DISTRICT COURT, COUNTY OF BOULDER, STATE OF COLORADO 1777 6th Street P.O Box 4249 Boulder, CO 80302 (303) 441-3744	
THE PEOPLE OF THE CITY OF BOULDER on behalf of THE PEOPLE OF THE STATE OF COLORADO Plaintiff-Appellee v. DAVID LEE MADISON, JR., Defendant-Appellant	COURT USE ONLY Case No.: 10CV716 Division: 2

RULING AND ORDER

This Matter is before the Court on appeal of the trial court ruling against Appellant David Lee Madison, Jr. ("Mr. Madison"). Having reviewed the parties' briefs, the record on appeal and the applicable law, the Court enters the following Ruling and Order:

I. FACTUAL AND PROCEDURAL BACKGROUND

On November 24, 2009 at approximately 7:15 a.m., police officers arrested Mr. Madison for camping on public property. Mr. Madison was charged with Camping Without Consent, B.R.C. § 5-6-10. Mr. Madison's counsel subsequently filed a motion to dismiss on the grounds that the ordinance was unconstitutional as imposing cruel and unusual punishment and infringing on the right to travel, which the municipal court denied. On April 7, 2010, the case proceeded to trial and on April 30, 2010 the municipal court issued a written order finding Mr. Madison guilty of Camping Without Consent.

Issues on Appeal

In his appeal, Mr. Madison argues the following:

1. The trial court erred in denying Mr. Madison's Motion to Dismiss, because the Camping Without Consent ordinance is unconstitutional in violation of the prohibition against cruel and unusual punishment.

2. The trial court erred in denying Mr. Madison's Motion to Dismiss, because the Camping Without Consent ordinance is impermissibly overbroad for infringing the fundamental right to travel.

3. The trial court erred in concluding that the violation of the Camping Without Consent ordinance was not excused or justified under the defense of choice of evils or necessity.

II. STANDARD OF REVIEW

An appeal taken from a judgment and conviction in a qualified municipal court of record shall be made to the district court of the county in which the municipal court is located, and the practice and procedure shall be the same as that provided in the applicable rules of procedure for appeal of misdemeanor convictions from county court to the district court. C.R.S. § 13-10-116(2); C.M.C.R. 237; *see also Hylton v. City of Colo. Springs*, 505 P.2d 26, 28 (Colo. App. 1973). Therefore, in reviewing the record on appeal from the municipal court, a district court cannot act as a finder of fact. *People v. Gallegos*, 533 P.2d 1140, 1142 (Colo. 1975); *People v. Williams*, 473 P.2d 982, 984 (Colo. 1970). On appeal, questions of law are reviewed *de novo*; questions of fact are reviewed for clear error; and questions of discretion are reviewed for abuse of discretion. *Valdez v. People*, 966 P.2d 587, 590 (Colo. 1988).

III. MERITS

Mr. Madison argues that the Camping Without Consent ordinance violates the prohibition against cruel and unusual punishment and is impermissibly overbroad for infringing the fundamental right to travel. Mr. Madison also argues that the trial court erroneously concluded that the violation of the Camping Without Consent ordinance was not excused or justified under the defense of choice of evils or necessity.

The Court reviews de novo a constitutional challenge to a municipal ordinance. *Kruse v. Town of Castle Rock*, 192 P.3d 591 (Colo. App. 2008). Municipal ordinances, like statutes, are presumed constitutional. *Id.* The party challenging the ordinance must prove that it is unconstitutional beyond a reasonable doubt. *People v. Janousek*, 871 P.2d 1189, 1195 (Colo. 1994).

"A statute is facially unconstitutional only if no conceivable set of circumstances exists under which it may be applied in a constitutionally permissible manner." *Woldt v. People*, 64 P.3d 256, 266 (Colo. 2003). A statute that is constitutional on its face may nonetheless be unconstitutional as applied to a particular case. *E-470 Public Highway Authority v. Revenig*, 91 P.3d 1038, 1041 (Colo. 2004).

The proper interpretation of a statute or ordinance is a question of law that is reviewed de novo. *Alvarado v. People*, 132 P.3d 1205, 1207 (Colo. 2006). "The existence of an affirmative defense is a question to be determined by the trier of fact. Where the trial court is the trier of fact, its factual findings are binding on appeal if adequately supported by the record." *People v. Dover*, 790 P.2d 834, 835 (Colo. 1990).

