IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

v.

DOMINIC PEZZOLA,

Defendant.

No. 21-cr-0052 (TJK)

DEFENDANT PEZZOLA'S MOTION FOR BAIL TO PLACE DEFENDANT ON CONDITIONAL RELEASE PENDING TRIAL

Defendant, Dominic Pezzola, by and through undersigned counsel, Martin H. Tankleff and Steven Metcalf, respectfully moves this Court, pursuant to the Bail Reform Act of 1984, 18 U.S.C. 3141, *et seq*., to release the defendant on personal recognizance.

Alternatively, if the Court is not amenable to release defendant on personal recognizance, defendant moves this court to release defendant into the third-party custody of his wife and commit him to the supervision of a High Intensity Supervision Program (HISP) with GPS monitoring by local Pretrial Services.

If the Court deems that Dominic isn't entitled to bail, he respectfully moves for a Court order permitting him to possess in his cell a laptop computer so he can review all discovery and participate in his own defense.

Dated: July 9, 2021

Respectfully Submitted,

Martin H. Tankleff

MARTIN H. TANKLEFF, ESQ.
Metcalf & Metcalf, P.C.
Attorneys for Pezzola
99 Park Avenue, 25th Floor
New York, NY 10016
Phone 646.253.0514

Fax 646.219.2012

/s/ Steven A. Metcalf II, Esq.

STEVEN A. METCALF II, ESQ.
Metcalf & Metcalf, P.C.
Attorneys for the Defendant
99 Park Avenue, 25th Floor
New York, NY 10016
Phone 646.253.0514
Fax 646.219.2012
metcalflawnyc@gmail.com

CERTIFICATE OF SERVICE

We hereby certify that, on July 9, 2021, the forgoing document was filed via the Court's electronic filing system, and sent to the AUSA via email, which constitutes service upon all counsel of record.

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Martin H. Tankleff

MARTIN H. TANKLEFF, ESQ.
Metcalf & Metcalf, P.C.
Attorneys for Pezzola
99 Park Avenue, 25th Floor
New York, NY 10016
Phone 646.253.0514
Fax 646.219.2012

/s/ Steven A. Metcalf II, Esq.

STEVEN A. METCALF II, ESQ.
Metcalf & Metcalf, P.C.
Attorneys for Pezzola
99 Park Avenue, 25th Floor
New York, NY 10016
Phone 646.253.0514
Fax 646.219.2012
metcalflawnyc@gmail.com

PREAMBLE

Fyodor Dostoyevsky once stated, "A society should be judged not by how it treats its outstanding citizens, but by how it treats is criminals." At the Hubert Humphrey Building dedication, Nov. 1, 1977, in Washington, D.C., former vice president Humphrey spoke about the treatment of the weakest members of society as a reflection of a government: "The moral test of government is how that government treats those who are in the dawn of life, the children; those who are in the twilight of life, the elderly; those who are in the shadows of life, the sick, the needy and the handicapped."

Denny Scott quoted Gandhi as saying: "The measure of a civilization is how it treats its weakest members." A related quote, "The greatness of a nation can be judged by how it treats its weakest member," is also attributed to Gandhi.

If there is any justice in our society, it is to grant bail to defendant, especially since in 1988, undersigned counsel, while under indictment for double murder was released on one-million-dollar bail and reduced after several months of freedom.[1]

[1] Judge Thomas Mallon also ordered that the youth, Martin Tankleff, 17, remain free on $1-million bail after arraigning him on second-degree murder charges in his father's death. *2 Asst. Das Barred in Tankleff Trial*, 1988 WLNR 171272; Martin Tankleff has pleaded not guilty and is being held in the Suffolk County Jail in lieu of $500,000 cash bail or $1 million bond. *Seymour Tankleff Dies of Injuries*, 1988 WLNR 158438 (*See*, **Exhibit J**).

Dominic isn't charged with murder, and individuals around this Country, charged with more serious crimes are granted bail.

The defendant states the following in support of this request.

I. INTRODUCTION

1. Mr. Pezzola now moves for Bail for the following reasons: (1) his treatment in a DC jail has violated his human rights, (2) his right to effective assistance of counsel is being deprived on a daily basis because he is unable to speak to his attorney's in a confidential setting, and participate in his own defense because he cannot adequately review the discovery in this matter; (3) the presumption against bail for pretrial detainees.
2. As we have stated, *ad nauseum*, the events that took place on January 6, 2021, did not occur in a vacuum.
3. The government is unable to prove that Pezzola (hereafter referred to as "Dominic", "Dom", or "Mr. Pezzola") is a flight risk by a preponderance of the evidence[2]; and instead, this case boils down to dangerousness, and whether the government can demonstrate that Dominic should be detained pretrial because there are "no condition or combination of conditions will

[2] Dom has lived in the same home for approximately 20 years. When he was apprehended, he was in his own home.

reasonably assure the appearance of the person as required and the safety of any other person and the community". 18 U.S.C. § 3142(e)(1).[3]

II. PROCEDURAL HISTORY

4. Additionally, the government cannot demonstrate that no "reasonable condition, or combination of conditions exist that would ensure Dom's return to court or the safety of all members of the community."

5. Dom does not have access to all the discovery in this matter and has no guarantee that every time his name comes up in the jail that he wont be harassed and used as a scapegoat inmate to raise false disciplinary charges against him to throw Dom in the box.

6. Dom has been moved from regular housing to the hole (aka, the box or special housing unit). Each time this has occurred, there wasn't reasonable penological reason other than as a form of retaliation and/or harassment.

7. Individuals who are housed in the D.C. Jail, who are accused of committing crimes on January 6, 2021, at The Capitol are treated differently than all other prisoners who are housed in the jail. There is a clear deprivation of Equal

[3] *See also United States v. Munchel*, 2021 WL 1149196, at 4 (D.C. Cir. Mar. 26, 2021) (*quoting* 18 U.S.C. § 3142(f)(highlighting that "[t]o justify detention on the basis of dangerousness, the government must prove by 'clear and convincing evidence' that 'no condition or combination of conditions will reasonably assure the safety of any other person and the community [which requires that defendant] poses a continued articulable threat to an individual or the community that cannot be sufficiently mitigated by release conditions.").

Protection under the law. Many, including Dom, have suffered when the conditions of confinement are exposed publicly.[4]

8. As background for this application, Magistrate Robin Meriweather, on February 15, 2021, found that:

> The following factual proffers persuaded the Court that release under strict conditions would unduly endanger the community: (1) Mr. Pezzola's alleged participation in a group discussion about plans to return to Washington D.C. with weapons, in which members asserted that they would have killed former Vice President Pence or any person they got their hands on; (2) the fact that law enforcement found a thumb drive[5] in Mr. Pezzola's house containing files that included instructions for making bombs, firearms, and poisons. Although no materials for making bombs or poisons are alleged to have been recovered, and the group's alleged plans to return to D.C. have not come to fruition, the potential for future violent conduct in support of overturning the election of President Biden is too great to be adequately mitigated by any release conditions.

(*See* ECF Doc. 18).

9. Approximately a month after the February 15, 2021, Order, on or about March 16, 2021, the Honorable Timothy Kelly ruled as follows:

> The defendant has presented evidence sufficient to rebut the presumption, but after considering the presumption

[4] Recently, when Dom's wife was interviewed, within hours of the interview airing, Dom was harassed and retaliated against and thrown in the "box" for approximately two weeks without a single disciplinary charge.

[5] As of the filing of this application, there is no evidence that Dom opened any of the files on the thumb drive.

> and the other factors discussed below, detention is warranted for the reasons summarized in Part III.

(*See* ECF Doc. 26).

10. Part III, the analysis, and statement of the reasons for detention, then finds that:

> After considering the factors set forth in 18 U.S.C. § 3142(g) and the information presented at the detention hearing, the Court concludes that the defendant must be detained pending trial because the Government has proven: By clear and convincing evidence that no condition or combination of conditions of release will reasonably assure the safety of any other person and the community.
> . . . .
>
> In addition to any findings made on the record at the hearing, the reasons for detention include the following: Weight of evidence against the defendant is strong Subject to lengthy period of incarceration if convicted.

(*See* ECF Doc. 26 at p. 2).

