SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Criminal Division – Felony Branch

UNITED STATES OF AMERICA	Hon. Judge Leibovitz
v.	
TROY NEVES,	Case No. 2017-CF2-001244
WILLIAM BOGIN,	Case No. 2017-CF2-001243
MAKENNA CLARK,	Case No. 2017-CF2-001268
TRACI DUNLAP,	Case No. 2017-CF2-001208
JARED FARLEY,	Case No. 2017-CF2-001286
MICHAEL LOADENTHAL,	Case No. 2017-CF2-001246
ROSA RONCALES,	Case No. 2017-CF2-001295
Defendants.	

OPPOSITION TO GOVERNMENT'S MOTION FOR A PROTECTIVE ORDER REGARDING MATERIALS PRODUCED DURING DISCOVERY AND MOTION TO VACATE THE PROTECTIVE ORDER IMPOSED

In its motion for a protective order, the government seeks to restrict any dissemination of virtually all discovery materials to anyone outside the defense team. It does so on the bare assertion that applying the traditional principle of openness here would lead to "juror taint" and infringement of privacy. But under Superior Court Rule of Criminal Procedure 16 ("Rule 16") and the First Amendment, Troy Neves, William Bogin, Makenna Clark, Traci Dunlap, Jared Farley, Michael Loadenthal, and Rosa Roncales (hereinafter "the moving defendants") have a presumptive right to disseminate discovery materials. *See Jepson, Inc. v. Makita Elec. Works, Ltd.*, 30 F.3d 854, 858 (7th Cir. 1994) (explaining that parties presumptively have a right, grounded in the First Amendment, to freely disseminate what they learn in discovery); *Oklahoma*

Hosp. Ass'n v. Oklahoma Pub. Co., 748 F.2d 1421, 1424 (10th Cir. 1984) (same).[1] To overcome that presumption, Rule 16 requires the government to show "good cause" for a protective order, Super. Ct. Crim. R. 16(d), and the First Amendment requires the government to prove its protective order uses the least restrictive means to further a substantial state interest, *see Seattle Times v. Rhinehart*, 467 U.S. 20, 32 (1984); *Federal Election Com'n v. International Funding Institute, Inc.*, 969 F.2d 1110, 1114 (D.C. Cir. 1992) (noting that the Court applied intermediate scrutiny in *Seattle Times*).

The government's vague claims of potential harm here come nowhere close to satisfying those standards. To begin, the government cites *zero* authority in making its request: no constitutional provision, no case law, no statute, no rule. Similarly, the government's rationale for this request, untethered to any legal authority, consists only of vague concerns that the materials may be "edited" and posted "selectively," as well as the wholly speculative possibility of "juror taint." Government's Mot. for a Protective Order ("Gov't Mot."), *United v. Gabriel Mielke, et al.*, 17 CF2 1149, at 6.[2]

As for its fear of "juror taint," the government has not explained why *any* of the material subject to its proposed order—let alone *all* of it—must be kept secret to permit a fair trial.

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[1] While these and other cases cited in this brief are civil, "[t]he constitutional right of access has a more limited application in the civil context than it does in the criminal." *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1310 (11th Cir. 2001). As the right to disseminate judicial documents is rooted in the constitutional right of access, *see id.*, the right to disseminate, like the right of access, is stronger in the criminal context than in the civil one. Thus, all presumptive protections for the right to disseminate civil discovery material described in cases cited in this brief are even stronger here, in the criminal context.

[2] Notably, the Metropolitan Police Department's (MPD's) Official YouTube Channel (titled OfficialDCPolice) contains uploads of cropped and edited clips of body-worn camera (BWC) footage before the cases for which the footage is collected go to trial. And not all BWC footage from a given event is uploaded; rather, MPD selectively chooses certain clips from certain angles from certain officers to upload. *See e.g.*, BWC Video: 3200 b/o Walnut St, NE, on 12/25/16 (CCN #16-217-326), uploaded Jan. 4, 2017, https://www.youtube.com/watch?v=cTR43ranGGs. The defense is not aware of any pleadings in which the government has raised concern of juror taint based on MPD's publishing of selective BWC clips.

Indeed, high-publicity cases go to trial all the time, and in those cases the government unfailingly points to voir dire as a cure to any potential prejudice jury taint might pose. There is no reason voir dire would not serve the same role here.

As for the government's stated interest in protecting privacy, the government has provided no details suggesting that the discovery materials in this case are particularly sensitive, such that there is any special need for privacy here. To the contrary, the media coverage of the Inauguration Day protests and arrests was extensive. They were covered on local and national television as well as in other news and social media.[3] This widespread coverage of the protests and arrests occurred at a time when television audiences were massive.[4] Yet, in its motion, the government makes no mention of how widely publicized the January 20, 2017, protests and arrests were or how much material associated with those events is accessible by the public. Instead, it argues, without providing any reasoning, that vast amounts of materials disclosed in discovery are "non-public" and should not be disseminated. Since all of the events at issue in this case were public, and since much of the discovery material is already public or will become public in a couple of months when the government begins the yearlong process of publicly trying these cases, it is hard to see any sufficient justification to deviate from the normal course of openness here.

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[3] *See, e.g.*, Gregory Kieg, *Police injured, more than 200 arrested at Trump inauguration protests in DC*, CNN (Jan. 21, 2017), http://www.cnn.com/2017/01/19/politics/trump-inauguration-protests-womens-march/index.html; Oliver Laughland, et. al., *Inauguration protests: more than 200 demonstrators arrested in Washington*, The Guardian (Jan. 20, 2017), https://www.theguardian.com/world/2017/jan/20/inauguration-protesters-police-washington-dc. Searches of the hashtags "#J20" and "#disruptJ20" on Twitter and other social media sites reveal more videos from Inauguration Day and demonstrate just how much of what took place on that day has already been made public. *See* https://twitter.com/search?q=%23j20%20%23disruptJ20&src=typd&lang=en.

[4] *See, e.g.*, Steve Gorman, *Trump inauguration draws nearly 31 million U.S. television viewers*, Reuters (Jan. 21, 2012), http://www.reuters.com/article/us-usa-trump-inauguration-ratings-idUSKBN15600S.

The moving defendants request that the government's motion for a protective order be denied, and that the Court vacate the protective order currently in place.

BACKGROUND

On January 20, 2017, several hundred people participated in political protests against the inauguration of President Donald Trump. The Metropolitan Police Department (MPD), after "kettling" the protesters, conducted mass, dragnet arrests of over 200 protesters because individuals within the group allegedly engaged in some violent or otherwise unlawful activity. These protesters were ultimately charged with, *inter alia*, felony rioting. In discovery, the government has disclosed video footage, including private security footage and body-worn camera (BWC) footage from MPD officers who participated in the arrests, as well as police paperwork, photographs, and other materials.

On August 10, 2017, the government moved to restrict dissemination of all materials it claims to be "non-public"—including all of the above-mentioned video footage. *See generally* Gov't Mot. The Court subsequently ordered defendants to "file any response to the motion on or before **August 21, 2017**." Order in *United v. Gabriel Mielke, et al.*, 17 CF2 1149, at 5 (August 10, 2017) (Leibovitz, J.) (requesting defendants' responses to government's request for protective order) (emphasis in original). Yet, on August 18, 2017, the Court issued an order granting the government's motion for a protective order.

MEMORANDUM OF POINTS AND AUTHORITIES

I. THE GOVERNMENT'S MOTION SHOULD BE DENIED BECAUSE IT FAILS TO SATISFY THE "GOOD CAUSE" STANDARD UNDER RULE 16(d).

A. THE GOVERNMENT HAS NOT MET ITS BURDEN OF SHOWING "GOOD CAUSE" PARTICULARIZED TO THE SPECIFIC DISCLOSURES IN THIS CASE.

The government has presented no substantial reason for the Court to grant its request for a protective order. Other than vague generalizations and statements, the government fails to identify any specific or particularized harm or articulate any specific privacy interests of individual defendants, witnesses, or officers. However, such specificity is required by law to support the Court granting a protective order.

A number of Superior Court judges have denied government motions for wholesale protective orders under similar circumstances—including restrictions on dissemination—precisely because of the government's failure to make a "good cause" showing. *See, e.g.*, Exhibit A, Order in *United States v. Graham*, 15 CF2 7743 (Edelman, J.) (denying government's motion for protective order); Exhibit B, Order in *United States v. Bates*, 15 CF2 4443 (Edelman, J.) (vacating protective order); Exhibit C, Order in *United States v. Jones*, 16 DVM 1162 (Nooter, J.) (declining to issue a protective order without a demonstration of good cause particularized to the case); and Exhibit D, Order in *United States v. Brooks*, 16 CF2 8066 (Raffinan, J.) (denying government's motion for protective order).

That so many Superior Court judges have rejected government requests for restrictive protective orders is for good reason. Neither Rule 16 nor any other law provide that the moving party—here, the government—is presumptively entitled to a protective order unless opposing

counsel can come up with a convincing argument *not* to enter a protective order. Rather, the *moving party* must make a showing of "good cause."

Assuming the Court treats the government's motion as being made pursuant to Rule 16,[5] that rule proscribes the Court from denying, restricting, or deferring discovery unless the government establishes "good cause." *See* Super Ct. Crim. R. 16(d)(1). There are no published cases in the District of Columbia discussing what constitutes "good cause" under the Rule or who bears the burden of making that showing. However, the corresponding federal rule, which is identical to the local rule, provides guidance: the burden is squarely on the moving party. *See United States v. Yassine*, 574 Fed. App'x 455, 461 (5th Cir. 2014) (moving party bears the burden of showing the requisite good cause under Fed. R. Crim. P. 16(d)(1)); *United States v. Isa*, 413 F.2d 244, 248 (7th Cir. 1969) (same); *United States v. Carriles*, 654 F. Supp. 2d 557, 565–66 (W.D. Tex. 2009) (same); *United States v. Nelson*, 486 F. Supp. 464, 480 (W.D. Mich. 1980) (same). *See also Rowland v. United States*, 840 A.2d 664, 678 n. 16 (D.C. 2004) (local Rule 16 is "construed . . . consistently with the federal rule from which it is derived"); *Marshall v. United States*, 145 A.3d 1014, 1017 (D.C. 2016) ("Consistent with this mandate, '[w]e construe rules that are substantially similar to the corresponding federal rule in light of the meaning given to the federal rule.'") (quoting *Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 543 (D.C. 2011)).

Before it was revised to require a showing of "good cause," the corresponding provision of Federal Rule of Criminal Procedure 16 ("Federal Rule 16") required the party seeking a protective order to make a "sufficient showing" justifying its request. *See* Fed. R. Crim. P. 16,

[5] The only mention of any legal authority by the government is a single reference, without analysis or argument, to Rule 16(d)(1) contained *not* in the government's motion, but in the order it proposed to the Court. *See* Government's Proposed Order ("Gov't Prop. Order"), *United v. Gabriel Mielke, et al.*, 17 CF2 1149, at 5.

Original Advisory Committee Notes ("This subdivision gives the court authority to deny, restrict or defer discovery upon a sufficient showing."). Discussing this iteration of the federal rule, the Supreme Court explained that trial courts are authorized to "rule on applications by the Government for protective orders in *unusual* situations, such as those involving the Nation's security or *clear cut* dangers to individuals who are identified by the testimony produced." *Dennis v. United States*, 384 U.S. 855, 875 (1966) (emphasis added); *see also* Original Advisory Committee Notes for then-subdivision (e) of Fed. R. Crim. P. 16 ("Among the considerations to be taken into account by the court will be the safety of witnesses and others, a particular danger of perjury or witness intimidation, the protection of information vital to national security, and the protection of business enterprises from economic reprisals."). The government alleges none of these concerns. *See generally* Gov't Mot.