At the time that Mr. Madison was charged, B.R.C. § 5-6-10 (2001), provided in relevant part as follows:

Camping or Lodging on Property Without Consent.

(a) No person shall camp within any park, parkway, recreation area, open space or other public or private property without first having obtained:

(1) A permit from the city manager, in the case of city property;
(2) Permission of the supervisory officer of other public property; or
(3) Permission of the owner of private property.

(c) For purposes of this section "camp" means to reside or dwell temporarily in a place, with shelter, and conduct activities of daily living, such as eating or sleeping, in such place. But the term does not include napping during the day or picnicking. The term "shelter" includes, without limitation, any cover or protection from the elements other than clothing. The phrase "during the day" means from one hour after "sunrise" until "sunset," . . . .

Mr. Madison contends that the ordinance is unconstitutional, both on its face and as applied to the particular facts of this case.

A. Cruel and Unusual Punishment

Mr. Madison argues that the Camping Without Consent ordinance violates the prohibition against cruel and unusual punishment facially and as applied, because it punishes the status of being homeless. He asserts that the ordinance criminalizes activities of daily living, such as sleeping, which the homeless population is forced to perform outdoors due to the limited availability of shelter. The City maintains, however, that the ordinance passes constitutional muster, because it punishes conduct rather than a person's status.

The Eighth Amendment to the United States Constitution and Article II, Section 20 of the Colorado Constitution prohibit "cruel and unusual punishments." *See People v. Guttierez* (622 P.2d 547, 556-57 (Colo. 1981) (holding that Article II, Section 20 is coextensive with the Eighth Amendment). The Eighth Amendment "imposes substantive limits on what can be made criminal and punished as such." *Ingraham v. Wright*, 430 U.S. 651, 667 (1977). This prohibition applies to the states and municipalities through the Due Process Clause of the Fourteenth Amendment.

State laws that criminalize a person's status constitute cruel and unusual punishment. *Robinson v. California*, 370 U.S. 660 (1962). In *Robinson*, the Supreme Court struck down a California statute that criminalized being addicted to narcotics. *Robinson*, 370 U.S. at 667-668. It reasoned that a conviction under the criminal statute was not predicated upon conduct, but rather it was predicated upon a person's "status" of narcotic addition. *Id.* at 665. Because the statute did not target conduct, a narcotic addict could be prosecuted for his "status" of narcotic addiction at any time before he reformed and regardless of whether he had ever taken narcotics within the state. *Id.*

Criminal penalties may be constitutionally imposed, however, when the accused has committed some act which society has an interest in preventing, even if the punished conduct is

related to a person's status. *Powell v. State of Tex.*, 392 U.S. 514, 533 (1968). In *Powell*, the Supreme Court rejected the argument that punishing a chronic alcoholic for public intoxication violated the Eighth Amendment. *Id.* at 536-37. The Supreme Court distinguished its ruling in *Robinson*:

> The State of Texas thus has not sought to punish a mere status, as California did in *Robinson*; nor has it attempted to regulate appellant's behavior in the privacy of his own home. Rather, it has imposed upon appellant a criminal sanction for public behavior which may create substantial health and safety hazards, both for appellant and for members of the general public, and which offends the moral and esthetic sensibilities of a large segment of the community.
> *Id.* at 532.

Although conduct subject to criminal sanction may be related to a person's status or condition, the Supreme Court declined to formulate a constitutional rule regarding whether a person's conduct was an involuntary product of his status or condition, because the States have historically grappled with the "constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views on the nature of man." *Id.* at 534-37. The dissent, however, contended that it was unconstitutional to punish conduct that was occasioned by a compulsion related to a person's status or condition. *Id.* at 569.