11. Other reasons include the following finding:

> In sum, the proffered evidence shows that Pezzola came to Washington, D.C. as a key member of a broader conspiracy to effectively steal one of our Nation's crown jewels: the peaceful transfer of power. He then played a prominent role in using violence to achieve those ends by, among other things, robbing a police officer of his or her riot shield and breaking a window of the Capitol to allow rioters to enter. Because of all that, he is charged with very serious crimes that subject him to very serious penalties. Thus, the nature and circumstances of the offense show a clear disregard for the law and the Constitution. More than that, though, theyshow a willingness to use violence

> and to act in concert with others to obstruct essential functions of the United States government. And Pezzola's refusal to obey the lawful orders of law enforcement throughout the day suggest that he would not comply with conditions of release to keep the public safe. This factor weighs very strongly in favor of detention.

(*See* ECF Doc. 25 at p. 15).

12. Footnote two (2) of the March 16, 2021, order highlights:

> The government does not press the argument that Pezzola is a flight risk very far, and like Judge Meriweather, this Court does not find it persuasive. The Court does not order that Pezzola be detained for this reason.

(*See* ECF Doc. 25 at p. 12).

13. Obviously, during the last 150 days of Pezzola's incarceration, ***Point One*** of February 15, 2021 Order has been obviated, where Dom if released cannot possess, legally or illegally a firearm or other weapon, and his every movement can be monitored to the extent of house arrest. He also can be precluded from even speaking to all other people besides his family and attorneys.

14. ***Point Two*** is now moot as well, "as the potential for future violent conduct in support of overturning the election of President Biden is too great to be adequately mitigated by any release conditions" should no longer be of concern to the government with respect to Mr. Pezzola. (*See* ECF Doc. 18).

15. Dom Pezzola currently remains in the D.C. jail, and for five months has

literally been in his cell for 22 or 23 hours a day. He has very little privileged communications with his attorneys and cannot possibly review all of the video and audio discovery that in this matter. When the undersigned counsel visited Dom, the setup of the visiting area exposed counsel and Dom to have every word of their conversation overheard by anyone around.[6]

III. APPLICABLE LAW

16. A circumstance in point, which allows for a Defendant, under the nature of these charge to be granted pre-trial release, is Dom's co-defendant, William Pepe.[7] Dom's Co-Defendant Pepe was granted "a personal recognizance bond" on January 22, 2021. (*See* ECF Doc. 5-1). U.S. Magistrate Judge G. Michael Harvey ordered Pepe released under the conditions that he must:

> (1) not violate federal, state, or local law while on release;
>
> (2) cooperate in the collection of a DNA sample if it is authorized by 42 U.S.C. § 14135a;
>
> (3) advise the court or the pretrial services office or supervising officer in writing before making any change of residence or telephone number;

[6] The day that the undersigned visited with Dom, another lawyer was sitting 2 spots down and we were able to hear everything she was telling her client. Every word the client was saying to the lawyer, Dom could hear.

[7] In the original indictment Pezzola was charged in counts 1-11, and Pepe was charges in counts 1,2,8, and 9. In the superseding indictment, Pezzola was charged in counts 1-10, and Pepe was charges in counts 1, 2, 3, 6, 7, 8, and 9.

> (4) appear in court as required and, if convicted, must surrender as directed to serve a sentence that the court may impose;
>
> (5) abide by the following restrictions on personal association, residence, or travel: stay out of WDC except for Court & PSA business and attorney meetings;
>
> (6) abide by additional travel restrictions such as: Travel outside continental United States to be approved by the Court. Def must notify PSA of travel outside state of New York. Do not illegally possess firearms. . . .

(*See* ECF Doc. 5-Main).

17. In the recent case of the *United States v. Klein*, U.S. District Court Judge John D. Bates, granted pretrial release to the Defendant, who was also charged with crimes related to the events of January 6, 2021.[8] The *Klein* Court[9] laid out the legal standard for pretrial release as follows:

> To assess a defendant's dangerousness, the court must "take into account the available information" concerning four statutory factors: (1) "the nature and circumstances of the offense charged," (2) "the weight of the evidence against the person," (3) "the history and characteristics of the person," and (4) "the nature and seriousness of the

[8] *See United States v Frederico Guillermo Klein,* 2021 WL 1377128 (*citing United States v. Chrestman,* 2021 WL 765662 (D.D.C February 26, 2021)).

[9] While inside the tunnel, Klein repeatedly placed himself at the front of the mob and used force against several officers in an effort to breach the Capitol entrance and maintain the mob's position. *Id.* at 5–10. He ignored several verbal commands by officers to "back up" and "[l]et it go now." *Id.* at 6. And twice he can be heard calling to the crowd behind him: "We need fresh people, we need fresh people." *Id.* at 8. Around 2:55 p.m., Klein bent down to pick up a flagpole, which lay at the foot of the police line, and passed it back to other rioters. *Id.* at 6; Rough Tr. of Hr'g (Apr. 9, 2021) ("Hr'g Tr.") 28:22–24.*United States v. Klein*, CR 21-236 (JDB), 2021 WL 1377128, at *1 (D.D.C. Apr. 12, 2021).

> danger to any person or the community that would be posed by the person's release." 18 U.S.C. § 3142(g)(1)–(4). As the D.C. Circuit recently stated in United States v. Munchel, "[t]o justify detention on the basis of dangerousness, the government must prove by 'clear and convincing evidence' that 'no condition or combination of conditions will reasonably assure the safety of any other person and the community.' " 2021 WL 1149196, at *4 (D.C. Cir. Mar. 26, 2021) (quoting 18 U.S.C. § 3142(f)). That requires the government to establish that the defendant poses a continued "articulable threat to an individual or the community" that cannot be sufficiently mitigated by release conditions. Id. (quoting Salerno, 481 U.S. at 751); see also id. ("[A] defendant's detention based on dangerousness accords with due process only insofar as the district court determines that the defendant's history, characteristics, and alleged criminal conduct make clear that he or she poses a concrete, prospective threat to public safety."). Furthermore, "[d]etention cannot be based on a finding that defendant is unlikely to comply with conditions of release absent the requisite finding of dangerousness ... [as] otherwise the scope of detention would extend beyond the limits set by Congress." Id. at *7; see also Salerno, 481 U.S. at 746 ("[P]retrial detention under the Bail Reform Act is regulatory, not penal.").[10]

18. In a detailed decision issued March 26, 2021, the *Munchel* Court, highlighted how "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Munchel*, 991 F.3d 1273, 1279 (D.C. Cir. 2021), *judgment entered*, 844 Fed. Appx. 373 (D.C. 2021) (*citing United States v. Salerno*, 481 U.S. 739, 755 (1987)).

[10] *Id.*

19. The Bail Reform Act of 1984 authorizes the detention of defendants awaiting trial on a federal offense only under certain, limited circumstances. 18 U.S.C. § 3142(f). Specifically, the court "shall order" a defendant detained before trial if it "finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community." *United States v. Munchel*, 991 F.3d 1273, 1279 (D.C. Cir. 2021), *judgment entered,* 844 Fed. Appx. 373 (D.C. Cir. 2021)(*citing* 18 U.S.C. § 3142(e)); *see also* 18 U.S.C. § 3142(f). "In common parlance, the relevant inquiry is whether the defendant is a 'flight risk' or a 'danger to the community.' " *Id.* (*quoting United States v. Vasquez-Benitez*, 919 F.3d 546, 550 (D.C. Cir. 2019)).

20. There are two types of situations in which the Bail Reform Act establishes a rebuttable presumption that no condition or combination of conditions will reasonably assure the safety of any other person and the community. 18 U.S.C. § 3142(e). First, a rebuttable presumption arises if the judicial officer finds that (a) the person has been convicted of certain listed federal offenses, including a "crime of violence," or similar state offenses, (b) that offense was committed while the person was on release pending trial for another offense, and (c) not more than five years has elapsed since the date of conviction of

that offense or the release from imprisonment, whichever is later. 18 U.S.C. § 3142(e)(2).

21. Where there is no rebuttable presumption of detention, the court instead must consider the following factors to determine whether there are conditions that would reasonably assure the defendant's appearance and the public's safety:

> 1. the nature and circumstances of the offense charged, including whether the offense is a crime of violence, a violation of Section 1591, a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device;
>
> 2. the weight of the evidence against the person;
>
> 3. the history and characteristics of the person, such as character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, drug or alcohol abuse, criminal history, and warrant history;
>
> 4. whether, at the time of arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, state, or local law; and
>
> 5. the nature and seriousness of the danger to any person or the community that would be posed by the person's release.