Although the texts of both the federal and local rule have since been revised and now require "good cause" for a protective order, the requisite justification for a protective order and the practical application of the rules do not appear to have changed. As the Third Circuit explained in *United States v. Wecht*, "[g]ood cause is established on a showing that disclosure will work a *clearly defined and serious injury* to the party seeking closure. The injury must be shown with specificity. *Broad allegations of harm, unsubstantiated by specific examples* or articulated reasoning, do not support a good cause showing." 484 F.3d 194, 211 (3d Cir. 2007) (emphasis added).[6]

[6] Protective orders issued in contexts outside Rule 16 also require a specific showing of injury and that the orders be tailored to protect the injury. The D.C. Circuit approved the imposition of a limited protective order in *United States v. Celis*, 608 F.3d 818 (D.C. Cir. 2010). There, the court allowed the defense access to the true identities of some of the testifying witnesses in the prosecution of members of a terrorizing drug organization so that the defense could investigate and prepare to cross examine the witnesses, but restricted the timing of the disclosure. *Celis*, 608 F.3d at 832–33. In *United States v. Machado-Erazo*, the D.C. Circuit interpreted the message of *Celis* as follows: "courts must make careful factual findings, doing everything possible to make sure that defendants receive the information that they can" and that "*Celis* is consistent with *Ramos–Cruz* and the Fourth Circuit cases, establishing that the

That showing of a "clearly defined and serious injury" is precisely what is missing in this case. In its motion, the government never points to any specific findings or even to specific defendants, witnesses, or officers. Nor has the government identified particularized privacy concerns. It alleges that defendants' personal information was disseminated without authorization, but it fails to identify which defendants' personal information has been newly made public, if any, and it fails to identify any defendants' who did or would object to that information being disseminated. Rather than identifying any clear injury, the government's motion is generic, non-particularized, and non-specific. As is often the case in litigation on this issue, the government relies on generalized language, analogues of which have been rejected by a number of Superior Court judges already. *See e.g.*, Exhibit A (Edelman , J.) at 3–4 ("[D]espite the obvious irony in relying on such a boilerplate motion to provide what should be detailed and particularized representations . . . [s]uch generic, interchangeable representations are precisely the opposite of the particularized, fact-specific showing the government must make to justify a protective order.").

Moreover, the specificity that must be shown does not just pertain to the discovery as a whole. To the contrary, the government must delineate with specificity each portion of discovery

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district court must balance witness safety with a need to give meaning to the Confrontation Clause right." 951 F. Supp. 2d 148, 157 (D.D.C. 2013). *See United States v. Stone*, No. 10-20123, 2012 WL 137746, at *2 (E.D. Mich. 2012) (denying government motion for a protective order because the government did not meet its burden to show good cause, contrasting the government's "broad allegations" and "generalized concerns about security" in that case to the "vivid detail[s]" the government presented in *Celis*, and noting that the court need not address the defendants' arguments against the protective order because the government did not meet its burden); *United States v. Simpson*, No. 3:09-CR-249-D(06), 2010 WL 4282173, at *2 (N.D. Tex. 2010) (rejecting prosecutor's motion to redact the names of persons mentioned in an affidavit based on government's argument that "because these persons are associated with criminal conduct, disclosure of their names would violate privacy interests." The court found the government's argument "conclusory" and that the government failed to show specifically how disclosure of their names would violate "substantial privacy interests."). A similarly narrowly tailored protective order was approved in *Harris v. United States*, 594 A.2d 546 (D.C. 1991). There, the court temporarily restricted defense counsel from playing or sharing a transcript of a video with his client that contained Jencks, but only until the court and the defense had a chance to review the video.

for which it believes a protective order is necessary based on the specific harms or privacy interests implicated by that specific portion of material. Yet, the government here asks the Court to grant a blanket protective order.

When protective orders are not adequately connected to case-related reasons that create a compelling need for the restrictions, courts have found no protective order is warranted. *See, e.g.*, *United States v. Eniola*, 893 F.2d 383, 387 (D.C. Cir. 1990); *Lancaster v. State*, 978 A.2d 717, 733 (Md. 2009); *People v. Hernandez*, 178 Cal. App. 4th 1510, 1531 (Cal. App. 6th Dist. 2009).

Put more bluntly, "talismanic invocations of purely hypothetical concerns" are "insufficient to support a protective order." *See* Exhibit A (Edelman, J.) at 3. The government here is relying on the same type of "[b]road allegations of harm, unsubstantiated by specific examples or articulated reasoning" that *Wecht* frowned upon. 484 F.3d. at 211.

B. THE GOVERNMENT CAN NOT MEET A "GOOD CAUSE" STANDARD BASED ON THE HARMS THEY ALLEGE.

1. THE BARE INVOCATION OF THE SPECTER OF "JUROR TAINT" DOES NOT CONSTITUTE "GOOD CAUSE."

The government attempts to scare the Court into issuing a protective order by claiming that dissemination of discovery materials may result in "juror taint." *See* Gov't Mot. at 6. Though it is true that dissemination of discovery materials may increase potential jurors' access to information about the case, this is neither unusual nor an automatic cause of jury taint:

> In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases.

Welch v. United States, 466 A.2d 829, 835 (D.C. 1983) (quoting *Irvin v. Dowd*, 366 U.S. 717, 722–23 (1961)). Exposure alone does not lead to a tainted jury. *See id.*

The government fails to explain why it believes dissemination of discovery materials would be so extensive as to pollute a jury pool. It does not specify *which* materials being made public it suspects would result in jury taint. Nor does it state in what ways it expects the pool to be tainted (e.g., will exposure to discovery materials result in jurors becoming more likely to view the defendants as guilty or innocent?). The government's total failure to articulate a rationale for its speculation about the possibility of jury taint is glaring given that "it is not required that jurors . . . be totally ignorant of the facts and issues involved in the case . . . 'It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.'" *Welch*, 466 A.2d at 835 (quoting *Irvin*, 366 U.S. at 723).

The government makes no effort to persuade the Court that any dissemination of discovery materials would result in greater publicity than normal for a newsworthy case. Even so, though, "pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial." *Skilling v. United States*, 561 U.S. 358, 384 (2010) (quoting *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 554 (1976)). *See also Welch*, 466 A.2d at 835. Moreover, the first trial in this case is set just a few months from now in November 2017, with over 25 trial dates set between November 2017 and October 2018. In turn, a substantial portion, if not all, of the discovery material in this case will become part of the public sphere during each of those trials.

Yet, even if some degree of juror taint is possible, there is a "strong presumption . . . that *in any case*, jurors can be found in the District of Columbia whose exposure to the case will have been sufficiently minimal to enable them to render a fair and impartial verdict." *Welch*, 466 A.2d at 836 (emphasis added) (punctuation omitted) (quoting *United States v. Edwards*, 430 A.2d 1321, 1346 (D.C. 1981)). Moreover, the government's baseless claim that dissemination of discovery materials creates the possibility of jury taint completely ignores the mechanism

already in place in Superior Court designed specifically to filter out tainted jurors: voir dire. Courts have repeatedly found that voir dire protects the fairness of a trial even where publicity is substantial. *See Welch*, 466 A.2d at 836–37; *Catlett v. United States*, 545 A.2d 1202, 1214–15 (D.C. 1988). In fact, the United States Attorney's Office has repeatedly taken the position that voir dire protects the fairness of a trial even where publicity is substantial, including in cases where the charges and the potential consequences were substantially more severe than those the defendants face here.

In *United States v. Ingmar Guandique*, for example, involving the high-profile disappearance and murder of Chandra Levy, the government took the position that "effective juror management by the trial court—careful voir dire, jury instructions, and sometimes even the drastic remedy of jury sequestration—can adequately ensure that defendants receive a fair trial." *See* Exhibit E, Government's Opposition in *Guandique*, 2009 CF1 9230, at 5 (citing *Welch*, *Edwards*, and *Catlett*). This, the government argued, was particularly the case in the District of Columbia. Citing Watergate, the Letelier assassination, and the Hanafi takeover, the government in *Guandique* pointed out the ability of D.C. courts to use voir dire to combat pervasive pretrial publicity. *Id*. at 6. D.C. "has such a surfeit of events commanding media attention that events occur, are reported, and pass with amazing rapidity," it stated. *Id*. (internal quotations omitted).

The government made nearly identical arguments in both *United States v. Reginald Rogers* and *United States v. Albrecht Muth*. *See* Exhibit F, Government's Opposition in *Rogers*, 2010 CF1 3867; Exhibit G, Government's Opposition in *Muth*, 2011 CF1 15683. In fact, in *Rogers*, the government chided the defense for its "overreaction" to concerns of juror taint "without some demonstration that the potential jury pool [wa]s actually tainted[.]" Exhibit F at 3.

Needless to say, the pretrial publicity in each of these cases was substantial. Yet, in each, the government argued vehemently that voir dire and other precautions could fully cure any prejudice resulting from juror taint and ensure a fair trial by D.C. jurors.

The bare assertion that dissemination of discovery materials *might* raise the *possibility* of jury taint cannot possibly meet the good cause standard required for the issuance of a protective order. The government's motion, however, argues nothing more than that unsupported possibility, and, in turn, fails to meet the good cause standard required here. *See* Gov't Mot. at 6.

2. THE GOVERNMENT'S ATTEMPTS TO PROTECT ALLEGED PRIVACY CONCERNS DO NOT CREATE GOOD CAUSE.

The government seeks to restrict the usage and dissemination of *all* "non-public" discovery, including body-worn camera footage, other video footage, radio runs, and police paperwork. The government fails to provide any objective criteria for determining what information is "public" and what information is "non-public." Instead, the government claims, conclusorily, that all such discovery is "non-public." *See* Gov't Mot. at 7. The government is mistaken. Not only is much of this material already publicly available or otherwise accessible by the public, but what is not yet public does not raise the privacy concerns the government alleges. Furthermore, the restrictions proposed by the government contradict the purpose of other, disclosure-related laws.

As the Court knows, the events of Inauguration Day occurred in public, in plain daylight, and in the national spotlight. They were widely broadcasted on January 20 and for the weeks following. As such, the incidents underlying these cases are public knowledge, and have been for over seven months. Extensive live television broadcasts covered these events, and still, months later, hundreds of hours of video footage of these events and countless articles in major

newspapers about the initial events *and* the pending prosecution remain available online.[7] Coverage will only continue given that the first trial is set for this November, and will be followed by trials every few weeks well into 2018.

As such, the government's interest in keeping private body-worn camera footage, details of the allegations of this case, and any other information that is not yet public is not and can not be sufficient. Courts have found that claimed interest by the government in keeping information confidential when the information at issue is already public knowledge, as it is here, is not compelling. *See e.g.*, *Virginia Dep't of State Police v. Washington Post*, 386 F.3d 567, 573 (4th Cir. 2004) ("Because the suspect's identity "[wa]s already a matter of public record . . . and his status as a suspect . . . ha[d] already been extensively reported in the media, the Court f[ou]nd[] that VDSP's stated interest in keeping [the suspect]'s identity confidential [wa]s not compelling."). *See also Washington Post v. Robinson*, 935 F.2d 282, 292 (D.C. Cir. 1991) ("Because disclosure . . . would only have confirmed to the public what was already validated [by newspaper articles and other media sources] . . . it could hardly have posed any additional threat to the ongoing criminal investigation.").

Moreover, at least portions of the discovery material that are not yet publicly available are likely to become available in November 2017, when the trials in these cases begin, and can be made so in the meantime. In addition, some of the so-called "non-public" discovery could become public by other means. While it is true that the majority of police paperwork, aside from publicly available incident reports ("PD-251s"), are not publicly available, these types of

[7] For example, a Google search for "inauguration day rally washington dc video" produces about 354,000 video results. *See* https://www.google.com/search?biw=1194&bih=776&tbm=vid&q=inauguration+day+rally+washington+dc+video&oq=inauguration+day+rally+washington+dc+video&gs_l=psy-ab.3...39711.40401.0.40773.5.5.0.0.0.0.74.334.5.5.0....0...1.1.64.psy-ab..0.0.0.3L8sAurPwl4.

materials at most include names and descriptive information of defendants, much of which has already been released to the public.[8] For example, the District of Columbia specifically creates a mechanism by which the subjects of body-worn camera footage may obtain such footage. See 24 D.C.M.R. § 3902.5(b)(1) ("To receive a copy of a BWC recording . . . an individual shall file a FOIA request with the [Metropolitan Police] Department[.]").