In relation to a person's status of being homeless, some jurisdictions have struck down municipal ordinances that criminalize sleeping in public places, such as streets, sidewalks, and parks. *See, e.g., Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006); *Johnson v. City of Dallas*, 860 F. Supp. 344, 350 (N.D. Tex. 1994); *Pottinger v. City of Miami*, 810 F. Supp. 1551 (S.D. Fla. 1992). In *Pottinger*, the court determined that a Miami municipal ordinance that provided that "[i]t shall be unlawful for any person to sleep on any of the streets, sidewalks, public places or upon the private property of another without the consent of the owner thereof," violated the Eighth Amendment. *Pottinger*, 810 F. Supp. at 1560 fn.11 & 1565. Relying upon the dissenting opinion in *Powell*, it reasoned that subjecting a homeless person to a criminal sanction for eating, sleeping, or engaging in other life-sustaining activities in public places constituted cruel and unusual punishment, because homelessness is an involuntary condition and a homeless person has no choice but to conduct involuntary, life-sustaining activities in public places. *Id.* at 1565.

In contrast, municipal ordinances that criminalize the conduct of camping in public places have passed constitutional muster. *See Lehr v. City of Sacramento*, 624 F. Supp. 2d 1218 (E.D. Cal. 2009); *Joel v. City of Orlando*, 232 F.3d 1353 (11th Cir. 2000). While the court in *Lehr* could have distinguished its holding solely by contrasting the language of the municipal ordinance at issue in that case with that in *Pottinger* and *Jones*, it further noted that "neither the Supreme Court nor any other circuit court of appeals has ever held that conduct derivative of status may not be criminalized . . ." and it declined to "couch its own moral beliefs in constitutional terms and to substitute its own judgment as to the morality of the criminal law for that of the states." *Lehr*, 624 F. Supp. 2d at 1232 & 1234.

Mr. Madison contends in a cursory manner that the Camping Without Consent ordinance is facially unconstitutional. However, he fails to develop any argument in support of his

contention. As the People note, the Camping Without Consent ordinance applies to all persons who wish to camp in Boulder, regardless of whether they are homeless, shoestring travelers trying to avoid the cost of accommodations, or persons who merely enjoy the great outdoors. Mr. Madison does not argue that there is no conceivable set of circumstances under which the Camping Without Consent ordinance may be applied in a constitutionally permissible manner. Upon examination of the ordinance, the Court finds that the Camping Without Consent Ordinance is facially neutral and that it does not violate the Eighth Amendment's prohibition against cruel and unusual punishment on its face.

In addition, Mr. Madison argues that the Camping Without Consent ordinance is unconstitutional as applied, because he is homeless and has an involuntary need for warmth and shelter against the elements as he sleeps at night. He urges the Court to adopt the reasoning in *Pottinger* and *Jones* and to hold that criminalizing conduct that is derivative of a person's status or condition constitutes cruel and unusual punishment. However, the Court is not persuaded by *Pottinger* and *Jones* to adopt the dissenting opinion in *Powell*. To formulate a constitutional rule regarding criminalizing derivative conduct threatens to usurp the state's authority to develop its own criminal laws. People are biologically complex beings who dwell in socially complex environments. The courts' understanding of what constitutes a status or condition and to what extent conduct is derivative of a condition evolves with advances in scientific knowledge and fluctuates with changing morals and attitudes over time. Thus, the Court adheres to the Supreme Court precedent in *Powell* and holds that laws that criminalize conduct, even if the punished conduct is related to a person's status, do not violate the Eighth Amendment's prohibition against cruel and unusual punishment.

Here, the Camping Without Consent ordinance limits the use of shelter for sleeping on public property at night, but it allows people to sleep on public property at any time and to use shelter for daytime napping. Unlike the municipal ordinances in *Pottinger* and *Jones*, the plain language of the Camping Without Consent ordinance does not prohibit sleeping in public places, but rather it targets the conduct of camping. The City of Boulder is constitutionally allowed to set reasonable restrictions on the use of public property, including regulating where and when camping occurs. Because the Camping Without Consent ordinance punishes conduct rather than a person's status as homeless, the Court holds that it does not violate the Eighth Amendment as applied to homeless persons.

B. Overbreadth and Right to Travel

Mr. Madison asserts that the Camping Without Consent ordinance is unconstitutionally overbroad facially and as applied to homeless people, because it impermissibly infringes on a person's fundamental right to interstate and intrastate travel. Specifically, Mr. Madison contends that the Camping Without Consent ordinance is so broadly drawn that it serves to criminalize the fundamental right to travel, as well as the corollary right to remain in public places as guaranteed by the U.S. Constitution and the Colorado Constitution.