(18 U.S.C. § 3142(g)(1) – (4); *United States v. Chansley*, No. 21-CR-3 (RCL), 2021).

22. As the *Munchel* Court highlighted:

> To justify detention on the basis of dangerousness, the government must prove by "clear and convincing evidence" that "no condition or combination of conditions will reasonably assure the safety of any other person and the community." Id. § 3142(f). Thus, a defendant's detention based on dangerousness accords with due process only insofar as the district court determines that the defendant's history, characteristics, and alleged criminal conduct make clear that he or she poses a concrete, prospective threat to public safety.

United States v. Munchel, 991 F.3d 1273, 1279 (D.C. Cir. 2021), *judgment entered,* 844 Fed. Appx. 373 (D.C. Cir. 2021).

23. In citing *Salerno*, the *Munchel* Court explained how:

> the Supreme Court rejected a challenge to this preventive detention scheme as repugnant to due process and the presumption of innocence, holding that "[w]hen the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, we believe that, consistent with the Due Process Clause, a court may disable the arrestee from executing that threat.

United States v. Munchel, 991 F.3d 1273, 1280 (D.C. Cir. 2021), *judgment entered,* 844 Fed. Appx. 373 (D.C. Cir. 2021) (*quoting United States v. Salerno*, 481 U.S. 739, 751 (1987) (emphasis added)).

24. If the Bail Reform Act authorizes pre-trial detention, the judicial officer must hold a hearing[11] to determine whether there are conditions of release that would reasonably assure the appearance of the defendant as required and the safety of any other person and the community. *See* § 3142(f). If the judicial

[11] The undersigned counsel respectfully requests a hearing on this matter, where testimony, if necessary, and arguments are permitted.

officer finds that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community," the judicial officer *shall* order the person detained pending trial. § 3142(e)(1). A finding that no condition or combination of conditions would reasonably assure the safety of any other person and the community must be supported by clear and convincing evidence. § 3142(f). And a finding that no conditions would reasonably assure the defendant's appearance as required must be supported by a preponderance of the evidence. *United States v. Xulam*, 84 F.3d 441, 442 (D.C. Cir. 1996).

25. As will be demonstrated, the Government cannot establish that Pezzola poses a continued "articulable threat to an individual or the community" that cannot be sufficiently mitigated by release conditions. *United States v. Munchel*, 991 F.3d 1273, 1280 (D.C. Cir. 2021), *judgment entered*, 844 Fed. Appx. 373 (D.C. 2021) (quoting 18 U.S.C. § 3142(f)). (*quoting Salerno*, 481 U.S. at 751).

IV. ARGUMENTS

POINT ONE

THE CONSTITUTIONAL RIGHT TO ASSISTANT IN ONE'S DEFENSE AND SUPPLEMENT IF NECESSARY.

26. Defendant Pezzola, hereby through his counsel, respectfully reserves and preserves his right to make further submissions on this issue of because of

counsel's inability to adequately communicate with Pezzola in a confidential setting.

27. Every Defendant has, at a minimum, the right to counsel. Such a right includes, but is not limited to, confidential communications with their counsel in person, by mail and via phone calls.[12]

28. In this case, our client, Defendant Pezzola's right to communicate with his counsel has been severally infringed.

29. In *McKaskle*, the U.S. Supreme Court highlighted:

> In *Faretta* the Court considered the case of a criminal defendant who was required to present his defense exclusively through counsel. The Court held that an accused has a Sixth Amendment right to conduct his own defense, provided only that he knowingly and intelligently forgoes his right to counsel and that he is able and willing to abide by rules of procedure and courtroom protocol. *Faretta* concluded that "[u]nless the accused has acquiesced in [representation through counsel], the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense." 422 U.S., at 821, 95 S.Ct., at 2534.
>
> *Faretta* 's holding was based on the long-standing recognition of a right of self-representation in federal and most state courts, and on the language, structure, and spirit of the Sixth Amendment. Under that Amendment, it is the accused, not counsel, who must be "informed of the nature

[12] On another note, during the course of a separate litigation in our firm, we recently learned that attorney-client phone calls were recorded and turned over to prosecutors in New York City, and if it easily happens in the big apple then it can happen anywhere in the country. *See* https://www.nydailynews.com/new-york/ny-jails-recordings-attorney-client-privilege-calls-20210321-tzbyxwnle5dc5jgvi5cona6wry-story.html; https://www.nydailynews.com/new-york/ny-rikers-jail-phone-records-lawyers-inmates-20210320-rdfb2lmuevgsdg5npad4egoqai-story.html.

> and cause of the accusation," who has the right to confront witnesses, and who must be accorded "compulsory process for obtaining witnesses in his favor." The Counsel Clause itself, which permits the accused "to have the Assistance of Counsel for his defense," implies a right in the defendant to conduct his own defense, with *assistance* at what, after all, is his, not counsel's trial.

McKaskle v. Wiggins, 465 U.S. 168, 174, 104 S.Ct. 944, 949 (1984).

30. The *McKaskle* principles remain the same to every one of these January 6, 2021, Defendants.

31. However, the pretrial conditions of the DC jail have created an environment where these Defendants, especially Defendant Pezzola are unable to assist in their own defense and thus are not ensured effective assistance of counsel.

32. An example of daily harassment to others is another one of our clients, Edward Jacob Lang, an observant Jew, is now labeled as a "false prophet" among the DC guards simply because he has prayed for other inmates.

33. This smaller group of inmates housed at the DC jail have it bad, where those awaiting trial for alleged crimes in the Jan. 6 Capitol riot. They have been placed in "restrictive housing," a maximum-security designation.

34. Regarding this "restrictive housing" definition, one reporter noted how:

> Solitary confinement is a form of punishment that is cruel and psychologically damaging," Warren told Politico a month later. The Massachusetts Democrat fears the Jan. 6 defendants are being singled out to "punish" them or "break them so that they will cooperate" with federal prosecutors.

> Durbin was surprised to learn about the restrictive housing. It should be a "rare exception" with a "clear justification," the Illinois Democrat told the news outlet, to be used in "very limited circumstances."
>
> Staff for Durbin, who chairs the Senate Judiciary Committee, and Warren, a member of the Senate Democratic leadership, did not respond to queries for an update on their efforts to get better treatment for the Jan. 6 defendants.

GREG PIPER, *D.C. Jail Treatment of Capitol Riot Defendants Draws Bipartisan Outrage*, Just the News, Updated May 10, 2021, *available at* https://justthenews.com/government/local/dc-jail-treatment-capitol-riot-defendants-draws-bipartisan-outrage.

35. The plight of nearby inmates has received surprisingly little attention on Capitol Hill for the better part of a year, since the District of Columbia Department of Corrections issued its "medical stay-in-place" policies for COVID-19 mitigation.

36. It is impossible to have a free-flowing conversation with Defendant Pezzola.

37. Attorney-client meetings are in open cages where there is no confidentiality, everyone can hear the conversations including prison guards. Undersigned counsel experienced this when they visited with Dom at the D.C. Jail.

38. Contact legal visits, where a defendant meets with his lawyer in person at the jail, require the Defendant to then quarantine for 14 days. This was specifically told to undersigned counsel by several staff when visiting Defendants Pezzola.

39. Essentially, the Attorney-client privilege is nonexistent, depriving Dom of his fundamental constitutional right to counsel.

40. Considering the conditions that Dom is housed in, and the manner in which legal visits are conducted, there is the strong likelihood that the Government is intruding on the attorney-client privilege.

41. Courts have held that when a prosecution knowingly arranges or permits intrusion into the attorney-client relationship, the right to counsel is sufficiently endangered to require reversal and a new trial. Lower Courts make prejudice the linchpin for invalidating a conviction. Courts require, first, whether the prosecution deliberately intruded into the Counsel's defense. *Shillinger v. Haworth*, 70 F. 3d 1132 (10th Cir. 1995) (highlighting "a deliberate attempt by prosecution to obtain defense strategy information or to otherwise interfere with the attorney-defendant relationship through the use of an undercover agent may constitute a per se violation of the 6th amendment").