Although the government alleges the implication of privacy interests, it does not identify which individuals, if any, had their personal information newly disclosed to the public, and whether those individuals object to this information being shared at all. And while the government also suggests that some of the materials it intends to disclose under a protective order contain "personal[] information about . . . officers," Gov't Mot. at 7, nowhere in its motion does the government specify what type of personal information it is concerned about revealing or in what particular documents or other materials this information is contained. It merely implies that this sensitive information is contained in "body-worn camera footage . . . [and] arrest paperwork[.]" *See id.* With only this, the government has not given the Court sufficient reason to believe that body-worn camera footage and arrest paperwork will contain more than officers' names and badge numbers—all of which are publicly available.

Moreover, federal courts have found that the privacy rights of officers related to the performance of their duties as police officers is circumscribed. *See, e.g.*, *King v. Conde*, 121 F.R.D. 180, 191 (E.D.N.Y. 1988) (emphasis added) (ordering defendant police officers to provide personnel records in discovery). In *King*, the court left open the possibility for a limited protective order, noting that "[p]rotective orders should not be granted without good reason[,]"

[8] *See, e.g.,* Christina Laila, *Report: Full List Of The 231 Leftist Thugs Arrested At Inauguration Day Riots in D.C.*, Gateway Pundit (Feb. 4, 2017), http://www.thegatewaypundit.com/2017/02/report-full-list-231-leftist-thugs-arrested-inauguration-day-riots-d-c/.

and that the "[l]awfulness of police operations is a matter of great concern to citizens in a democracy and protective orders must not be granted without that public interest in mind." *Id.* at 190. *See also* Bryce Clayton Newell, *Crossing Lenses: Policing's New Visibility and the Role of "Smartphone Journalism" As A Form of Freedom-Preserving Reciprocal Surveillance*, U. Ill. J.L. Tech. & Pol'y 59, 104 (2014) ("[T]he public interest in ensuring our political liberty and effective citizen oversight of government agents, along with First Amendment rights to gather and access information, points to the conclusion that police officers and other public officials have, by virtue of their public roles, effectively waived certain of their rights to privacy while carrying out their official duties in public spaces.").

The Maryland District Court similarly found:

> While there is a significant public interest . . . in confidentiality . . . [to] promot[e] cooperation by civilian witnesses and police officers, there is also a countervailing significant public interest in transparency of government and accountability of public servants and the unimpeded search for the truth, *especially where abuses of police power are alleged*.

Martin v. Conner, 287 F.R.D. 348, 355 (D. Md. 2012) (emphasis added) (internal quotation marks and citation omitted).

The government here has only made a vague assertion of a privacy right of the officers. The government has not presented the Court with a "clearly defined" injury that is required to justify a protective order issued under Rule 16(d)(1). *See United States v. Smith*, 985 F. Supp. 2d 506, 528 (S.D.N.Y. 2013) ("To establish good cause based on the interests of third parties, the Government may not rely on conclusory allegations[.]"). And the government has made no showing that the proposed protective order is "narrowly tailored" to protect the expressed injury. The government has said nothing more specific and relied wholly on these minimal, vague, and conclusory arguments, which simply cannot constitute good cause.

The government's request here is also inconsistent with the premise behind the federal Freedom of Information Act (FOIA) and its local counterparts: that the public has a "right to be informed about 'what their government is up to.'" *U.S. Dept. of Justice v. Reporters Committee For Freedom of Press*, 489 U.S. 749, 772–73 (1989) (citing *EPA v. Mink*, 410 U.S. 73, 105 (1973) (Douglas, J., dissenting)). *See also Robinson*, 935 F.2d at 288 (noting that public access to court documents "serves an important function of monitoring prosecutorial or judicial misconduct"). The legislative and executive branches have already made the judgment that this material should be available to the public so that citizens can hold their government and its agents accountable. Indeed, the very purpose both of FOIA and of body-worn cameras is to protect these rights. Finding in favor of the government in this case cuts directly against those rights and the laws protecting them.

As former Attorney General Loretta Lynch stated in 2015, the purpose of equipping police officers with body-worn cameras is in large part to benefit the public: "[b]ody-worn cameras hold tremendous promise for enhancing transparency, promoting accountability, and advancing public safety for law enforcement officers and the communities they serve." Mark Berman, *Justice Dept. will spent $20 milliion on police body cameras nationwide*, The Washington Post (May 1, 2015), https://www.washingtonpost.com/news/post-nation/wp/2015/05/01/justice-dept-to-help-police-agencies-across-the-country-get-body-cameras/. And when Mayor Muriel Bowser signed the bill outfitting 2,800 Metropolitan Police Department officers with body-worn cameras, she explained their importance rested in how "[t]hey increase accountability among all parties involved." *All D.C. Patrol Officers to get Body Cameras Under New Law*, NBC Wash. (Dec. 30, 2015), http://www.nbcwashington.com/blogs/first-read-dmv/DC-Mayor-to-Sign-Body-Cam-Bill-Into-

Law-for-Officers-363809871.html. Even President Obama's Task Force on 21st Century Policing emphasized that a main purpose was "to enhance [law enforcement] agency transparency." Final Report of the President's Task Force on 21st Century Policing 31 (2015), available at https://cops.usdoj.gov/pdf/taskforce/TaskForce_FinalReport.pdf. *See also* Joseph Wenner, *Who Watches the Watchmen's Tape? FOIA's Categorical Exemptions and Police Body-Worn Cameras*, 2016 U. Chi. Legal F. 873, 903 (2016) (asserting that body-worn cameras lose their very purpose if they are not readily available to the public).

Similarly, "the basic purpose of the Freedom of Information Act [is] 'to open agency action to the light of public scrutiny.'" *Department of Air Force v. Rose*, 425 U.S. 352, 372 (1976). In fact, the Supreme Court itself "declared that the Act was designed to create a broad right of access to 'official information.'" *U.S. Dept. of Justice v. Reporters Committee For Freedom of Press*, 489 U.S. 749, 771 (1989). And when President Johnson signed FOIA into law, he made clear its purpose by declaring "[a] democracy works best when the people have all the information that the security of the nation permits." H.R. Rep. No. 104-795, at 8 (quoting *Statement by the President Upon Signing the "Freedom of Information Act,"* 2 Pub. Papers 699 (July 4, 1966)). Notably, under District law, individuals are explicitly authorized to disseminate body-worn camera footage acquired through FOIA. *See* 24 D.C.M.R. § 3902.5 ("Upon receipt of the copy of the BWC recording, the individual may further copy or distribute the BWC recording."). In enacting § 3902.5, the District effectively recognized that the public's right to hold its government accountable through acquiring information about the government's activities *necessarily* includes the right to disseminate that information.

In short, this Court cannot recognize good cause in this case because doing so would directly contradict the importance of the public's right to access and disseminate information in

order to hold the government accountable, as recognized by the national legislature, the local executive, and the national executive.

II. THE FIRST AMENDMENT PRECLUDES THE RESTRICTIONS THE GOVERNMENT REQUESTS.

The First Amendment provides parties with a presumptive right to share what they learn in discovery with the media, the public, and any persons as they see fit. *See Jepson, Inc. v. Makita Elec. Works, Ltd.*, 30 F.3d 854, 858 (7th Cir. 1994) (Parties presumptively have a right, grounded in the First Amendment, to freely disseminate what they learn in discovery as they see fit.); *Oklahoma Hosp. Ass'n v. Oklahoma Pub. Co.*, 748 F.2d 1421, 1424 (10th Cir. 1984) (same). Protective orders that bar parties from sharing discovery material, just like the government's requested order, infringe on this First Amendment right. *See Jepson*, 30 F.3d at 858. Generally, the First Amendment scrutiny of protective orders (as a concept) is confined to Rule 16's good cause framework.[9] *See, e.g.*, *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 780, 788 (1st Cir. 1988); *United States v. Bulger*, 283 F.R.D. 46, 51 (D. Mass. 2016). However, individual protective orders are still subject to as-applied First Amendment challenges. *Seattle Times*, 467 U.S. at 37–38 (Brennan, J., concurring) (emphasizing that the Court's holding subjected the individual protective order to intermediate scrutiny under the First Amendment, and the individual protective order was only constitutional because it was specifically justified by a substantial government interest); *Tavoulareas v. Washington Post Co.*, 737 F.2d 1170, 1172 (D.C. Cir. 1974) (interpreting *Seattle Times* to mean the First Amendment still applies to individual protective orders, but that it "does not require a court to apply *especially close scrutiny*") (emphasis added); *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 7 (1st Cir. 1986)

[9] The moving defendants contend that this order is unconstitutional even if analyzed under the more limited good cause analysis for the reasons stated in Part I.

(interpreting *Tavoulareas* as described, emphasizing that "[t]he [*Seattle Times*] Court did not hold that a discovery protective order could *never* offend the first amendment," and holding "that first amendment considerations cannot be ignored in reviewing discovery protective orders").

In assessing an as-applied challenge to a protective order, courts apply intermediate scrutiny to balance parties' First Amendment rights with governmental interests. Specifically, the government must establish that "the practice in question [furthers] an important or substantial governmental interest unrelated to the suppression of expression" and "the limitation of First Amendment freedoms [is] no greater than is necessary or essential to the protection of the particular governmental interest involved." *Seattle Times*, 467 U.S. at 32 (alterations in original). *See also Federal Election Com'n v. International Funding Institute, Inc.* ("*IFI*"), 969 F.2d 1110, 1116 (D.C. Cir. 1992) (applying intermediate scrutiny); *Federal Election Com'n v. Legi-Tech, Inc.*, 967 F. Supp. 523, 532–33 (D.D.C. 1997) (same).

A. THE GOVERNMENT HAS NOT IDENTIFIED A SUBSTANTIAL INTEREST JUSTIFYING THE REQUESTED ORDER.

There is no substantial government interest that justifies the requested order. Because of the important nature of parties' First Amendment rights, courts have recognized few substantial interests that justify protective orders infringing on these rights, none of which apply here. In *Seattle Times*, for example, the Supreme Court granted a protective order barring the dissemination of a private list of individuals who had donated to a religious organization after the list was produced in discovery. 467 U.S. at 26–28. The list was not otherwise publicly available, so its dissemination would have infringed on both (1) the privacy rights and (2) the religious association rights of the individuals on that list. *Id.* at 37 n. 24. Because the government articulated and demonstrated these two specific harms to protected rights, the Supreme Court

found that the protective order did not offend the First Amendment. *Id.* And, in so doing, it emphasized that this was in large part because the lists at issue were not "traditionally public source[s] of information." *Id.* at 33.

Similarly, in *IFI*, the D.C. Circuit identified another substantial government interest that justified a protective order barring the dissemination of a political subcommittee's list of individual donors.[10] 969 F.2d at 1117–18. The court emphasized that the committee's list was its "most valuable asset[], the product of time-consuming, labor-intensive activities that can cost a political committee thousands, even millions, of dollars." *Id.* at 1116. Because the court found that if the list were to be disseminated through discovery, its economic value would be lost, the court found the protective order was justified by a substantial government interest. *Id.*

Courts have repeatedly rejected interests that fall short of those articulated in *Seattle Times* and *IFI*. Particularly relevant to this case, in *Humboldt Baykeeper v. Union Pacific R. Co.*, the United States District Court for the Northern District of California rejected "privacy interests" as a substantial interest when the requesting party "could not reasonably have expected" that the allegedly "private" information was actually private and would remain private. 244 F.R.D. 560, 566 (N.D. Calif. 2007). And in *Cummings v. Beaton & Associates, Inc.*, the Appellate Court of Illinois rejected "protect[ing] the judicial process" as a substantial interest because "the matters [to be] suppressed [we]re matters that ha[d] already received press coverage." 192 Ill. App. 3d 792, 797 (1989).

[10] While the order in *IFI* was requested pursuant to former 2 U.S.C. § 438(a)(4) (now 52 U.S.C. § 30111), rather than Rule 16, the intermediate scrutiny analysis was the same there as here. The court assumed, without deciding, that *Seattle Times*' intermediate scrutiny analysis applied in the § 438(a)(4) context just as it applies to this case in the Rule 16 context. *See IFI*, 969 F.2d at 1116. *See also Legi-Tech*, 967 F. Supp. at 532 (interpreting *IFI* and applying *Seattle Times*' intermediate scrutiny again in the § 438(a)(4) context).