When there is a facial challenge to the overbreadth of a statute or ordinance, "a court's first task is to determine whether the enactment reaches a substantial amount of protected

conduct. If it does not, then the overbreadth challenge must fail." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982).

Municipal ordinances that define camping so as to criminalize germane recreational activities are unconstitutionally overbroad. *State v. Beltran*, 172 P.3d 458, 464 (Haw. 2007). In the ordinance in *Beltran*, camping was defined, in part, as:

> the use of public park for living accommodation purposes such as sleeping activities, or making preparations to sleep (including the laying down of bedding for the purpose of sleeping), or storing personal belongings, or making any fire, or using any tents or shelter or other structure or vehicle for sleeping or doing any digging or earth breaking or carrying on cooking activities.
> *Id.* at 460-61.

As the court discussed, the camping ordinance in *Beltran* criminalized enjoying a day at the beach or the park, because one could be subject to a criminal sanction for merely taking a nap under an umbrella or sun tent. *See id.* at 464.

In contrast, the Camping Without Consent ordinance is narrowly drafted to limit the use of shelter for sleeping on public property. The ordinance allows people to sleep on public property at any time and expressly excludes napping during the day and picnicking from the purview of the ordinance. Therefore, the plain language of the ordinance targets the conduct of camping and does not target a substantial amount of protected conduct. The City of Boulder is constitutionally allowed to set reasonable restrictions on the use of public property, including regulating where and when camping occurs. Thus, the Court finds that the Camping Without Consent ordinance does not reach a substantial amount of protected conduct, and therefore, is not unconstitutionally overbroad on its face.

In deciding whether the Camping Without Consent ordinance passes constitutional muster with regard to the right to travel, this Court must determine whether the ordinance should be subjected to a rational basis analysis or a strict scrutiny analysis. Courts have used a strict scrutiny analysis in cases where a statute or ordinance is facially discriminatory, where a statute or ordinance targets a suspect class, or where the statute or ordinance directly burdens a fundamental right. *See Parrish v. Lamm*, 758 P.2d 1356, 1370 (Colo. 1988) (discussing three-tiered standard of review applicable to equal protection claims); *see also Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 269 (1974) (applying strict scrutiny to a statute that "create[d] an 'invidious classification' that impinge[d] on the right of interstate travel by denying newcomers 'basic necessities of life.' "); *Pottinger*, 810 F. Supp. at 1581 (applying strict scrutiny because the statute burdened the right to travel). Other courts have used a rational basis analysis to determine the constitutionality of an ordinance. *See, e.g., Joyce*, 846 F. Supp. at 859-60.

The Court concludes that the Camping Without Consent ordinance is not facially discriminatory. The ordinance, on its face, applies equally to all individuals. Similarly, the plain language of the ordinance does not distinguish between residents and nonresidents, or homeless individuals and those individuals with a home.

The Court also concludes that the Camping Without Consent ordinance does not target a suspect class. The United States Supreme Court has identified race, alienage, national origin,

gender, and illegitimacy as suspect classes. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985). The United States Supreme Court has not held that economic status is a suspect class. *See Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 458 (1988). Therefore, an ordinance that allegedly targets homeless individuals does not target a suspect class. Mr. Madison does not dispute that the prevailing view is that homelessness is not considered to be a suspect class.

The parties dispute whether the right to intrastate travel is a fundamental right. The United States Supreme Court has recognized a fundamental right to interstate travel. *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972). The United States Supreme Court has not held that there is a fundamental right to intrastate travel. *See, e.g., Mem'l Hosp.*, 415 U.S. at 255-56. Other courts have recognized that the right to intrastate travel, or the right of an individual to move freely within his state, is a constitutionally protected right. *See, e.g., Lutz v. City of York, Pa.*, 899 F.2d 255, 268 (3d Cir. 1990); *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646, 648 (2d Cir. 1971). This Court does not need to conclusively decide whether the right to intrastate travel is a fundamental right for the purposes of this appeal. This Court will assume for purposes of this appeal only that the right to intrastate travel is a constitutionally protected right.