42. If confidential information is disclosed, many courts ordinarily do not try to weigh the amount of prejudice, but instead, invalidate the conviction. *U.S. v. Levy*, 577 F. 2d. 200 (3rd Cir. 1978); *U.S. v. Kembler*, 648 F 2d. 1354 (D.C. Cir 1980). The extreme difficulty of measuring such hypothetical prejudice has been noted. *See Weatherford v. Bursyey*, 429 U.S. 545, 97 S ct. 837, SI L Ed. 2d

30 (1977); Additionally, Courts will dismiss the indictment. *U.S. v. Orman*, 417 F. Supp 1126 (1) Col. (1976); *Barber v. Municipal Court*, 24 Cal 3d 742, 157 cal. Rptr. 658, 598 P. 2d. 1131 (6th Cir. 1978) *judgment vacated*, 459 U.S. 810, 103 S. Ct. 34, 74 L. Ed. 2d 47 (1982).

43. Even when information is not disclosed and no prejudice is shown, gross prosecutorial misconduct according to some courts, may result in reversal or dismissal. *Shillinger v. Haworth*, 70 F 3d 1132 (10th Cir. 1995); *US. v. Davis*, 646 F. 2d 1298, 1303 n. 8 (8th Cir. 1981); *State of S.D.V. Long*, 465 F. 2d 65 (8th Cir 1972); *State v. Quattlebaum*, 338 S.C. 441, 527 S.E. 2d 105 (2000).

44. In *Quattlebaum*, the Court disqualified the entire prosecutor's office after a deputy prosecutor eavesdropped on private conversations between an attorney and his client. According to the court, "[t]he sanction of disqualification was necessary to protect the integrity of the judicial system, whose reputation was called into question by the prosecutor's reprehensible act". *Id.* [Quattlebaum] was convicted of murder, first degree burglary, armed robbery, assault and battery with intent to kill, and possession of a firearm during the commission of a violent crime. [Quattlebaum] was [then] sentenced to death." *State v. Quattlebaum*, 338 S.C. 441, 444, 527 S.E.2d 105, 106 (2000).

45. Finally, in light of the Supreme Court directives, "that remedies should be tailored to the injury suffered, "the remedy that the Cd's containing privileged confidential defendant-attorney conversations along with other non-confidential conversations must be handed over to defense counsel, the only one legally eligible to listen to all conversations. He should then select all calls supporting ineffective claims and supporting conversations of abuse and claims, and then submit such to the court. *Shillenger v. Haworth*, 70 F. 3d 1132 (10th Cir. 1995); *US. v. Solomon*, 679 F 2d 1246 (8th Cir 1982).

46. For example, in *In re Myers* the Supreme Court noted that the Solicitor's role in determining a criminal's fate subjects him to the highest ethical standards. *In re Myers*, 355 S.C. 1, 10-11, 584 S.E.2d 357, 362 (2003). This elevated ethical obligation requires the implementation and management of a system designed to effectively "supervise his deputies so that when he discovers that they may be violating a Rule of Professional Conduct, he can immediately ameliorate any prejudicial effect that the violation may have on the defense." *Id.* (emphasis added). "This suggests that satisfaction of the corrective duty may be dependent on the success of the preventive duty; if there is an adequate supervisory system in place, notice of any SCRPC violation will be recognized quickly enough to mitigate any damage. . . .Furthermore, failure to satisfy either of the two duties imposed by Rule 5.1 may have drastic and

unintended effects.

47. For example, had *Myers* satisfied his corrective duty as a supervisory lawyer by informing defense counsel of the eavesdropped conversation shortly after he received knowledge of it, *Quattlebaum's* conviction might not have been overturned." SARAH THERESA EIBLING, *Duties and Responsibilities of Lawyers in Light of In Re Myers: Are you Aware?*, 55 South. Car. Law. Rev., 559 (2004). The government has created an untenable environment whereby we believe there is the likelihood of an intrusion into the attorney-client privilege. How can we trust the government if we cannot communicate with our own clients at the jail or over the phone in a confidential manner. Something must be done here to ensure that we can have privileged communications with our client – such as granting of bail.

POINT TWO

DEFENDANT'S NEED FOR ACCESS TO A LAPTOP AS ALTERNATIVE RELIEF.

48. Every defendant has the right to review discovery materials in their own case, especially, January 6, 2021, Defendants as the Government has deemed these cases part of the largest criminal investigation and prosecution in US history.

49. Defendant Pezzola is entitled to review every document, video, audio, and anything else that the FBI, Department of Justice, United States Attorney's

Office, or any other agency obtaining or generating video or audio materials. Such a review must not be dictated on whether his attorneys can visit him. No such burden should be placed on counsel or corrections, especially considering the financial and time-consuming burden it would place if undersigned counsel were required to sit with Dom at the jail and review each and every video.

50. "[I]n the usual case when production is ordered, a client has the right to see and know what has been produced." *See*, *e.g.*, *Geders v. United States*, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976); *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); *United States v. Truong Dinh Hung*, 667 F.2d 1105, 1108 (4th Cir. 1981).

51. Failure to review discovery with Dom can rise to the level of ineffective assistance of counsel since a "defendant generally has a right to review the discovery materials that will be used against him at trial, *United States v. Hung,* 667 F.2d 1105, 1108 (4th Cir.1981)," *Johnson v. United States*, 2:07-CR-00924-DCN-3, 2014 WL 295157, at 5 (D.S.C. Jan. 27, 2014).

52. Therefore, alternatively, Mr. Pezzola should be provided a laptop where he can view all the evidence that will be used against him:

    a. All written discovery provided by the Government;
    b. All audio and video discovery provided by the government;
    c. The ability to email and receive emails from his attorneys;

d. The ability to generate notes, documents, and other relevant materials to aid in his own defense; and
e. A guarantee that no one shall access the laptop in an effort to gain access to attorney client privileged materials.

53. Applications for accessibility for a laptop for pre-trial detainees is regularly granted around the country, and in some jurisdictions, there are specific policies in place:

a. In *United States v. Helbrans*, 7:19cr497 (NSR), a Southern District of New York Case, an application was made for the defendant to have access to a laptop and internet so that the defendant may prepare his defense, which was granted (*See* **Exhibit A**);

b. In *United States v. Reid, et al, including Brandon Nieves*, a Southern District of New York case, an application was made for the defendant to have access to a laptop "to permit clients to review large amounts of discovery in the case. Judge Halpern, granted the application. (*See* **Exhibit B**);

c. Attached as **Exhibit C**, is a sample order by Judge Denise Cote of the Southern District of New York, granting a defendant the right to have access to a laptop computer and email access to communicate with his attorneys;

d. In *United States v. Ghislaine Maxwell*, 20 Cr. 330 (AJN), a Southern District of New York case, an application was made to give the defendant access to a laptop computer to review the discovery in the case. The Court granted the request. In light of the Court order, defendant has access to her laptop 13 hours a day, 7 days a week. (*See* **Exhibit D**);

e. In *United States v. Washington*, 20 CR 30015, a Central District of Illinois case, an application was made for access to a laptop was granted. (*See* **Exhibit E**);

f. In the United States District Court for the Northern District of California, San Francisco Division, the Court has in place a Proposed Order Re Use of Digital Tablet in Custody to allow defendants to review discovery in their cases. (*See* **Exhibit F**);

g. The CJA Panel, that represents prisoners housed in the Santa Rita County Jail, have issued a memo, "CJA Panel – Tablets and accessories to enable clients to access e-discovery at Santa Rita Jail." (*See* Exhibit G);

h. The Joint Electronic Technology Working Group issued a report ***Guidance for the Provision of ESI to Detainees*** on October 25, 2016. (*See* **Exhibit H**) A specific issue raised and addressed by the report was, "[a] represented defendant who is detailed pending trial must generally have the opportunity to personally review some or all of the discovery and disclosure, which is now commonly in ESI format." (Report at 2);

i. The District of Columbia, Department of Corrections, as a policy titled **Access to Legal Counsel**, attached as **Exhibit I**. Therein, there is a policy whereby prisoners are able to review discovery on a laptop, however, the policy on it's face has the potential to invade attorney-client privilege. **Attachment C**. Further, the alternative policy, identified in **Attachment D**, punishes prisoners who opt to participate in the alternative Surveillance/Voluminous Documents Review Program by moving their housing location and putting them in restrictive housing; and

j. In this case, a better alternative to granting Defendant with a laptop will be to grant bail. If Bail isn't granted, there are concerns that the DC jail will not comply with

> Court orders and will invade the defendant's attorney-clients privilege.