The government did not—and cannot—identify any substantial government interests or other similar interests to justify its requested protective order. The government appears to vaguely allege two possible interests: (1) the privacy interest of some subset of defendants and officers; and (2) possible juror taint. In addition to falling short of good cause, *see supra* Part I, these are also insufficient to constitute a substantial government interest.

Most importantly, this case does not invoke privacy interests because the bulk of the relevant evidence is video of a public demonstration, which from the moment it occurred has been publicly available. *See American Civil Liberties Union v. U.S. Dept. of Justice*, 655 F.3d 1, 8 (D.C. Cir. 2011) (noting that the privacy interest in events, specifically court proceedings, that occurred in public are "considerably weaker" than previously private information). Simply calling the discovery materials "non-public," Gov't Mot. at 7, does not make them so. To the contrary, the very nature of the discovery is public and the materials involve little, if any, privacy interests. In fact, by the government's theory, the demonstrators *wanted* to be seen and *wanted* their presence at these protests to be known and publicized: that is why the demonstrators were there. As for the police officers, as discussed above in Part I(B)(2), police officers acting in their official capacity have only limited privacy interests. Thus, the privacy interests in these materials, if there are any, fall far short of constituting a substantial government interest.

Juror taint falls even shorter of constituting a substantial government interest. No court has ever recognized speculative juror taint as a substantial government interest, let alone juror taint as speculative as that described in the government's motion. While the government does have an interest in "inhibiting disclosure of sensitive information" to *actual* jurors, this only overcomes the presumption in favor of public access in the "rare" circumstance where the government "articulate[s] [the interest] along with findings specific enough that a reviewing

court can determine whether the [] order was properly entered." *Waller v. Georgia*, 467 U.S. 39, 45 (1984) (citing *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 510 (1984)). The government simply has not done so here. Its motion alleges nothing more than a mere "possibility" of juror taint from dissemination of discovery materials. And instead of providing "specific findings" that the materials will cause juror taint—such as identifying particular videos, statements, or images—the government generally claims that "footage has been posted in a manner that is editorialized, arguably inflammatory, and less than complete."[11]

Moreover, the government's allegations that the dissemination of these discovery materials implicates either of these interests is fundamentally flawed. Despite the government's mischaracterization of the discovery materials in this case as "non-public," *see* Gov't Mot. at 7, this case involves events that were extremely publicized and intended to be public. In turn, neither juror taint nor privacy interests are even relevant because the vast majority of these discovery materials, and likely all of the body-worn camera footage, has always been within the public eye.

B. THE PROPOSED ORDER IS UNCONSTITUTIONALLY OVERBROAD.

Even if this Court finds there is a substantial government interest, the proposed order is unconstitutionally overbroad. When the government articulates a substantial interest, "the limitation of First Amendment freedoms [must be] no greater than is necessary or essential to the protection of the particular government interest involved." *Seattle Times*, 467 U.S. at 32 (quoting *Procunier v. Martinez*, 416 U.S. 396, 413 (1974)). It is thus the government's burden to *specifically* identify which documents must *necessarily* be restricted in order to protect the

[11] The only allegedly "inflammatory" video to which the government points is a YouTube clip of police officers and demonstrators interacting. *See* Gov't Mot. at 6 n. 1. The video has since been taken down and had fewer than 2,500 views when the defense last viewed it.

substantial interest alleged. *See Citizens First Nat. Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 945–46 (7th Cir. 1999). For example, in *Cincinnati Ins.*, Judge Posner of the Seventh Circuit vacated a district court's overbroad order to bar dissemination of discovery materials in order to protect "trade secrets or other confidential or governmental information." *Id.* Judge Posner explained that the order was necessarily overbroad because it in no way "demarcate[d] a set of documents clearly entitled . . . to confidential status." *Id.* In fact, Judge Posner rejected the very concept of "blanket protective orders."[12] He went on to explain that the general assertions supporting this order were "standardless" and "overbroad," falling far short of the tailoring required by the First Amendment. *Id.* at 946. For the protective order to pass scrutiny, the requesting party must show the judge "what parts of the [documents] contain the material that ought . . . be kept [from] the public." *Id.* In other words, the requesting party must demonstrate a clear connection between the documents included in the order and the justifying interest.

The government has not met this burden. Even if this Court were to find, contrary to prevailing case law, that this case involves a substantial interest, the government's motion does not connect any specific documents to a substantial interest. Indeed, the motion only includes

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[12] Specifically, Judge Posner wrote:

> We are mindful of the school of thought that blanket protective orders ("umbrella orders") . . . are unproblematic aids to . . . litigation because there is no tradition of public access to discovery materials. . . . The weight of authority, however, is to the contrary. Most cases endorse a presumption of public access to discovery materials, e.g., *Grove Fresh Distributors, Inc. v. Everfresh Juice Co., supra*, 24 F.3d at 897; *Beckman Industries, Inc. v. International Ins. Co.*, 966 F.2d 470, 475–76 (9th Cir.1992); *Public Citizen v. Liggett Group, Inc., supra*, 858 F.2d at 788–90; *Meyer Goldberg, Inc. v. Fisher Foods, Inc.*, 823 F.2d 159, 162–64 (6th Cir.1987); *In re "Agent Orange" Product Liability Litigation, supra*, 821 F.2d at 145–46, and therefore require the district court to make a determination of good cause before he may enter the order. E.g., *EEOC v. National Children's Center, Inc.*, 98 F.3d 1406, 1411 (D.C.Cir.1996); *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 484–85 (3d Cir.1995); *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157, 165–67 (3d Cir.1993); *In re Remington Arms Co.*, 952 F.2d 1029, 1032 (8th Cir.1991); *City of Hartford v. Chase, supra*, 942 F.2d at 135–37; *Farnsworth v. Procter & Gamble Co.*, 758 F.2d 1545, 1547 (11th Cir.1985). Rule 26(c) would appear to require no less. And we note that both the First and Third Circuits, which used to endorse broad umbrella orders (e.g., *Cryovac, Cipollone*), have moved away from that position (*Public Citizen, Glenmede, Pansy, Leucadia*).

Cincinnati Ins. Co., 178 F.3d at 945-46.

two sentences that could even be characterized as identifying "what parts of the [documents] contain the material that ought" to be included in the order. In paragraph 3, the government alleges that "[p]ublic dissemination of discovery materials . . . raises the possibility of juror taint," Gov't Mot. at 6, and in paragraph 5, the government alleges that "[t]hese items contain relevant, but personal, information about defendants, and even officers," Gov't Mot. at 7. These statements fail to identify particular videos, particular documents, or particular statements within the discovery materials. And the connection they attempt to draw between the discovery materials and any substantial interest is, at best, extremely attenuated. This is the very type of "standardless" and "overbroad" blanket protective order that Judge Posner warned against. *Cf. Cincinnati Ins.*, 178 F.3d at 945–46.

Since the government has neither good cause nor a substantial interest to justify this order and because, even if they did, the requested order is exceedingly overbroad, the requested order would violate the First Amendment.

III. THE GOVERNMENT'S PROPOSED PROTECTIVE ORDER INFRINGES ON THE DEFENDANTS' SIXTH AMENDMENT RIGHT TO EFFECTIVE COUNSEL.

The Sixth Amendment right to zealous and effective counsel is fundamental to our system of justice. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 685 (1984); *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963). The duty to conduct a prompt, thorough investigation is foremost among a defense attorney's Sixth Amendment obligations. *See, e.g.*, *Cosio v. United States*, 927 A.2d 1106, 1123 (D.C. 2007) (en banc); *Kigozi v. United States*, 55 A.3d 643, 651 (D.C. 2012). In fact, defense attorneys who do not conduct the necessary investigation in a criminal case can be found ineffective. *See, e.g.*, *Young v. United States*, 56 A.3d 1184, 1199 (D.C. 2012).

The government's proposed protective order infringes on the Sixth Amendment because it impedes defense counsel's ability to conduct investigation by sharing the information on the USAfX portal with individuals who are considered a "third party." Gov't Mot. at 7. The proposed order defines "third party" as an "individual or entity that is not a party to this proceeding, or a member of the defense team which shares the attorney client privilege." Thus, for example, the defense would be prohibited from sharing discovery from the online portal with witnesses, including complainants, who arguably do not "share[] the attorney client privilege." The effects of this prohibition are, for example, made clear in the potential use of the "CBP aerial video," which the government specifically cites in their motion as an example of a "non-public video." Gov't Mot. at 7. The video is extremely lengthy and contains footage of nearly the entirety of the protest taken from a surveillance helicopter. In other words, the event is seen from hundreds of feet in the air, and given this "bird's-eye view," the individuals on the street are extremely small, and nearly all movement appears en masse. Yet, according to the government's proposed order, defense counsel could not show that video to a prospective witness or complainant to ask them where they were during certain events or ask them specific questions regarding what was happening during the events depicted. In addition, the government's proposed order presents other problems for investigation. For example, the defense would arguably be unable to share this discovery with custodians for the data—*i.e.*, a defense attorney could not even show the body-worn camera footage to the officer who took the footage.[13]

[13] As another example, the proposed order appears to require defense counsel to get the permission of any and all involved parties before filing any discovery material as an exhibit attached to a motion, as doing so would necessarily disclose discovery material to "third part[ies]." Such a result cannot be proper, and further infringes on defendants' rights to effective counsel.

This result impedes on defense counsel's ability to engage in the type of thorough investigation and adequate representation to which a defendant is entitled under the Sixth Amendment. Accordingly, the Court should reject the government's proposed order.

CONCLUSION

In sum, the government's proposed protective order is not the sort of narrowly tailored protective order that has been found to be valid by courts only when a properly detailed and supported showing of need has been made. Rather, the government here failed to make any remotely adequate showing of the injury that would be sustained if the proposed protective order were *not* granted. *See Lancaster*, *supra*, 410 Md. at 381.

The moving defendants respectfully request a hearing on this motion. For the foregoing reasons and any other reasons which may appear at such a hearing, the moving defendants request that the Court deny the government's motion for a protective order, and vacate the order currently in place.

August 21, 2017

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing filing has been served by e-filing on Jennifer Kerkhoff, Assistant United States Attorney, on this 21st day of August, 2017.

Rachel Cicurel

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Criminal Division – Felony Branch

UNITED STATES OF AMERICA	Hon. Judge Leibovitz
v.	
TROY NEVES,	Case No. 2017-CF2-001244
WILLIAM BOGIN,	Case No. 2017-CF2-001243
MAKENNA CLARK,	Case No. 2017-CF2-001268
TRACI DUNLAP,	Case No. 2017-CF2-001208
JARED FARLEY,	Case No. 2017-CF2-001286
MICHAEL LOADENTHAL,	Case No. 2017-CF2-001246
ROSA RONCALES,	Case No. 2017-CF2-001295
Defendants.	

ORDER

Upon consideration of Moving Defendants' Opposition to Government's Motion for a Protective Order Regarding Materials Produced During Discovery and Motion to Vacate the Protective Order Imposed, **IT IS HEREBY ORDERED**:

that the government's motion is

_____ **DENIED**;

and the protective order imposed is

_____ **VACATED**.

SO ORDERED this _____ day of _____, 2017.

_____

Judge Lynn Leibovitz
Superior Court for the District of Columbia

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EXHIBIT A

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION – FELONY BRANCH

UNITED STATES	:	
	:	**Case No. 2015 CF2 7743**
v.	:	**Judge Todd E. Edelman**
	:	
TAVONTE GRAHAM	:	

ORDER

This matter is before the Court on Government's Motion for Protective Order ("Government's Motion"), filed August 25, 2016. The Government's Motion requests that the Court issue a protective order limiting the manner in which the defense can use and retain certain discoverable materials. Specifically, Government's Motion seeks to limit the distribution and retention of any internal investigative information obtained from the Metropolitan Police Department's Personnel Performance Management System ("PPMS") involving police officer witnesses in this case. The Defense filed its Opposition ("Defendant's Opposition") on September 20, 2016, stating that the Government has not shown good cause to restrict discovery of requested PPMS material.