Courts that have applied a strict scrutiny analysis in determining the constitutionality of a statute or ordinance that allegedly burdened an individual's right to travel have done so when the burden on the right to travel was direct and substantial. *See, e.g., Shapiro v. Thompson*, 394 U.S. 618, 628-38 (1969), *overruled in part on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974). Moreover, in *Pottinger*, the court engaged in a discussion concerning how the right to travel can be burdened. *See Pottinger*, 810 F. Supp. at 1579-81. The court listed cases involving the imposition of residency requirements before individuals are eligible to receive various government services, a law "prohibiting the transportation of 'indigents' into California," and laws that had the "primary objective" of "imped[ing] migration." *Id.* at 1579-80 (citations omitted). The court also discussed how "[o]ne commentator argues persuasively that anti-sleeping ordinances can burden the right to travel of homeless individuals when they create direct barriers to travel, are intended to impede travel or penalize migration." *Id.* at 1580 (citation omitted).

Other courts have applied a rational basis analysis when analyzing the constitutionality of a public sleeping or camping ordinance. *See, e.g., Joyce*, 846 F. Supp. at 859-60 (rejecting the application of strict scrutiny analysis in the context of a preliminary injunction); *Roulette v. City of Seattle*, 850 F. Supp. 1442 (W.D. Wash. 1994).

This Court concludes that the Camping Without Consent ordinance does not directly or substantially burden an individual's right to travel. The ordinance does not involve residency requirements in order to receive government benefits. The ordinance does not prohibit the transport of any individuals within or outside of the state. Similarly, the ordinance does not have the primary objective of impeding migration. Moreover, the ordinance does not create a direct barrier to travel for homeless individuals, does not have the intention of impeding travel, and does not penalize migration. Instead, the ordinance is drafted to limit the use of shelter for sleeping on public property. Individuals are permitted to sleep on public property at anytime without shelter, and daytime napping and picnicking is not within the scope of the ordinance. At

best, there is a tenuous, indirect link between the Camping Without Consent ordinance and the right to travel.

As discussed above, the Camping Without Consent ordinance is not facially discriminatory, does not target a suspect class, and does not directly or substantially burden a fundamental right. Therefore, this Court will analyze the constitutionality of the ordinance using a rational basis standard. Under rational basis review, the ordinance must be rationally related to a legitimate governmental interest in order to pass constitutional muster. *Lyng v. Int'l Union, United Auto., Aerospace, & Agric. Implement Workers of Am., UAW*, 485 U.S. 360, 370 (1988); *Ferguson v. People*, 824 P.2d 803, 808 (Colo. 1992).

The City of Boulder presented evidence that the Camping Without Consent ordinance has legitimate governmental purposes, including protecting Boulder's public spaces from environmental damage, as well as the promotion of sanitation, public health, and safety. This Court is persuaded by the City of Boulder's argument that turning public spaces in Boulder into campgrounds would present problems concerning sanitation, public health, safety, and environmental damage. This Court therefore concludes that the Camping Without Consent ordinance is rationally related to these legitimate governmental interests.

In conclusion, this Court holds that the Camping Without Consent ordinance is not unconstitutionally overbroad and does not impermissibly infringe on Mr. Madison's right to travel. Therefore, the Camping Without Consent ordinance is upheld as a constitutionally permissible restriction on the use of public property.

C. Choice of Evils

Mr. Madison asserts that he provided sufficient evidence to satisfy the elements of the defense of choice of evils and that the prosecution failed to disprove the defense beyond a reasonable doubt. However, as noted in the City of Boulder's brief, the trial court found that Mr. Madison failed to meet the threshold for the defense to be invoked. The record supports this position. Therefore, this Court will address whether Mr. Madison met the legal threshold required for choice of evils to be invoked.

The affirmative defense of choice of evils is set forth in B.R.C. § 5-2-15. B.R.C. § 5-2-15 provides as follows:

> (a) Conduct that would otherwise constitute a violation is justifiable and not criminal when it is unavoidably necessary as an emergency measure to avoid imminent public or private physical injury that is about to occur by reason of a situation occasioned or developed through no conduct of the actor and that is of sufficient gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly and convincingly outweigh the desirability of avoiding the injury sought to be prevented by the code section or ordinance defining the violation at issue.

(b) The necessity and justifiability of conduct under subsection (a) of this section do not rest upon considerations pertaining only to the morality and advisability of the code section or ordinance, either in its general application or with respect to its application to a particular class of cases arising thereunder.