54. When "Asked about Jan. 6 defendants specifically, Comer's office provided Just the News a statement Friday night. 'Reports that January 6 defendants, who have been charged but not yet convicted of a crime, [are] receiving even harsher treatment is equally appalling,' he said." GREG PIPER, *D.C. Jail Treatment of Capitol Riot Defendants Draws Bipartisan Outrage*, Just the News, Updated May 10, 2021, *available at* https://justthenews.com/government/local/dc-jail-treatment-capitol-riot-defendants-draws-bipartisan-outrage.

55. "Your ability to participate in your own defense" is not available to these clients, which is an obvious ground for appeal, he added.

56. The design of D.C. inmate facilities also makes confidentiality functionally impossible, according to Tankleff. "There isn't even a solid wall" in the space where attorneys meet with clients, he explained. Two cubicles down from one meeting, "we heard everything" another lawyer was saying, he recalled.

57. It's highly suspicious why the defendants arrested elsewhere have to be sent to D.C. when all their hearings are virtual by default, he said: "What was the purpose of transferring them?"

POINT THREE

DC JAIL: HUMAN RIGHT VIOLATIONS, ON A DAILY BASIS

58. The jail allows prisoners to leave their cells from anywhere from an hour a day to a few hours a day.

59. Religious services are not allowed. Dozens of prisoners have to share the same fingernail/toenail cutter, without it being disinfected between each use.

60. Exercise, especially outdoor access is limited or non-existent. Under the restrictive housing conditions, exercise is limited, whereas others in the jail have more ability to exercise.

61. Access to personal hygiene such as showers is nearly nonexistent, according to our client, and defense lawyers and relatives I've spoken with. Those housed in general population are able to take a shower whenever they want. The same can be said for those seeking a haircut – every person we have spoken to has stated that they have been denied a haircut since their imprisonment commenced at the DC Jail.

62. Those in general population vs. restrictive housing have more chances to wash their clothing.

63. Those in general population have the ability to either visit the law library or gain more materials than those being housed in restrictive housing.

64. The detainees, before a single moment of their trial has begun, suffer the same harsh treatment as convicted criminals incarcerated in the D.C. prison system—pandemic-justified conditions recently condemned by elected officials of both parties.

65. The treatment is so bad that the detainees have found advocates in two unlikely allies: Senators Elizabeth Warren (D-Mass.) and Richard Durbin (D-Ill.). "Solitary confinement is a form of punishment that is cruel and psychologically damaging," Warren told *Politico* last month. "And we're talking about people who haven't been convicted of anything yet." Durbin expressed surprise at how the January 6 detainees were being held and urged progressives to "amplify their criminal justice reform calls even on behalf of Donald Trump supporters who besieged the entire legislative branch in January."[13]

66. The issues of confinement have are so widespread that politicians are conducting ongoing investigations into this matter. Undesigned counsel has spoken to members on the Hill. Worse though is that when the press covers these issues, prisoners, such as Dom are retaliated within 48 hours of a newspaper article or television report airing.

[13] Congresswoman Marjorie Taylor Greene stated in her letter, "The treatment at these facilities is so bad that both Republicans and Democrats have called for change. Senator Elizabeth Warren told reporters that 'Solitary confinement is a form of punishment that is cruel and psychologically damaging.'" (**Exhibit L** at pg. 2)

67. On June 24, 2021, Marjorie Taylor Greene, a member of Congress sent a letter to: Christopher Wray, Direct of the FBI; Yogananda D. Pittman, Acting Chief of the US Capitol Police; and cc'd Muriel Bowser, Mayor of DC and Michael Carvajal, the Director of the Federal Bureau of Prisons. (*See*, **Exhibit L**).

68. In the Congresswoman's letter, she raised the following concerns of how people like our clients are being treated in custody:

    a. Visitation hours;

    b. Access to religious texts and reasonable religious service accommodations;

    c. Access to exercise;

    d. Portion of time in lockdown, solitary confinement;

    e. Nutritional content – including number of daily meals – compared with the general population;

    f. Access to communication with family and attorneys; and

    g. Whether the prosecution made potentially exculpatory evidence available to the appropriate defense counsels of record.

69. In the letter, the Congresswoman stated some other facts, which echo exactly what our clients have conveyed to us:

    a. "[T]he accused protestors from January 6 are being abused behind bards and denied their constitutional rights";

b. "There is substantial evidence that the accused of January 6 face inhumane detention conditions"; and

c. "One man was beaten so badly that he has a skull fracture and is now blind in one eye."

70. The caselaw regarding the denial of human rights, especially for those housed as a pretrial detain, favor Dominic's application for bail. If the conditions have only worsened over the past several months, there is no likelihood that they will get better, and the longer that Dom is imprisoned, the more serious the violations rise to.

71. In the past, the DC jail was found to be overcrowded, without proper care for inmates with psychiatric problems, lacking in recreation opportunities, having overly restrictive visitation rights along with generally unsafe and unsanitary conditions. Judge Bryant also ordered the defendant jail officials to initiate action to correct these violations. Judge Bryant extended many of the District Court's findings from *Campbell v. McGruder*, (JC-DC-001), which involved unconstitutional jail conditions for pre-trial detainees.

72. The D.C. District court has held, "with regard to the everyday administration of pretrial detention facilities, the Court is merely concerned with whether a "particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective"; if so, the detention facilities practice does not violate due process and thus should generally not concern the

court. *See Bell,* 441 U.S. at 548, 99 S.Ct. 1861 ("[T]he operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial."). *United States v. Medina,* 628 F. Supp. 2d 52, 55 (D.D.C. 2009).

73. The Court in *Mednia*, supports the position that since the issues raised herein rise to the level of a Constitutional violation, this Court is empowered to grant relief.

74. There is no doubt that the Government will counter that Dominic should file a grievance to address the human rights issues that are violating his Constitutional rights on a daily basis. However, this court is empowered to eradicate those violations by granting bail.

POINT FOUR

THE NATURE AND CIRCUMSTANCES OF THE OFFENSE, UNDER 18 U.S.C. 3142(G)(2).

75. In analyzing this first of the four Section 3142(g) statutory factors, "The Nature and Circumstances of the Defendant" the *Klein* court applied the following six subfactor analysis:

> These considerations include whether a defendant: (1) "has been charged with felony or misdemeanor offenses;" (2) "engaged in prior planning before arriving at the Capitol;" (3) carried or used a dangerous weapon during the riot; (4) "coordinat[ed] with other participants before, during, or after the riot;" or (5) "assumed either a formal or a de facto leadership role in the assault by encouraging

> other rioters' misconduct;" and (6) the nature of "the defendant's words and movements during the riot," including whether he "damaged federal property," "threatened or confronted federal officials or law enforcement, or otherwise promoted or celebrated efforts to disrupt the certification of the electoral vote count during the riot."

United States v Frederico Guillermo Klein, 2021 WL 1377128 at p. 6.

76. Here, regarding Dom, this Court's February 15 order states the following:

> Mr. Pezzola's charges arise from his alleged conduct as part of a large group of individuals who stormed the U.S. Capitol on January 6, 2021 while lawmakers were attempting to certify the 2020 election results. Mr. Pezzola was allegedly at the front of the group of people at various stages of the approach to the Capitol building.
>
> The United States further proffered that Mr. Pezzola stole a riot shield from a Capitol Police Officer and used it to break a window of the Capitol building, thereby allowing himself and countless others to gain entry into the building. The indictment also charges him with conspiring with other individuals regarding the charged crimes. The government also proffered that Mr. Pezzola took a video of himself in the Capitol building while smoking and stating that he knew the rioters would overtake the Capitol if they tried hard enough. A cooperating witness told law enforcement that Mr. Pezzola was part of a discussion among a group of people after the breach, in which group members stated that they would have killed anyone they came across and expressed an intent to return to Washington, D.C. Mr. Pezzola is charged with felony offenses, in contrast to individuals who are solely facing misdemeanor charges for entering the restricted areas at the Capitol. Indeed, Congress wrote into the Bail Reform Act a presumption of detention that is triggered when someone is charged with the destruction of property

> offense charged in Mr. Pezzola's indictment. Therefore, this factor weighs in favor of pretrial detention.
>
> . . . .
>
> The defendant's dangerousness/risk of flight:
>
> The danger posed by Mr. Pezzola's release is that he would engage in conduct similar to or worse than the charged offenses, specifically, attempting to thwart the democratic process by violent means or engaging in violence against government officials. Defense counsel denied any such Intent, and portrayed the charged conduct as aberrational. Nonetheless, the danger is sufficiently strong that this factor weighs in favor of pretrial detention. The Court considered whether strict release conditions, such as GPS monitoring and home confinement, could mitigate the dangerousness, but ultimately concluded that no conditions or combination of conditions could reasonably assure the safety of the community. The following factual proffers persuaded the Court that release under strict conditions would unduly endanger the community: (1) Mr. Pezzola's alleged participation in a group discussion about plans to return to Washington D.C. with weapons, in which members asserted that they would have killed former Vice President Pence or any person they got their hands on; (2) the fact that law enforcement found a thumb drive in Mr. Pezzola's house containing files that included instructions for making bombs, firearms, and poisons. Although no materials for making bombs or poisons are alleged to have been recovered, and the group's alleged plans to return to D.C. have not come to fruition, the potential for future violent conduct in support of overturning the election of President Biden is too great to be adequately mitigated by any release conditions.