I. Analysis

A. Protective Orders May Issue Only Upon a Sufficient Showing

In criminal cases, a trial court may issue a protective order concerning discovery materials upon "sufficient showing" of a need for that order. D.C. Super. Ct. R. Crim. P. 16(d)(1). Although the District of Columbia Court of Appeals has provided little guidance as to the meaning of "sufficient showing," it has looked to Federal Rule of Criminal Procedure 16

when applying the local rule. *Rowland v. United States*, 840 A.2d 664, 678 n.16 (D.C. 2004). Federal Rule of Criminal Procedure 16(d)(1) states that "the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief."

In order to show good cause for a protective order, the government must "make a particularized showing of potential harm if information disclosed in discovery does not remain confidential." *United States v. Lewis*, 2016 U.S. Dist. LEXIS 23763, at *2 (D. Mass. Feb. 26, 2016) (citing *United States v. Wecht*, 484 F.3d 194, 211 (3d Cir. 2007)); *see also United States v. Celis*, 608 F.3d 818, 830–34 (D.C. Cir. 2010) (upholding the district court's decision to restrict access to the true identities of government witnesses where the government provided detailed submissions about potential dangers if they were revealed). In contrast, "[b]road allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not support a good cause showing." *Wecht*, 484 F.3d at 211 (citing *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994)).

Trial courts must evaluate the particularized showing necessary to support a protective order on a case by case basis. *See Roviaro v. United States*, 353 U.S. 53, 62 (1957) (rejecting application of a "fixed rule" to govern disclosures of government informants and noting instead the "particular circumstances of each case" to be considered in making such determinations). The Court must view the requested limitations with an eye toward ensuring that the defendant has personal access to the information necessary to mount a full-throated defense. *See, e.g.*, *United States v. Machado-Erazo*, 951 F. Supp. 2d 148, 157–58 (D.D.C. 2013); *Harris v. United States*, 594 A.2d 546, 549 (D.C. 1991). Thus, courts have required a high level of detail and specificity before issuing protective orders in relation to discoverable materials. *See, e.g.*, *United States v. Stone*, 2012 U.S. Dist. LEXIS 5785, at *7–8 (E.D. Mich. Jan. 18, 2012) (rejecting request based

on insufficiently detailed showing of harm); *United States v. Simpson*, 2010 U.S. Dist. LEXIS 114751, at *8–11 (N.D. Tex. Oct. 28, 2010); *United States v. Jones*, 2007 U.S. Dist. LEXIS 91744, at *3–5 (E.D. Tenn. Dec. 13, 2007).

B. The United States Has Failed to Make a Sufficient Showing

Although the government attempts to justify its request by invoking the need to protect the privacy of officer witnesses, it has made no proffer of facts demonstrating or even suggesting that disclosure would improperly or unfairly invade their privacy in this case. The Government's Motion states only that PPMS material "*may* contain very personal information about law enforcement officers, such as information about the officer's family or health." Gov't Mot. at 5 (emphasis added). This Court has already characterized such "talismanic invocation[s]" of purely hypothetical concerns as insufficient to support a protective order. *See* Order Vacating Temporary Consent Protective Order, *United States v. Demarco Bates*, 2015 CF2 4443, at *4 (Mar. 17, 2016).

In this case, the Government has not even attempted to provide case-specific justifications for a protective order. Quite the contrary, the Government's Motion appears to be a generic form motion, interchangeable from one case to another through the use of a search-and-replace feature in a word processing program. In fact, despite the obvious irony in relying on such a boilerplate motion to provide what should be detailed and particularized representations, the Government has already filed identical motions in at least three other cases before this Court, with nothing but the case captions, defendant's names, charges, and trial dates changed.[1] *See*

[1] The Government's sloppiness in drafting this form motion, and reusing it in case after case without so much as a proofread, has not gone unnoticed. The form motion contains not only typographical errors, such as inaccurate and missing punctuation, *see, e.g.*, Gov't Mot. at 2, 5 n.4, but includes inaccurate citations. For example, the pincite in

Government's Motion for Protective Order, *United States v. Eddie Leonard*, 2016 CF2 10813 (Sept. 27, 2016); Government's Motion for Protective Order, *United States v. Maurice Tilghman*, 2016 CF3 8876 (Sept. 26, 2016); Government's Motion for Protective Order, *United States v. Quonshae Simms*, 2016 CF2 10165 (Sept. 23, 2016). Such generic, interchangeable representations are precisely the opposite of the particularized, fact-specific showing the government must make to justify a protective order.

Finally, the Government's Motion cites to several cases applying Federal Rule of Civil Procedure 26, under which good cause for a protective order exists when justice requires the protection of "a party or person from annoyance, embarrassment, oppression, or undue burden or expense."[2] *See Huthnance v. District of Columbia*, 255 F.R.D. 285, 296 (D.D.C. 2008); *Escobar v. Foster*, 2000 U.S. Dist. LEXIS 6764, at *4 (N.D. Ill. May 16, 2000). This civil law standard simply does not apply to the context of criminal discovery. Even so, cases applying the civil standard have still noted the need for "a specific demonstration of facts in support of the request as opposed to conclusory or speculative statements about the need for a protective order and the harm which will be suffered without one." *Huthnance*, 255 F.R.D. at 296 (citing *Fonville v. District of Columbia*, 230 F.R.D. 38, 40 (D.D.C. 2005)); *see also Fonville*, 230 F.R.D. at 40 ("[T]he moving party has a heavy burden of showing extraordinary circumstances based on specific facts that would justify such an order." (citing *Alexander v. Fed. Bureau of*

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the Government's citation to *United States v. Agurs* and the reporter in the Government's citation to *Escobar v. Foster* are incorrect. *See* Gov't Mot. at 5, 6.

[2] Other authorities cited by the government have little to do with the issue before this Court. The Government cites to *United States v. Davis*, 809 F.2d 1194, 1210 (6th Cir. 1987), as "requiring defendant to 'demonstrate substantial prejudice' from a protective order," without noting that, in fact, this is the legal standard applied by an appellate court in reviewing a challenge to a trial court's issuance of a protective order on appeal. *See* Gov't Mot. at 2. That legal standard does not bear on this Court's determination of whether to issue a protective order in the first instance. In addition, the Government cites to *Alderman v. United States*, 394 U.S. 165, 185 (1969), as stating that "the court should seek to ensure that disclosure of discovery materials to a defendant 'involves a minimum hazard to others.'" *See* Gov't Mot. at 2. The Supreme Court of the United States has required no such thing. Instead, the excerpted quotation was simply a description of the facts before the Court in that case, not a statement setting a legal standard.

Investigation, 186 F.R.D. 71, 75 (D.D.C. 1998))). As noted above, the government has made no effort to make such a demonstration here.

II. Conclusion

Government's Motion thus fails to make a sufficient showing of good cause to justify the restriction on discovery sought in this case.

Accordingly, it is this 30th day of September, 2016, hereby

ORDERED that Government's Motion is DENIED.

Todd E. Edelman
Associate Judge
(Signed in Chambers)

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EXHIBIT B

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION – FELONY BRANCH

UNITED STATES	:	
	:	**Case No. 2015 CF2 4443**
v.	:	**Judge Todd E. Edelman**
	:	
DEMARCO BATES	:	

ORDER

This matter is before the Court on Defendant's Motion to Rescind or, in the Alternative, to Modify the Protective Order ("Defendant's Motion"), filed under seal on December 7, 2015. The United States filed its Opposition on January 4, 2016 and Defendant filed a Reply on February 5, 2016.

Well in advance of the November 23, 2015 trial in this matter[1] Defendant requested "information regarding any civilian or internal police complaints made or sustained…and any past instances of misconduct, dishonestly [sic], or other impeachment information; and any evidence of bias, regarding…any other officers involved in [any] portion of the investigation of the incident or arrest of Mr. Bates." Def.'s Mot. at 19 (quoting Apr. 30, 2015 *Rosser* letter from defense counsel).[2] The United States disclosed no documents until the morning of trial, when it informed defense counsel of the "existence of sustained complaints against Officer [Jeffrey] Henderson" but "refused to disclose the source documents relating to the sustained complaints." *Id.* at 5. The United States insisted on entry of a "protective order that the disclosed documents not be shared outside of the defense team and that the documents be returned to the government

[1] Defendant was charged with carrying a pistol without a license, unauthorized possession of a firearm, and unauthorized possession of ammunition.

[2] Of course, even if defense counsel had made no such request, the United States was at all times obliged to provide the Defendant with any and all exculpatory evidence. *See United States v. Agurs*, 427 U.S. 97, 107 (1976).

at the close of the case." *Id.* Defendant agreed, reserving in open court his right to challenge those conditions. *Id.* This Court reserved ruling on whether the terms of the protective order would remain in place post-trial. Def.'s Reply at 6. The United States then made a mid-trial disclosure of over one hundred pages of documents related to complaints against Henderson. Def.'s Mot. at 5. Henderson ultimately failed to appear in court to testify, and the documents were not used for impeachment (or any) purposes at trial. *Id*.

Defendant's Motion is a timely challenge to entry of the protective order; in order to expedite the trial, Defendant reserved his right to challenge the protective order post-trial, and the Court explicitly ruled that it would consider the Defendant's objections at that time. The Court now finds that its protective order was improperly issued, and that it must be vacated.

I. Analysis

A. Protective Orders May Issue Only Upon a Sufficient Showing

A trial court may issue a protective order concerning discovery materials upon a "sufficient showing" of a need for that order. D.C. Super. Ct. R. Crim. P. 16(d)(1).[3] This showing is evaluated on a case by case basis. *Cf. Howard v. United States*, 656 A.2d 1106, 1111-12 (D.C. 1995) (trial court properly exercised discretion prohibiting defense counsel from disclosing to defendant information which the trial court had already ruled was too attenuated to fall within *Brady*); *see also Roviaro v. United States*, 353 U.S. 53, 62 (1957) (rejecting the application of a "fixed rule" to govern mandatory disclosures of government informants and

[3] There is virtually no guidance from the District of Columbia Court of Appeals on the meaning of a "sufficient showing." The Court of Appeals has looked to interpretations and applications of Federal Rule of Criminal Procedure 16 for guidance when applying the local rule. *Rowland v. United States*, 840 A.2d 664, 678 n.16 (D.C. 2004). Although the federal and D.C. rules use different language on the burden facing the party seeking the protective order, there is no indication that the trial court is to balance interests under one standard which are inapplicable under the other.

noting instead the "particular circumstances of each case" to be considered in making such determinations).

In *United States v. Celis*, 608 F.3d 818 (D.C. Cir. 2010), the United States Court of Appeals for the District of Columbia Circuit addressed a protective order limiting and conditioning release of the names of certain witnesses who would testify in a cocaine conspiracy case implicating an international terrorist organization. *Celis* upheld the district court's decision to restrict access to the true identities of the government witnesses in light of a detailed submission by the government about the dangers in revealing those names. *Id.* at 832-33. *Celis* instructs that the trial judge is to view the requested limitations with an eye toward ensuring that the defendant has personal access to the information necessary to mount a full-throated defense. *See, e.g.*, *United States v. Machado-Erazo*, 951 F. Supp. 2d 148, 157-58 (D.D.C. 2013) (rejecting Confrontation Clause challenge to order prohibiting defendant or defense counsel from learning the identity of a government expert witness in light of a threat which was "actual and not a result of conjecture" and where the defendant received information which would enable effective cross-examination); *Harris v. United States*, 594 A.2d 546, 549 (D.C. 1991) (approving temporary restriction preventing defense counsel from disclosing potential *Jencks* material to his client until the court determined the relevance of the material).