(c) Before evidence relating to a defense of justification under this section is presented to a jury, the defendant shall first make a detailed offer of proof to the judge, who shall rule as a matter of law whether the claimed facts or circumstances would, if established, constitute a justification. If the judge admits such evidence, the judge shall again rule as a matter of law on the sufficiency of the evidence that, if believed by the jury, would establish the defense.

(d) Choice of evils under this section is a specific defense. It does not apply to traffic violations.

The defense of choice of evils is to be narrowly construed and "is not available as an instrument" to nullify "unpopular laws." *People v. Brandyberry*, 812 P.2d 674, 677 (Colo. App. 1990). "[L]imitations upon the applicability of the defense have traditionally been recognized and applied to safeguard against its misuse or abuse." *Id.* As described in B.R.C. § 5-2-15(c), the defendant must make an offer of proof, and the Court must "rule as a matter of law whether the claimed facts or circumstances would, if established, constitute justification."

> A sufficient offer of proof must therefore establish: (1) all other potentially viable and reasonable alternative actions were pursued, or shown to be futile, (2) the action taken had a direct causal connection with the harm sought to be prevented, and that the action taken would bring about the abatement of the harm, and, (3) the action taken was an emergency measure pursued to avoid a specific, definite, and imminent injury about to occur.
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> *Andrews v. People*, 800 P.2d 607, 610 (Colo. 1990).

"A reviewing court determines[s], as a matter of law, whether the offer in the record, considered in a light most favorable to defendants, is substantial and sufficient in both quantity and quality to support the statutory defense." *People v. Brante*, 232 P.3d 204, 209 (Colo. App. 2009) (internal quotation marks omitted).

The first factor is that "all other potentially viable and reasonable alternative actions were pursued, or shown to be futile." *Andrews*, 800 P.2d at 610. The choice of evils defense "does not arise from a 'choice' of several courses of action, but rather is based on a real emergency involving specific and imminent grave injury that presents the defendant with no alternatives other than the one taken." *Id.* at 609. Mr. Madison had at least one alternative other than camping. Instead of camping, Mr. Madison could have protected himself from the cold weather by using layers of clothing. While this may not have been the best alternative, Defendant did have another viable and reasonable alternative action other than violating the Camping Without Consent ordinance.

The third factor is that "the action taken was an emergency measure pursued to avoid a specific, definite, and imminent injury about to occur." *Id.* at 610. Courts have limited the use of the choice of evils defense to situations "where the defendant's conduct is necessary because

of the sudden and unforeseen emergence of a situation requiring the actor's immediate action to prevent the occurrence of an imminently impending injury." *Brante*, 232 P.3d at 209-10 (internal quotation marks omitted). There was evidence at trial that Mr. Madison used the services of Boulder Shelter for the Homeless in the past. (Trial Tr. at 32.) Mr. Madison was aware that if he did not sleep at the homeless shelter, he might have to sleep outside. (Trial Tr. at 112.) There was also evidence at the trial that Mr. Madison had been in Boulder for approximately a year prior to the violation. (Trial Tr. at 101.) Therefore, it is reasonable to conclude that on the day of the violation Mr. Madison was not new to Boulder and had at least some familiarity with the climate and potential for sudden significant changes in the weather. It is also reasonable to conclude that it would have been foreseeable to Mr. Madison that it may become very cold at night in Boulder in mid to late November. Similarly, it was foreseeable that space at the homeless shelter would not always be available. Therefore, Mr. Madison was not faced with a sudden and unforeseen emergency on November 24, 2009 when the weather became cold at night.

As a matter of law, considered in the light most favorable to the defendant, Mr. Madison has not sufficiently established in both quantity and quality that all other potentially viable and reasonable alternatives were pursued or shown to be futile, nor, that camping was an emergency measure pursued to avoid a specific, definite, and imminent injury about to occur. Because the first and third factors have not been established, the Court does not need to address whether the second factor has been established. This Court concludes that Mr. Madison's offer of proof was insufficient and cannot support the defense of choice of evils. Therefore, this Court holds that the trial court did not err in concluding that Mr. Madison failed to meet the threshold requirements necessary to assert the choice of evils defense.

IV. CONCLUSION

For the foregoing reasons, the municipal court's ruling is **AFFIRMED.**

Done this 20th day of April, 2011.

BY THE COURT:

Ingrid S. Bakke
District Court Judge