(*See* ECF Doc. 18).

77. A circumstance in point, which allows for a Defendant, under the nature of these charge to be granted pre-trial release, is Dom's co-defendant, William Pepe. Dom's Co-Defendant Pepe was granted "a personal recognizance bond" on January 22, 2021. (*See* ECF Doc. 5-1).

78. In the original indictment Pezzola was charged in counts 1-11, and Pepe was charges in counts 1,2,8, and 9. In the superseding indictment, Pezzola was charged in counts 1-10, and Pepe was charges in counts 1, 2, 3, 6, 7, 8, and 9. (*See* Superseding Indictment at ECF Doc. 34).

79. Simply put, Dom is charged with three more counts than Co-Defendant Pepe, counts 4, 5, and 10.

80. Count 4 is a Robbery of personal Property of the United States under 18 U.S.C. § 2112. This count specifically charges that Dom "by force and violence and by intimidation, did take and attempt to take, from the person and presence of a Capitol Police officer, personal property belonging to the United States, that is a riot shield." What continues to be forgotten about this day is that it was chaos and there were various points where Officers are seen pushing crowds away and down. During Officers pushing the crowds back or down stairs, officers happened to drop some of their belongings.

81. As a result, people who were there would then pick material up off the floor, such as shields that the officers dropped on the floor. That behavior is not

tantamount to or the equivalent to Dom taking the shield "by force and violence and by intimidation". The record here is devoid a showing supporting that Dom used any force or intimidation to obtain the shield that was dropped on the floor.

82. Count 5 is an Assaulting, Resisting, or Impeding certain Officers count, under 18 U.S.C. § 111(a)(1). This count alleges that with the intent to commit count 3 and 4 (discussed above about the shield), Dom "forcibly assault, resist, oppose, impede, intimidate, and interfere with, an officer and employee of the United States . . ." . This count fails to take into account the same exact thing as count 4, that this shield was picked up off the floor. That means that Dom never had any contact with any officers where he took the shield from the officer. Instead, an officer dropped his shield and Dom merely picked it up off the floor. There was not assault or intimidation that took place in order for Dom to obtain a shield. Rather, all the government can proof is that Dom ended up with the shield – that is it. Because he picked it up off the floor.

83. Count 10 is an Obstruction of law Enforcement during a Civil Disorder and Aiding and Abetting count, pursuant to 18 U.S.C. § 231(a)(3)(2). This count alleges that Dom obstructed, impeded, and interfered with a law enforcement officer, "that is E.G.", and in the commission of a civil disorder,

a "obstructed, delayed, and adversely affected the conduct and performance of a federally protected function." (*See* Superseding Indictment at ECF Doc. 34 at p. 15). Defendant Michael Foy is charged with this same charge, and he was just released on bond despite being alleged to strike at law enforcement at least 10 times with a hockey stick before "rallying" others to climb through broken windows into the U.S. Capitol. (*See US v. Foy*, 1:21-cr-00108 (TSC) at ECF Doc. 46); 2021 WL 2778559, *United States of America v. Michael Joseph Foy,* Defendant, 21-CR-00108 (TSC), 2021 WL 2778559 (D.D.C. July 2, 2021)(**Attached as Exhibit K**).

84. Dom, just like Michael Foy, is a U.S. Marine, with no disciplinary history, who is sitting in isolation in a D.C. Jail[14]. He has two young daughters and a wife at home, who all want Dom back at home even if it's during the pre-trial stages of his case. His co-defendant was granted bond without a problem, and the only addition charges Dom has from his Co-Defendant are that he picked up an officer's shield off the floor, and that he "adversely affected the conduct and performance of a federally protected function".

85. These three additional charges for Co-defendant Pepe- who is out on Bond- lack specificity and are not the types of crimes that support an individual

[14] "Foy, a former United States Marine with no prior criminal record," *United States of America v. Michael Joseph Foy,* Defendant., 21-CR-00108 (TSC), 2021 WL 2778559, at 1 (D.D.C. July 2, 2021).

being denied bond during his pre-trial stages of his case, especially when there is no light as to when these January 6th cases will actually go to trial.

86. These three additional charges from co-defendant Pepe do not establish that Dom is a flight risk or that he poses a dangerousness to the any member or part of the community. As the *Foy* Court highlighted "[i]n considering 'the nature and seriousness of the danger to any person or the community that would be posed by [Foy]'s release,' " 18 U.S.C. § 3142(g)(4), the court is mindful of the D.C. Circuit's caution that a future threat must be "clearly identified" for pretrial detention to be justified, particularly given that "the specific circumstances of January 6 have passed." (*See United States of America v. Michael Joseph Foy*, Defendant., 21-CR-00108 (TSC), 2021 WL 2778559, at p. 5 (D.D.C. July 2, 2021) (*citing Munchel*, 991 F.3d at 1283–84).

87. Dominic Pezzola, even assuming *arguendo*, that every allegation the government has put forward is true, there is no evidence that Dom is a "flight risk" or a "danger to the community," a community he, his wife and children have lived in for over 20 years. *United States of America v. Michael Joseph Joy*, Defendant, 21-CR-00108 (TSC), 2021 WL 2778559, at p. 2 (D.D.C. July 2, 2021).

POINT FIVE

HISTORY AND CHARACTERISTICS OF MR. PEZZOLA, UNDER 18 U.S.C. § 3142(G)(3).

88. Dom is a 43-year-old and has no prior criminal record, is a Veteran, lives with his wife and children, and owns a business through which he employs a number of people. Those who know Dom and love him desperately want him back home. Those who have worked with Dom know his skills and work product, and one company, in particular, has indicated to the undersigned that if Dom were to be released tomorrow that he would be employed with jobs every single day for at least the next year.

89. Dom was not a leader during the events at the Capitol; and is not accused of directing people to engage in illegal conduct.

90. Dom's ties to his community are strong. He has personal relationships with members of the local business community, law enforcement, friends, and family. He has no criminal history and is not on probation or parole.[15] He has never forged or altered his identification. Nothing about his past or current history supports the conclusion that he is dangerous to anyone, a risk

[15] "Foy's 'history and characteristics' tip the scales—just barely—in favor of his release." *See* 18 U.S.C. § 3142(g)(3). Foy, who has no prior criminal record, was honorably discharged from the United States Marine Corps in June of 2020, after approximately five years of service, and had been living with family members in their Michigan home throughout the pandemic." *Id.*; *U.S. v. Foy*, 21-CR-00108 (TSC), 2021 WL 2778559, at p. 4 (D.D.C. July 2, 2021).

of flight, and/or incapable of complying with court-imposed restrictions designed to assure his return to court and protect the community from future harm.

91. In applying 18 U.S.C. Section 3142(g)(3) to the above-mentioned facts to Dom's life, the only reasonably conclusion is that such factors weigh in favor of pretrial release.

92. As argued above, Dom has *no criminal history whatsoever*, and a strong personal history in terms of finding favorability under the Bail Reform Act.

93. In a February 15, 2021, order denying Dom's bail, Magistrate Robin Meriweather, even found that:

> The defendant's history and characteristics, including criminal history:
>
> Mr. Pezzola's history and characteristics weigh in favor of pretrial release. He is 43 years old and has no prior criminal history. He is also self-employed and a Marine Corps veteran. In addition, Mr. Pezzola has strong family ties to his hometown where he still resides and lives with his wife and children. Indeed, his history and characteristics favor release strongly enough to rebut the presumption of detention.
>
> . . . .
>
> Mr. Pezzola also disputed the government's allegation that he poses a serious risk of flight. He highlighted that he voluntarily surrendered himself to police, essentially all of his ties are to his hometown, he did not significantly alter his appearance as argued by the government, and his wife would be an excellent third-party custodian because she

> was previously employed as a Pretrial Release Supervisor in New York.