B. The United States Failed to Make a Sufficient Showing

Although the government attempts to justify the protective order by invoking the need to protect its witness's privacy, it made no proffer of facts demonstrating or even suggesting that disclosure of these documents would improperly or unfairly invade Officer Henderson's privacy. A non-proffer is, by definition, not a "sufficient showing," and amounts to a failure by the

United States to provide the court with the high level of detail and specificity most courts have deemed necessary before the issuance of a sealing order. *See United States v. Stone*, 2012 U.S. Dist. LEXIS 5785, at *7-8 (E.D. Mich. Jan. 18, 2012) (rejecting request based on insufficiently detailed showing of harm); *United States v. Simpson*, 2010 U.S. Dist. LEXIS 114751, at *8-11 (N.D. Tex. Oct. 28, 2010); *United States v. Jones*, 2007 U.S. Dist. LEXIS 91744 (E.D. Tenn. Dec. 13, 2007). While the government states that "Officer Henderson has a privacy interest in his personal files regarding his employment," Gov't Oppn. at 5-6, talismanic invocation of privacy interests do not suffice.[4] For this reason alone, the protective order must be vacated as improperly justified *ab initio*.

II. Conclusion

Accordingly, it is this 17th day of March, 2016, hereby

ORDERED that Defendant's Motion is GRANTED; and it is

FURTHER ORDERED that the protective order issued in this case on November 24, 2015 is VACATED.

Todd E. Edelman
Associate Judge
(Signed in Chambers)

[4] Nor does the Court believe that the records at issue in this case are the type of employment or personnel files that, on their own, raise any presumption of a privacy interest – the records do not relate to Officer Henderson's medical history, health insurance, address, personal finances, tax information, or any other such information commonly regarded to invoke privacy concerns. Rather, these records relate to a public official's performance of his public and official duties.

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EXHIBIT C

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
DOMESTIC VIOLENCE UNIT

UNITED STATES	**Case No. 2016 DVM 001162**
v.	**Judge William W. Nooter**
MAURICE JONES	

ORDER

I. Background

This matter comes before the Court upon the Government's Motion for Protective Order ("Motion"), filed August 31, 2016, and upon Defendant's Opposition to Government's Motion for Protective Order ("Opposition"), filed September 11, 2016. The government in its instant Motion asks the Court to issue a protective order "limiting the distribution and retention of any internal investigative information obtained from the Metropolitan Police Department's ("MPD") Personnel Performance Management System ("PPMS") involving officer witnesses in this case." Mot. at 1.

II. Legal Standard

Prior to the recent amendment, Super. Ct. Crim. R. 16 (d)(1) provided that:

> Upon a *sufficient showing* the Court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by a party, the Court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the Court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the Court to be made available to the appellate court in the event of an appeal.

Rule 16 (d)(1) (Feb. 16, 2000) (emphasis added). Amended as of April 11, 2016, Super. Ct. Crim. R. 16 (d)(1) is identical to its federal counterpart, providing that:

> At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect ex parte. If relief is granted, the court must preserve the entire text of the party's statement under seal.

Super. Ct. Crim. R. 16(d)(1). The burden rests upon the *moving party* – here, the government – to establish "good cause" for a protective order to issue.

Super. Ct. Rule Promulgation Order 16-01 provides that "the [relevant] amendments to Superior Court Rules of Criminal Procedure 1-60 shall take effect April 11, 2016, and shall govern all proceedings thereafter commenced and insofar as is just and practicable all pending proceedings." The charges in this matter were filed on July 9, 2016, meaning that this case was commenced after the amendments took effect, and should therefore be governed pursuant to the current version of Rule 16 (d)(1). There is no indication to this Court that the standards of our former Rule 16 (d)(1) versus the current version differ in any substantial way, nor that the parties' arguments pursuant to the former would be any less effective or accurate when applied as under the latter.

III. Analysis & Conclusion

Upon careful consideration of the government's Motion, and of Defendant's Opposition, the Court cannot find at this time that there is good cause for the issuance of a protective order. The government has provided arguments sufficient to convince the Court that a protective order may be appropriate in some instances when dealing with the disclosure of PPMS material; however, the government has failed to demonstrate whether the PPMS material *in this specific case* is of such a sensitive nature that a protective order is justified. The Court is not inclined to grant the government's Motion absent a specific explanation for why a protective order should be issued as to the PPMS material relevant in the instant matter.

Accordingly, on September 15, 2016, this Court set a motion hearing to be held on October 14, 2016 to address this issue. The government must therefore disclose to the defense on or before October 14, 2016: information as to all complaints against and investigations of officers that the government intends to call as witnesses in this case that either (a) resulted in a finding of misconduct, or (b) were pending at any time during the investigation of this case, even if they ultimately concluded without a finding of misconduct prior to trial.[1] Should the government object to the disclosure of any portion(s) of this material on grounds of relevancy or privacy concerns, the government may retain those portion(s) of the material until October 14, 2016, when the government shall produce the same to the Court for *in camera* inspection. The Court will at that time accept any further arguments – to be made *ex parte*, if necessary, pursuant to Rule 16 (d)(1) – needed to determine whether those portion(s) of the material should be disclosed, and whether a protective order is necessary. Counsel for the government shall further submit, that day, a written statement to the Court alone of any supplemental arguments that the government intends to make *ex parte* in furtherance of establishing good cause for a protective order.

Accordingly, it is this 3rd day of October, 2016, hereby:

ORDERED that the government disclose to the defense on or before October 14, 2016 information as to all complaints against and investigations of police officers to be called as government witnesses that either (a) resulted in a finding of misconduct; or (b) were pending at any time during the investigation of this case, even if they ultimately concluded without a finding of misconduct prior to trial. If the government objects to the disclosure of any portion of this material on grounds of privacy or relevancy concerns, the government shall produce those

[1] To be clear, this shall include all PPMS and internal investigative data, as well as all source document material.

portions of the material to this Court for *in camera* inspection at the hearing set below; and it is further

ORDERED that the parties appear on **October 14, 2016 at 11:00am** in Courtroom 118 of the Superior Court of the District of Columbia for a motion hearing, where the Court will accept any further argument on this matter, to be made *ex parte*, if needed. If *ex parte* arguments are to be made by the government, the government shall also submit to the Court that day a written statement thereof.

SO ORDERED.

Judge William W. Nooter
(Signed in Chambers)

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EXHIBIT D

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION – FELONY BRANCH

United States	:	
	:	**2016 CF2 8066**
v.	:	
	:	**Judge Maribeth Raffinan**
Tyrell Brooks	:	

ORDER

This matter comes before the Court upon the Government's Motion for Protective Order, received August 8, 2016. The Government represents that its proposed protective order "recognizes the sensitive nature of the information contained in PPMS and appropriately balances the privacy interest of individual law enforcement officers with the defendant's discovery and trial rights, as well as the public's interest in the requested information." The Government requests that the Court issue an order stating that the PPMS materials may not be distributed beyond the defense team nor retained by the defense team. The Defense, in its Motion to Compel, received on August 4, 2016, stated its opposition to any protective order.

Pursuant to D.C. Superior Court Criminal Rule 16(d)(1), upon a sufficient showing the Court may at any time order that the inspection of discovery be denied, restricted or deferred, or make such other order as is appropriate.[1] The D.C. Superior Court rule is essentially identical to Fed. R. Crim. P. 16(d)(1), which states that, "[a]t any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief." "Where one of our procedural rules is nearly identical to the functional equivalent of a federal procedural rule, we

[1] There is little helpful guidance from the District of Columbia Court of Appeals on the meaning of a "sufficient showing." The Court of Appeals has looked to interpretations and applications of Federal Rile of Criminal Procedure 16 for guidance when applying the local rule. *Rowland v. United States*, 840 A.2d 664, 678 n. 16 (D.C. 204).

look to cases interpreting the federal rule for guidance on how to interpret our own." *Patterson v. Sharek*, 924 A.2d 1005, 1009-1010 (D.C. 2007).

"Fed. R. Crim. P 16(d)(1) expressly authorizes the court to deny discovery of information sought by a defendant based on a . . . showing by the government of the need for confidentiality." *United States v. Innamorati*, 996 F.2d 456, 487 (1st Cir. Mass. 1993). "To show good cause for a protective order, the government must make a particularized showing of potential harm if information disclosed in discovery does not remain confidential." *United States v. Lewis*, 2016 U.S. Dist. LEXIS 23763, 2 (D.Mass. 2016). "Good cause ordinarily requires 'a particularized, specific showing.'" *United States v. Williams*, 2015 U.S. Dist. LEXIS 138261, 12 (D.Mass. 2015) (quoting *United States v. Bulger*, 283 F.R.D. 46, 52 (D.Mass. 2012)). "'Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not support a good cause showing.'" *United States v. Wecht,* 484 F.3d 194, 211 (3rd Cir. 2007) (quoting *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3rd Cir. 1984)). "[T]he norm is to deny a request for restricted discovery." *Nelson*, 486 F. Supp. at 480. The Court should also consider whether the Defendant would be prejudiced by the imposition of a protective order. *See United States v. Davis*, 809 F.2d 1194, 1210 (6th Cir. Mich. 1987).

In this case, the Court finds that the Government has not established a sufficient need for confidentiality. The Government can point to only one case – *Huthnance v. District of Columbia* – in which United States District Court for the District of Columbia, in the context of a 42 U.S.C.S. Section 1983 false arrest claim, found that disclosure of information about disciplinary actions taken against officers would invade their privacy . . . ." The standard applied there, under Rule 26 of the Federal Rules of Civil Procedure, is that good cause for a protective has been

established "when justice requires protection of a party or person from annoyance, embarrassment, oppression, or undue burden or expense." *Huthnance*, 255 F.R.D. at 296.

The correct standard in this case is that "good cause requires a particularized showing of potential harm if information disclosed in discovery does not remain confidential." *Lewis*, 2016 U.S. Dist. LEXIS at 2. "[T]he norm is to deny a request for restricted discovery." *Nelson*, 486 F. Supp. At 480. The Government has not made a particularized showing of potential harm if information disclosed in discovery does not remain confidential. In this case, the Government's general assertion that disclosure would undermine officers' privacy does not meet the "particularized showing of harm" standard. *See United States v. Lewis*, 2016 U.S. Dist. LEXIS at 2. Moreover, the Government's concerns regarding inaccurate, incomplete, and old information and uninvolved officers may be remedied through redaction of PPMS materials and investigation of underlying source documents prior to disclosure.

Therefore, it is this 10th day of August, 2016, hereby

ORDERED that the Government's Motion is **DENIED.**

SO ORDERED.

Judge Maribeth Raffinan
Associate Judge

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Pierce Suen
Counsel to Defendant

EXHIBIT E

ORIGINAL

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION - FELONY BRANCH

UNITED STATES OF AMERICA	:	Case No. 2009-CF1-9230
v.	:	Judge Gerald I. Fisher
INGMAR GUANDIQUE	:	Status: May 14, 2010

GOVERNMENT'S OPPOSITION TO
DEFENDANT'S MOTION FOR CHANGE OF VENUE

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully submits this opposition to defendant's motion for change of venue. In support of its opposition, the government relies on the following points and authorities and any other points and authorities that may be cited at a hearing on this motion.

This motion should be summarily denied without a hearing for at least three reasons: *First*, change of venue is not available in the Superior Court of the District of Columbia. This Court sits in a unitary judicial district, which means that change of venue among D.C. judicial "districts" is not possible. Moreover, D.C. charges must be prosecuted within the D.C. court system. *Second*, the defendant will receive a fair trail in this jurisdiction through the effective administration of *voir dire* by the Court, with the assistance of the parties. *Finally*, this case has received media attention all across the United States, not just D.C. As a result, the fairness of the trial in this or any jurisdiction depends on *voir dire*, not the location of the trial.

FACTUAL BACKGROUND

This prosecution stems from the murder of Ms. Chandra Levy. The government expects to prove at trial that Ingmar Guandique kidnaped and murdered Ms. Levy on or about May 1, 2001, during an attempted sexual assault and robbery. The attack took place as Ms. Levy was walking or

jogging along the Western Ridge Trail of Rock Creek Park (the "Park") near Grove 17 in Washington, D.C. After a lengthy investigation, on May 19, 2009, a Grand Jury returned a six count indictment in this case charging Guandique with the following offenses in the Levy murder: Kidnaping; First Degree Felony Murder (for Kidnaping); Attempted First Degree Sexual Abuse; First Degree Felony Murder (for Attempted First Degree Sexual Abuse); Attempted Robbery; and First Degree Felony Murder (for Attempted Robbery). On December 2, 2009, the Grand Jury returned a superseding indictment, adding three additional charges to the original indictment: Conspiracy to Obstruct Justice; Obstruction of Justice; and Felony Threats. Trial is now set for October 4, 2010.

