abortion prevention trials the defendant's only defense does not, and ought not, be revealed to the jury.

It is also difficult for many attorneys to grasp the concept of anyone like me, who is not an attorney, offering anything useful to the discussion.

In fact, Lawyer Land even has a rule against letting anyone pull lawyers out of their ruts. They call it "Stare Decisis".

According to the rule of Stare Decisis, if abortion is *in fact* genocide, that fact is irrelevant because abortion has been going on for such a long time that it will be too disruptive to change it.

According to Stare Decisis, preserving the status quo is more important than stopping genocide. How the Civil Rights movement ever overcame the hurdle of stare decisis, I'll know when I get to Heaven. I don't think stare decisis ever comes up when judges are ready to change laws and Constitutions. It just comes up when you ask judges to change *their* rulings.

So here I come, offering to pull America out of her genocidal ruts, dreaming about Scott Roeder stipulating to the facts alleged by the prosecutor, about what the defendant did, while at the same time still insisting on a jury trial over the facts alleged by the defendant, about what the abortionist did that had to be stopped.

I say, "when the jury isn't told about the defendant's defense, that is a de facto denial of trial by jury."

An attorney answers, "You have to stop saying you aren't getting trial by jury. You want Scott to *waive* trial by jury, by stipulating to the facts. You can't waive trial by jury, and then complain that you no longer have a trial by jury"

I explain "I propose stipulating only to the facts about what the defendant did, in order to end the parade of 182 witnesses proving what no one disputes, but which marches on for the sole purpose of satisfying the public that a jury trial was granted. Then I propose alleging other facts, about the harm which the defendant prevented."

The attorney answers, "Oh, so you're arguing the Necessity Defense. But that's been argued a thousand times and failed. What makes you think you have better arguments than all the rest?"

I admit, that is a very good question. Do you think I am not intimidated by it? Who am I, to offer America a tow rope? My only college degree is in playing trumpet.

I know all of you can relate to being surrounded by evils far beyond your ability to even imagine healing. So if their victims ask your help, you say, "Oh, I am not qualified to fight that battle. I am just called to go to church, tithe, and listen passively to others."

So what makes me so out of touch with reality that I keep pulling on mountains?

What can make you unrealistic enough to want to pull with me?

The promises of God.

Mat 21:21 Jesus answered and said unto them, Verily I say unto you, If ye have faith, and doubt not, ye shall not only do this *which is done* to the fig tree, but also if ye shall say unto this mountain, Be thou removed, and be thou cast into the sea; it shall be done. 22 And all things, whatsoever ye shall ask in prayer, believing, ye shall receive.

I too struggle between two ruts. In one rut, I ask, who am I, to offer to pull America out of her genocidal rut?

In the other rut, I ask, Who am I, to question God? If God promises that if I will just pull with what little might I have, He will pull with me, who am I to mutter over my shoulder “No you won’t!” on my way to the TV set?

How dare I ignore the cries of fellow human beings with the excuse that I am powerless to help them anyway, even if I try? How will I stand before God with that excuse, as He reminds me of His glorious promise which I refused to believe?

So here is my answer to any lawyer that asks how I can presume to offer better arguments than the thousand arguments before which have failed to persuade the judge to let the jury in on the defendant’s defense:

If there have been a thousand arguments which have been true, the thousand and first time is *not* the time to quit. Lies cannot withstand truths perpetually beating upon them. If abortion has already been weakened by a thousand irrefutable arguments, this may be the time it’s going to fall.

“I don’t know if my arguments are any better. I have seen arguments in the past which *should* have been good enough to persuade the judge.

“I haven’t seen anyone else offer the arguments I offer, but maybe people have. All I know is that I have read the excuses given by state supreme courts for not allowing juries to hear the trial issue, and I find their reasoning embarrassing. They reason as if no one has presented to them the arguments I present, but maybe people have, and the judges just ignore them.

“But the bottom line for me, as I contemplate whether it is time for me to give up and go in a corner and practice my scales on my trumpet, is not whether my arguments will end abortion this time, but whether they are true. As long as they are true, as nearly as I can determine, I have a responsibility before God to keep pulling the mountain of genocide.

I must swing my hammer of truth and justice and freedom at the tinsel of tyranny until nothing is left.