(*See* ECF Doc. 18).

89. The government cannot provide evidence of a specific articulated threat to the community, or a risk of danger to any specific person. Consequently, Dom respectfully asks this Court to grant him pretrial release under the above cited line of cases in *Munchel, Klein, Norwood,* and *Foy,* and other recent precedent out of the D.C. Circuit Court and D.C. District Courts, regarding the release of persons accused of crimes related to the January 6, 2021, incident at the United States Capitol.

90. Dom's personal history, community ties, and lack of criminal history are more than sufficient proof to rebut any presumption of detention. Because of this, Dom should be released from the dangerous conditions of punishment he is experiencing in the DC Central Detention Facility.[16] He has no warrant history and has never forged or altered his identification. Nothing about his past or current history supports the conclusion that he is dangerous to anyone, a risk of flight, and/or incapable of complying with court-imposed restrictions designed to assure his return to court and protect the community from future harm.

[16] *See* Politico's article on the horrific conditions of confinement at the DC Detention Facility where our client is being detained, available at, *https*://www.politico.com/amp/news/2021/04/06/capitol-riot-defendant-beating-guards-479413, (last visited April 16, 2021).

91. The law mandates Dom's release, because the government cannot prove by a preponderance of the evidence that Dom poses a risk of flight, and the government has not proven by clear and convincing evidence that Dom poses a danger to the community. Moreover, the offenses charged do not qualify for detention. Without question, a combination of conditions, including GPS monitoring, will reasonably ensure his appearance in court, and the safety of the community. Because the events that took place at the Capitol on January 6, 2021, are unique to that day and not indicative of a future event, Dom poses no ongoing fear or threat. Release was properly decided and requires deference under the meaning of the Federal Magistrates Act. This Court's original decision to grant the government's motion for pretrial detention, is out of line with relevant legal precedent, and is violative of the United States Constitution.

92. Overall, the *Duke-Robinson-Mattis-Munchel-Foy*, line of cases, clearly establish the continued enforceability of the Bail Reform Act's presumption against pretrial detention. Especially, during circumstances where in can be reasonably inferred that a person's actions arise from an ardent desire to openly criticize the actions of government. The Court's granting of the government's motion for against pretrial release, when viewed in light of the *Duke-Robinson-Mattis-Munchel-Foy*, is grossly unjust because the objective facts

regarding Dom's personal history, and lack of criminal record have counted for nothing. While a meritless concoction of unfounded allegations was weighed against him despite the fact that he was never arrested or given the opportunity to confront his alleged accuser in court. These unfounded allegations are then intentionally comingled with the violent actions of others, to suggest that Dom was violent, incited violence, planned violence, is violent, lead violence, when in fact there is no evidence of violence whatsoever.

93. The events that took place at the Capitol on January 6, 2021, are unique to that day and not indicative of a future ongoing danger or threat. For instance, the "Stop the Steal" rally, referred the belief that the November 2020 United States Presidential Election was at best incorrectly decided and at worst stolen from the people, by a government conspiring against the people, and that if enough people showed up to express their belief about this wrongdoing- Joe Biden would not be confirmed as the 46th President of The United States. Clearly, that did not happen and any worry over Biden's confirmation moot, as he is now our President. Therefore, the argument that an ongoing future threat abides is diminished to the extent that it does not meet the threshold of clear and convincing evidence.

94. The government has failed to prove dangerousness by clear and convincing evidence because it has not identified at least one specific articulable threat to the safety on any individual or community stemming from PEZZOLA's prospective release on bail. Neither has there been an adequate demonstration that the crimes under which he has been charged qualify as violent under the meaning of the Bail Reform Act. Nor has there been any indication that his lack of criminal history, home life, employment history, community ties, or the fact that he self-surrendered were properly balanced against the allegations to which he has been charged.

95. When one, first, analyses the totality of circumstance of PEZZOLA's case, under the lens of precedent set forth in the *Duke-Robinson-Mattis-Munchel-Foy, et al.*, line of cases; and second, applies said precedent to the facts of this case, then the only logical, reasonable, and justifiable conclusion is that Dom must be released without delay. *See US v. Foy*, 1:21-cr-00108 (TSC) at ECF Doc. 45 at p. 9 (*citing Munchel*, 991 F.3d at 1283–84); *See also United States v. Munchel*, 991 F.3d 1273, 1279 (D.C. Cir. 2021), *judgment entered,* 844 Fed. Appx. 373 (D.C. Cir. 2021); *U.S. v. Mattis*, 963 F.3d 285 (2020); *U.S. v. Robinson*, *Order Setting Conditions of Release* (ECF Document No. 12 July 14, 2020); *United States v. Singleton*, 182 F.3d 7 (D.C. Cir. 1999); *United States v Chimurenga*, 760 F.2d 400, 404 (2d. Cir. 1985); *United States v. Salerno*, 481 U.S. 739; *United States v.*

Sabhnani, 493 F.3d 63, 75 (2d Cir. 2007); *United States v. Friedman*, 837 F.2d 48, 49 (2d Cir. 1988); *United States v. Xulamn*, 84 F.3d 441 (DC Circuit 1996).

POINT SIX

THE DENIAL OF BAIL TO DEFENDANT DOMINIC PEZZOLA VIOLATES HIS RIGHTS TO DUE PROCESS, EQUAL PROTECTION AND NECESSITATES THAT BAIL BE GRANTED.

96. As stated earlier, undersigned counsel, Martin Tankleff, was free on one million dollars bail, while awaiting trial for double murder. The following cases, establish that individuals around the country who have faced equal or greater criminal charges, have been granted bail, released on their own recognizance or some other form of appropriate relief was established. The denial of bail for Dominic is a denial of his Equal Protection Rights under the law.[17]

[17] Most Portland rioter have had their cases dismissed; Almost Half of Federal Cases Against Portland Rioters Have Been Dismissed; DA Vance Declines to Prosecute Protest Arrests; Charges against hundreds of NYC rioters, looters have been dropped; Most Riot, Looting Cases From Last Year Dropped by NYC DA's (*See* **Exhibit M**); https://www.theepochtimes.com/department-of-justice-treats-jan-6-detainees-with-double-standard-conservative-legal-activists_3891357.html; https://www.theepochtimes.com/jan-6-detainees-confined-23-hrs-day-risking-all-for-american-dream_3885912.html. Further, Congresswoman Greene highlights that there has been a denial of Equal Protection across America based on similar arrests:

> Consider that charges were dropped in at least 90 percent of cases where BLM and ANTIFA domestic terrorists were arrested over the last year. In Atlanta, charges were dropped in 37 cases of rioters arrested.[1] In Detroit, a judge dropped charges in 39 cases of rioters and looters. Altogether, 93 percent of cases have been dropped in Detroit.[2] In Orange County, California, assault charges were dropped for a leader of a BLM riot even though the prosecutor backed the police for making the arrest. In cities like Dallas and Philadelphia, up to 95 percent of citations were dropped or not prosecuted. In Houston, about 93 percent of citations were dropped. In Los Angeles, 93 percent of riot citations were not even filed by prosecutors.