ARGUMENT

A. Change Of Venue Is Not Available In D.C. Superior Court

The D.C. Court of Appeals has continually recognized and held that transfer of venue is not available within the D.C. Superior Court because it "sits as a single unitary judicial district." *Welch v. United States*, 466 A.2d 829, 834 (D.C. 1983); *see also United States v. Edwards*, 430 A.2d 1321, 1345 (D.C. 1981) (en banc), *cert. denied*, 455 U.S. 1022 (1982); *Catlett v. United States*, 545 A.2d 1202, 1215 n.27 (D.C. 1988) (reaffirming the "well-established rule" that change of venue is not available in D.C., and rejecting defendant's request for transfer to suburban Maryland or Virginia due to prejudicial pretrial publicity as "groundless"); *Flax v. Schertler*, 935 A.2d 1091, 1108 n.16 (D.C. 2007) (noting that the Superior Court and the Court of Appeals have "no authority" to grant a motion for change of venue). Although the defense argues that these decisions fail to "engage in any meaningful analysis," *see* Def.'s Mot. for Change of Venue at 3-4, this Court is bound to follow the "well-established rule" of the D.C. Court of Appeals (*Catlett*, 545 A.2d at 1215 n.27), unless and until the law changes.

This prohibition on change of venue in the District of Columbia is logically required by a proper understanding of the interplay between venue and jurisdiction. Change of venue allows for transfer from one in-state district to another in-state district possessing the same jurisdictional power over the relevant offense. However, D.C. is a "single unitary judicial district," *Welch*, 466 A.2d at 834, so there is no other "district" within D.C. that the case can be transferred to. As a result, the defendant cannot argue for a change of venue to a different district within D.C. Instead, the defendant seeks "transfer from a state with jurisdiction to a state without jurisdiction," which is not covered by the doctrine of venue and is not otherwise permitted. 4 Wayne R. LaFave et al., *Criminal Procedure* § 16.1(a) (3d ed. 2007).

The murder of Chandra Levy occurred within the territory of D.C., and the D.C. Code grants jurisdiction over offenses that occur within its territory to the D.C. Superior Court. *See* D.C. Code § 11-923(b)(1). No other state's courts can claim jurisdiction over the offense, because "states have power to make conduct a crime only if that conduct takes place, or its results occur, within the state's territorial borders." 4 LaFave et al., *supra*, at § 16.1(a). Similarly, federal courts outside of D.C. cannot claim jurisdiction because the Defendant is charged exclusively with violations of the D.C. Code, not federal offenses. *See, e.g.*, *Thor v. United States*, 554 F.2d 759, 762 (5th Cir. 1977) ("If the indictment upon which [the defendant] was tried and convicted failed to allege a federal offense, the district court lacked the subject matter jurisdiction necessary to try [the defendant] for the actions alleged in the indictment.").

The defendant urges the Court to treat the D.C. Superior Court like a federal district court, and the D.C. Code like the U.S. Code, so as to manufacture jurisdiction where none exists. *See* Def.'s Mot. for Change of Venue at 6-7. Despite the similarities between the two court systems,

D.C. Superior Court cannot simply be assimilated as part of the federal judiciary. *Compare, e.g.*, D.C. Code § 11-923(b)(1) (granting D.C. Superior Court plenary jurisdiction over D.C. Code offenses occurring on D.C. territory), *with* D.C. Code § 11-502(2)(A) (granting D.D.C. authority only over specifically enumerated D.C. Code offenses). U.S. district courts other than D.D.C. would lack even the limited jurisdictional authority over the D.C. Code offenses enumerated in D.C. Code § 11-502(2)(A). So-called 'change of venue' to another state would therefore be an end-run around these jurisdictional limitations.

Contrary to the argument presented by the defense, D.C. Super. Ct. R. Crim. P. 20 does not suggest a different outcome. Rule 20 allows a defendant to plead guilty to D.C. offenses in a non-D.C. federal district court when several conditions are satisfied: (1) the defendant must have been arrested or detained in that non-D.C. jurisdiction; (2) he must waive his right to trial and agree to plead guilty or nolo contendere; and (3) the U.S. Attorney for both districts must agree to the transfer. None of these conditions are satisfied in the present case. The goal of Rule 20 is to spare defendants the undue "hardship" of removal to D.C. when they are already being held elsewhere and are prepared to resolve their case without a trial. *See* Fed. R. Crim. P. 20, Adv. Comm. Notes (1944); *see also* D.C. Rule 20, Comment (noting that Rule 20 is modeled on Fed. R. Crim. P. 20).

However, a non-D.C. court does not have jurisdiction to conduct a trial involving a crime perpetrated within D.C. *See supra* (discussing the well-established principle that criminal-law jurisdiction is local); *see also* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury **of the State and district wherein the crime shall have been committed** (emphasis added)). This is why, even after a defendant receives a transfer of his case from D.C. to a non-D.C. court under Rule 20(a) or (b), the case must be transferred *back* to D.C. if

the defendant reverts to a plea of not guilty and decides to go to trial. *See* Rule 20(c). In short, Rule 20 does not support the transfer of venue for trial from D.C. Superior Court to a federal district court.

B. Defendant Will Receive A Fair Trial In D.C. Superior Court

The defendant acknowledges that existing law precludes his motion for a change of venue, but he argues that the applicable authorities fail to meaningfully discuss the constitutional dimensions of pretrial publicity. *See* Def.'s Mot. for Change of Venue at 4. This argument is simply incorrect. Each of the three opinions prohibiting change of venue in the District of Columbia, *Welch*, *Edwards*, and *Catlett*, address the constitutional dimensions of pretrial publicity and conclude that effective juror management by the trial court—careful *voir dire*, jury instructions, and sometimes even the drastic remedy of jury sequestration—can adequately ensure that defendants receive a fair trial. *See Welch*, 466 A.2d at 834–35 (holding that the defendant's "right to a fair trial by an impartial jury is not defeated . . . merely because the requested remedy [change of venue] is unavailable," and that "the Sixth Amendment inquiry turns on the adequacy of the voir dire"); *id.* at 837 (referring to the trial court's use of jury sequestration as a "protective procedure" that helps to "'dissipat[e] the impact of pretrial publicity and emphasize[] the elements of the jurors' oaths" (quoting *Neb. Press Assoc. v. Stuart*, 427 U.S. 539, 564 (1976)); *Catlett*, 545 A.2d at 1215 ("This extensive and careful voir dire procedure . . . ensured that appellants . . . were not prejudiced by the pretrial publicity."); *Edwards*, 430 A.2d at 1346 ("The strong presumption must be that in any case, jurors can be found in the District of Columbia whose exposure to the case will have been sufficiently minimal to enable them to render a fair and impartial verdict.").

Although publicity surrounding the murder of Chandra Levy case has been extensive, "pretrial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically

and in every kind of criminal case to an unfair trial." *Neb. Press Assoc.*, 427 U.S. at 565. This is especially true in the District of Columbia, which has such a "surfeit of events commanding media attention" that "[e]vents occur, are reported, and pass with amazing rapidity." *Edwards*, 430 A.2d at 1346. D.C. courts have used careful *voir dire* procedures to conduct fair trials in cases receiving "far more pervasive and accusatory" publicity even than the current case. *Welch*, 466 A.2d at 835 n.1 (collecting cases ranging from Watergate to the Letelier assassination and the Hanafi takeover).

Furthermore, the publicity surrounding the Chandra Levy case is not restricted to D.C., but has reached the entire nation through, for example, the coverage given to it by the *New York Times*, *Fox News*, *CBS*, and numerous other sources. Because "the publicity is nationwide rather than local," any problems associated with pretrial publicity in this case should be resolved through *voir dire* and effective juror supervision, not change of venue. *Welch*, 466 A.2d at 837 (quoting *United States v. Chapin*, 515 F.2d 1274, 1289 (D.C. Cir.), *cert. denied*, 423 U.S. 1015 (1975)). Interestingly, the defense does not even suggest to the Court which jurisdiction they believe the case should be transferred to for trial, and that could allegedly serve as the comparison to D.C. in terms of publicity regarding the murder of Chandra Levy.

C. Defense Has Failed To Demonstrate Need For Evidentiary Hearing

The defense has failed to demonstrate the need for an evidentiary hearing, particularly in light of the clear legal precedent that precludes change of venue in cases brought in D.C. Superior Court. In addition, defendant's motion should also be denied without a hearing because it completely failed to demonstrate any factual basis for the requested relief. *See e.g., Duddles v. United States*, 399 A.2d 59 (D.C. 1979) (holding that a defendant who files a motion to suppress "is obliged, in his definitive motion papers, to make factual allegations which, if established, would warrant relief.") If the Court

determines that a hearing on this motion is necessary, then the defense should be required – before any hearing – to disclose the factual evidence relied upon by the defense that allegedly supports the position that a change of venue is necessary.[1] Otherwise, the government would not be in a position to meaningfully address these allegations at the requested evidentiary hearing.

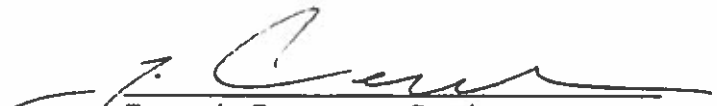
WHEREFORE, the United States respectfully requests that the Court deny in its entirety defendant's motion for change of venue without a hearing. In the alternative, the government requests that the Court order the defense to provide to the Court and the government, before any evidentiary hearing, the alleged evidence that they intend to rely at any hearing on this motion.

Respectfully submitted,

RONALD C. MACHEN JR.
UNITED STATES ATTORNEY

Amanda Haines
Assistant United States Attorney
Specialized Case Unit

[1] The government has information that citizens in the District of Columbia have been contacted by telephone and asked a number of questions regarding the criminal justice system in general, and the murder of Chandra Levy in particular. The government does not know whether the defense team or someone working for the defense team is responsible for these calls. It is possible that someone that is not associated with the defense team is responsible for these calls. However, if the defense team is behind these calls, then the Court has yet another reason to reject the motion for change of venue because the defendant "cannot now 'complain'" that the publicity he himself helped to shape "'interfered with [his] right to a fair trial.'" *Welch*, 466 A.2d at 837 (quoting *Khaalis v. United States*, 408 A.2d 313, 334 (D.C. 1979), *cert. denied*, 444 U.S. 1092 (1980)). For these reasons, if there is an evidentiary hearing as to this matter, it will be necessary for the parties and the Court to explore this issue in some detail before a ruling on this motion.



Fernando Campoamor-Sanchez
Assistant United States Attorney
Homicide Unit

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 9, 2010, I caused a copy of the foregoing to be served by first class mail and electronic mailing upon counsel for the defense, Santha Sonenberg and Maria Hawilo, Public Defender Service, 633 Indiana Avenue, NW, Washington, D.C. 20004.

Fernando Campoamor
Assistant United States Attorney

EXHIBIT F

ORIGINAL

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division - Felony Branch

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

2011 DEC 27 P 3:25

FILED

UNITED STATES	:	Docket No.: 2010-CF1-3867
	:	Judge Thomas Motley
v.	:	Trial: January 23, 2012
	:	
REGINALD ROGERS	:	

UNITED STATES' OPPOSITION TO
MOTION FOR CHANGE OF VENUE

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully submits the following opposition to the Motion for Change of Venue served on or about December 1, 2011. In support of this opposition, the United States would show:

1. The defendant, Reginald Rogers, has been indicted on one count of Armed Robbery, in violation of 22 D.C. Code §§ 2801, 4502; one count of First Degree Murder While Armed - Felony Murder, in violation of 22 D.C. Code §§ 2101, 4502; one count of First Degree Murder – Premeditated, in violation of 22 D.C. Code §§ 2101, 4502; one count of Assault With the Intent to Kill While Armed, in violation of 22 D.C. Code §§ 401, 4502; two counts of Assault With the Intent to Commit Robbery While Armed, in violation of 22 D.C. §§ 401, 4502; two counts of Carrying a Pistol Without a License (Outside the Home or Business), in violation of 22 D.C. Code § 4504(a); two counts of Possession of an Unregistered Firearm, in violation of 7 D.C. Code § 2502.01; two counts of Unlawful Possession of Ammunition, in violation of 7 D.C. Code § 2506.01(3); and six counts of Possession of a Firearm During a Crime of Violence or Dangerous Crime, in violation of 22 D.C. Code § 4504(b). These charges arise out of the robbery and murder of Calvin Woodland,

Jr., on January 27, 2010.[1]

2. On August 30, 2011, following motions hearings and jury selection, the defendant attempted to enter into a plea agreement pursuant to Rule 11(e)(1)(C) of the Superior Court Rules of Criminal Procedure.

3. On November 4, 2011, the Court rejected the plea agreement. The Court ruling was largely based on its conclusion that the stipulated period of incarceration, i.e., 22 years, was night sufficient in light of the circumstances of this offense and the defendant's criminal history. The Court also went on to explain that an additional basis was that the defendant had failed to fully accept responsibility during the plea colloquy by claiming that he had acted alone. The defendant opted to proceed to trial and the current trial date was selected.

4. The defendant's Motion for Change of Venue seeks a continuance to allow "the taint of the jury pool to dissipate." See, ¶ 12. In short, the defendant argues that a fair and unbiased jury cannot be selected in light of the news coverage that surrounded the Court's rejection of the plea agreement in November of 2011. The motion argues that it will be next to impossible to find jurors who have not heard of Mr. Rogers' admission of guilt. The motion is premised o incorrect assumptions and will serve only to delay the final resolution of this mater.

Sealed Portions of Sentencing Materials

5. The driving force behind the Court's sealing of the sentencing materials was information from the presentence report that the Court ruled should not be in the public domain. In an abundance of caution, the Court went on to seal the entirety of the plea and sentencing materials pending the

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[1] There are also three firearms-related charges included in the indictment that pertain to the 4th of March, 2010.

outcome of the trial. Like defense counsel, the United States does not know how the media was able to obtain any of the materials. The undersigned does recall that there was a reporter in the audience at the time the Court rejected the plea agreement. The United States would further note that the information from the presentence report, which was the subject of the defendant's motion to redact, was not mentioned in any of the press coverage. But, the coverage did make reference to the defendant's admission of guilt. Nonetheless, the trial should not be continued.

Voir Dire Can Weed Out Tainted Jurors

6. It is correct that the media coverage did refer to the fact that the defendant admitted his complicity in the offense. However, it is a tremendous assumption to conclude that every potential juror must be aware of the coverage and/or that the defendant admitted his guilt. This is precisely the type of situation that can be addressed and resolved through voir dire. Indeed, it is relatively common for potential jurors to indicate that they are vaguely aware of news coverage of a murder. These jurors will typically go on to indicate that they do not recall the details and, in any event, they can follow the Court's instructions not to let any media coverage affect their view of the evidence. If these same jurors are asked to recount their recollection of the coverage, it will likely uncover any real problems. It is not uncommon for jurors to state that they do not read or watch coverage of crime stories for a variety of reasons. The motion offers no indication of when the taint might sufficiently dissipate, e.g., six months, a year, or after counsel's trial schedule opens up. In short, without some demonstration that the potential jury pool is actually tainted, it is an unwarranted overreaction to postpone the trial.

7. The Court can also seat one or two extra alternates if voir dire suggests that this is a bigger problem than it appears. This would address the situation where a juror suddenly recalls having

heard the story about the defendant's admission of guilt.

8. By the time this case goes to trial, it will be almost exactly two years since the defendant murdered Mr. Woodland, and two months since the story about the Court's rejection of the plea agreement. On the current state of the record, there is no basis to expect and/or conclude that appropriate voir dire cannot lead to a fair and unbiased jury. Moreover, there is nothing to suggest that a continuance would be better suited to achieve that end.

Delay for the Victim's Family

9. It is also important to note that Mr. Woodland was murdered two years ago, and the family has been waiting for their day in court. While the United States takes the defendant's right to a fair trial very seriously, it is equally important to account for the family's interest in a speedy resolution of this matter.

CONCLUSION

For the foregoing reasons, and upon the authorities cited, the United States respectfully requests that the Court deny the Motion for a Change of Venue in its entirety.

Respectfully submitted,

RONALD C. MACHEN JR.
United States Attorney

By: _____
MICHAEL T. TRUSCOTT
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the United States' Opposition to Motion for Change of Venue was served via telefax upon counsel for the defendant, Dana Page, Public Defender Service, 633 Indiana Avenue, N.W., Washington, D.C., this 23rd day of December , 2011.

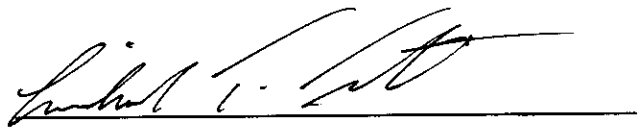

EXHIBIT G

ORIGINAL

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION
2013 MAR 14 A 11:00
FILED

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA **Criminal No. 2011CF115683**

v. **Judge Russell F. Canan**

Status Hearing Date: March 14, 2013

ALBRECHT MUTH
_____/

GOVERNMENT'S OPPOSITION TO
DEFENDANT'S MOTION FOR CHANGE OF VENUE

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully submits this opposition to defendant's motion for change of venue. In support of its opposition, the government relies on the following points and authorities and any other points and authorities that may be cited at a hearing on this motion.

This motion should be summarily denied without a hearing. Importantly, change of venue is not available in the Superior Court of the District of Columbia. This Court sits in a unitary judicial district, which means that change of venue among D.C. judicial "districts" is not possible. Moreover, D.C. charges must be prosecuted within the D.C. court system. Moreover, the defendant will receive a fair trial in this jurisdiction through the effective administration of *voir dire* by the Court, with the assistance of the parties. Finally, this case has not received a significant amount of publicity as compared to any number of other "high-profile" cases that have been fairly tried in Superior Court over the years.

I. FACTUAL BACKGROUND

On the morning of August 11, 2011, the defendant called 911 and reported that his 91-year-old wife, Viola Drath, was dead on the bathroom floor of their Georgetown home located at 3206 Q Street, NW. On August 16, 2011, the defendant was arrested for the murder of his wife. On March 6, 2012, the grand jury indicted the defendant on one count of first degree premeditated murder (with aggravating circumstances) for the murder of his wife.

II. ARGUMENT

A. Change Of Venue Is Not Available In D.C. Superior Court

The D.C. Court of Appeals has continually recognized and held that transfer of venue is not available within the D.C. Superior Court because it "sits as a single unitary judicial district." *Welch v. United States*, 466 A.2d 829, 834 (D.C. 1983); *see also United States v. Edwards*, 430 A.2d 1321, 1345 (D.C. 1981) (en banc), *cert. denied*, 455 U.S. 1022 (1982); *Catlett v. United States*, 545 A.2d 1202, 1215 n.27 (D.C. 1988) (reaffirming the "well-established rule" that change of venue is not available in D.C., and rejecting defendant's request for transfer to suburban Maryland or Virginia due to prejudicial pretrial publicity as "groundless"); *Flax v. Schertler*, 935 A.2d 1091, 1108 n.16 (D.C. 2007) (noting that the Superior Court and the Court of Appeals have "no authority" to grant a motion for change of venue).

This prohibition on change of venue in the District of Columbia is logically required by an understanding of the interplay between venue and jurisdiction. Change of venue allows for transfer from one in-state district to another in-state district possessing the same jurisdictional power over the relevant offense. However, D.C. is a "single unitary judicial district," *Welch*, 466 A.2d at 834, so there is no other "district" within D.C. that the case can be transferred to. As a result, the

defendant cannot argue for a change of venue to a different district within D.C. Instead, the defendant in substance seeks a transfer from a 'state' with jurisdiction to a state without jurisdiction, which is not covered by the doctrine of venue and is not otherwise permitted. 4 Wayne R. LaFave et al., *Criminal Procedure* § 16.1(a) (3d ed. 2007).

The murder of Viola Drath occurred within the territory of Washington, D.C., and the D.C. Code grants jurisdiction over offenses that occur within its territory to the D.C. Superior Court. *See* D.C. Code § 11-923(b)(1). No other state's court can claim jurisdiction over the offense, because "states have power to make conduct a crime only if that conduct takes place, or its results occur, within the state's territorial borders." 4 LaFave et al., *supra*, at § 16.1(a). Similarly, federal courts outside of Washington, D.C. cannot exercise jurisdiction because the defendant is charged exclusively with violations of the D.C. Code, not federal offenses. *See, e.g., Thor v. United States*, 554 F.2d 759, 762 (5th Cir. 1977) ("If the indictment upon which [the defendant] was tried and convicted failed to allege a federal offense, the district court lacked the subject matter jurisdiction necessary to try [the defendant] for the actions alleged in the indictment.").

B. Defendant Will Receive A Fair Trial In D.C. Superior Court

Each of the three opinions prohibiting change of venue in the District of Columbia, *Welch*, *Edwards*, and *Catlett*, address the constitutional dimensions of pretrial publicity and conclude that effective juror management by the trial court—careful *voir dire*, jury instructions, and sometimes even the drastic remedy of jury sequestration—can adequately ensure that defendants receive a fair trial. *See Welch*, 466 A.2d at 834–35 (holding that the defendant's "right to a fair trial by an impartial jury is not defeated . . . merely because the requested remedy [change of venue] is unavailable," and that "the Sixth Amendment inquiry turns on the adequacy of the voir dire"); *id.*

at 837 (referring to the trial court's use of jury sequestration as a "protective procedure" that helps to "dissipat[e] the impact of pretrial publicity and emphasize[] the elements of the jurors' oaths" (quoting *Neb. Press Assoc. v. Stuart*, 427 U.S. 539, 564 (1976)); *Catlett*, 545 A.2d at 1215 ("This extensive and careful voir dire procedure . . . ensured that appellants . . . were not prejudiced by the pretrial publicity."); *Edwards*, 430 A.2d at 1346 ("The strong presumption must be that in any case, jurors can be found in the District of Columbia whose exposure to the case will have been sufficiently minimal to enable them to render a fair and impartial verdict.").

Although there has been some publicity surrounding the murder of Viola Drath, it has not been particularly extensive, nor has it been dramatically staged. Indeed, "pretrial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically and in every kind of criminal case to an unfair trial." *Neb. Press Assoc.*, 427 U.S. at 565. This is especially true in the District of Columbia, which has such a "surfeit of events commanding media attention" that "[e]vents occur, are reported, and pass with amazing rapidity." *Edwards*, 430 A.2d at 1346. D.C. courts have used careful *voir dire* procedures to conduct fair trials in cases receiving "far more pervasive and accusatory" publicity even than the current case. *Welch*, 466 A.2d at 835 n.1 (collecting cases ranging from Watergate to the Letelier assassination and the Hanafi takeover).

C. Defense Has Failed To Demonstrate Need For Evidentiary Hearing

The defense has failed to demonstrate the need for an evidentiary hearing, particularly in light of the clear legal precedent that precludes change of venue in cases brought in D.C. Superior Court. In addition, defendant's motion should also be denied without a hearing because it completely failed to demonstrate any factual basis for the requested relief. *See e.g.*, *Duddles v. United States*, 399 A.2d 59 (D.C. 1979) (holding that a defendant who files a motion to suppress "is obliged, in his definitive

motion papers, to make factual allegations which, if established, would warrant relief.") If the Court determines that a hearing on this motion is necessary, then the defense should be required – before any hearing – to disclose the factual evidence relied upon by the defense that allegedly supports the position that a change of venue is necessary. Otherwise, the government would not be in a position to meaningfully address these allegations at the requested evidentiary hearing.

WHEREFORE, the United States respectfully requests that the Court deny in its entirety defendant's motion for change of venue without a hearing.

Respectfully submitted,
RONALD C. MACHEN JR.
UNITED STATES ATTORNEY

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Phone: (202) 252-7100 (glk)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served by email upon attorney Dana Page, Public Defender Service, 633 Indiana Avenue, N.W., Washington, D.C. 20004, this 13th day of March, 2013.

Assistant United States Attorney