(Exhibit L at pg.1)

Name/Charge/State/ Year	Bail/Website
• Elias Aaron Perez-Diaz • Multiple sex crimes • Wisconsin • 2021	Perez-Diaz is currently being held at the Burleigh Morton Detention Center on a $1 million bond. https://www.kfyrtv.com/2021/06/14/man-held-1-million-bond-molesting-raping-children-burleigh-county/
• Allen Weisselberg (Trump CFO) • Conspiracy, tax fraud, falsifying business records • Federal Court - New York • 2021	Has been released on bail https://www.scmp.com/news/world/united-states-canada/article/3139515/trump-organisation-charged-conspiracy-tax-fraud-and
• Allison Mack • Sex trafficking, sex trafficking conspiracy, and conspiracy to commit forced labor • California • 2018/2019	5-million-dollar bail https://www.cbc.ca/news/entertainment/allison-mack-sentenced-nxivm-1.6086143
• Lori Loughlin & Massimo Giannulli • Mail fraud • Federal Court - California • 2019	One million dollars each https://variety.com/2019/tv/news/lori-loughlin-bail-admissions-scandal-1203162547/
• Ryan Le-Nguyen	$100,000 bail

• Assault with intent to murder, assault with intent to do bodily harm and two firearms charges • Michigan • 2021	https://www.usatoday.com/story/news/nation/2021/06/10/court-increases-bail-man-who-allegedly-shot-6-year-old-michigan/7637989002/
• **Jonathan Rodriguez-Zamora** • Shooting into an inhabited dwelling, carrying a concealed weapon, being a driver permitting a person to discharge a firearm from a vehicle and three counts of attempted murder • California • 2021	3-million-dollar bail https://conandaily.com/2021/06/28/wilmington-los-angeless-jonathan-rodriguez-zamora-being-held-on-3-million-bail/
• 11 individuals • Charged with eight counts of unlawful possession of a firearm, unlawful possession of ammunition, use of body armor in commission of a crime, possession	$100,000 bail each https://www.usatoday.com/story/news/nation/2021/07/04/massachusetts-95-standoff-what-rise-moor-moorish-sovereign/7858039002/

of a high capacity magazine, improper storage of firearms in a vehicle and conspiracy to commit a crime • Massachusetts • 2021	
• Adam Christian Johnson • Three counts of entering or remaining in a restricted building without lawful authority, theft of government property and violent entry and disorderly conduct on Capitol grounds. • 2021	$25,000 bail https://www.dailymail.co.uk/news/article-9136587/Florida-rioter-stole-Nancy-Pelosis-lectern-released-jail-posting-25K-bail.html
• Derek Chauvin • Second-degree murder, third-degree murder, and second-degree manslaughter • Minnesota • 2020	$ 1 million https://bk-lawgroup.com/blog/derek-chauvin-released-on-bond-how-did-he-manage-to-pay-1m/

• Sgt. Daniel Perry • Murder, aggravated assault and deadly conduct for killing Air Force veteran and activist Garrett Foster • Texas • 2020	$300,000 https://www.forbes.com/sites/nicholasreimann/2021/07/01/active-duty-sergeant-charged-with-murder-after-killing-black-lives-matter-protestor/?sh=1310f5cd5826
• LaDonia Bogg • Murder of her two-month-old baby • D.C. • 2021	- Released on no cost bail - https://www.nbcwashington.com/news/local/mother-of-missing-dc-baby-charged-with-murder/2672717/

97. Below is a list of defendants charged in federal court in the District of Columbia related to crimes committed at the U.S. Capitol in Washington, D.C, on Wednesday, Jan. 6, 2021. Every case is being prosecuted by the U.S. Attorney's Office for the District of Columbia. Here are a few who have been granted bail:

1) **Antonio, Anthony Alexander** - Charges: Knowingly Entering or Remaining in any Restricted Building or Grounds Without Lawful Authority, Violent Entry and Disorderly Conduct on Capitol Grounds, Obstruction of Law Enforcement During Civil Disorder, Obstruction of an Official Proceeding and Aiding and Abetting, Destruction of Government Property.
Case #: 21-mj-375. Antonio remains released on bail. https://www.justice.gov/usao-dc/capitol-breach-cases;

2) **Adam Christian Johnson.** Charges: Three counts of entering or remaining in a restricted building without lawful authority, theft of government property and violent entry and disorderly conduct on Capitol grounds. Bail: $25,000 https://abcnews.go.com/US/capitol-rioter-pictured-nancy-pelosis-lectern-released-bond/story?id=75186197; and

3) **Harris, Johnny -** Charges: Knowingly Entering or Remaining in any Restricted Building or Grounds without Lawful Authority, Knowingly, with Intent to Impede Government Business or Official Functions, Engaging in Disorderly Conduct on Capitol Grounds, Engaging in Disorderly or Disruptive Conduct on the Capitol Buildings or Grounds, and Parading, Demonstrating or Picketing in the Capitol Buildings. Case #: 1:21-cr-274 Bail: Defendant remains on personal recognizance bond and has a status hearing set for 5/24/21 at 1 pm. https://www.justice.gov/usao-dc/capitol-breach-cases

98. Other Defendants from Jan 6, 2021 who received personal recognizance bond:

Name:	**Charges:**
ADAMS, Jared Hunter	Entering and Remaining in a Restricted Building; Disorderly and Disruptive Conduct in a Restricted Building; Violent Entry and Disorderly Conduct in a Capitol Building; Parading, Demonstrating, or Picketing in a Capitol Building
ABUAL-RAGHEB, Rasha N.	Entering and Remaining in a Restricted Building; Disorderly and Disruptive Conduct in a Restricted Building; Violent Entry and Disorderly Conduct in a Capitol Building; Parading, Demonstrating, or Picketing in a Capitol Building
ADAMS, Daniel Page	Civil Disorder; Obstruction of an Official Proceeding; Assaulting, Resisting or Impeding Certain Officers; Entering and Remaining in a Restricted Building or Grounds; Disorderly and Disruptive Conduct in a Restricted Building or Grounds; Disorderly Conduct in

	a Capitol Building; Impeding Passage Through the Capitol Grounds or Buildings; Parading, Demonstrating, or Picketing in a Capitol Building
ZINK, Ryan Scott	Obstruction of an Official Proceeding; Knowingly Entering or Remaining in any Restricted Building or Grounds Without Lawful Authority and engages in any act of physical violence against any person or property in any restricted building or grounds.
ALLAN, Tommy Frederick	Theft of Government Property; Entering and Remaining in a Restricted Building or Grounds; Disorderly and Disruptive Conduct in a Restricted Building or Grounds; Entering and Remaining on the Floor of Congress; Disorderly Conduct in a Capitol Building; Parading, Demonstrating, or Picketing in a Capitol Building
BALLESTEROS, Robert	Knowingly entering and remaining on restricted grounds without lawful authority and/or engaging in disorderly conduct within proximity to a restricted building to impede official functions
BARANYI, Thomas	Entering and Remaining in a Restricted Building; Disorderly and Disruptive Conduct in a Restricted Building or Grounds; Disorderly Conduct in a Capitol Building; Parading, Demonstrating, and Picketing in a Capitol Building
BARBER, Eric	Entering and Remaining in a Restricted Building or Grounds; Disorderly and Disruptive Conduct in a Restricted Building or Grounds; Disorderly Conduct in a Capitol Building or Grounds; Parading, Demonstrating, or Picketing in a Capitol Building
BARNARD, Richard Franklin	Unlawful Entry on Restricted Building or Grounds; Unlawful Entry on Restricted Building or Grounds; Violent entry and disorderly conduct on Capitol Grounds; Parading, Demonstrating or Picketing in a Capitol Building
BARNES, Joseph	Obstruction of an Official Proceeding; Entering and Remaining in a Restricted Building or Grounds; Disorderly and Disruptive Conduct in a Restricted Building or Grounds; Disorderly Conduct in a Capitol

	Building; Parading, Demonstrating, or Picketing in a Capitol Building
BARNETT, Richard	Obstruction of an Official Proceeding; Aiding and Abetting; Entering and Remaining in a Restricted Building or Grounds with a Deadly or Dangerous Weapon; Disorderly and Disruptive Conduct in a Restricted Building or Grounds with a Deadly or Dangerous Weapon; Entering and Remaining in Certain Rooms in the Capitol Building; Disorderly Conduct in a Capitol Building; Parading, Demonstrating, or Picketing in a Capitol Building; Theft of Government Property
BINGERT, Craig Michael	Obstruction of an Official Proceeding and Aiding and Abetting; Assaulting, Resisting, or Impeding Certain Officers; Civil Disorder; Entering and Remaining in a Restricted Building or Grounds; Disorderly and Disruptive Conduct in a Restricted Building or Grounds; Engaging in Physical Violence in a Restricted Building or Grounds; Obstructing, or Impeding Passage Through or Within, the Grounds or Any of the Capitol Buildings: Engaging in an Act of Physical Violence in the Grounds or Any of the Capitol Buildings
BLAIR, David Alan	Assaulting, Resisting, or Impeding Certain Officers Using a Dangerous Weapon; Civil Disorder; Obstruction of an Official Proceeding; Entering and Remaining in a Restricted Building or Grounds with a Deadly or Dangerous Weapon; Disorderly and Disruptive Conduct in a Restricted Building or Grounds with a Deadly or Dangerous Weapon; Engaging in Physical Violence in a Restricted Building or Grounds with a Deadly or Dangerous Weapon; Unlawful Possession of a Dangerous Weapon on Capitol Grounds or Buildings; Disorderly Conduct on Grounds or in a Capitol Building; Act of Physical Violence in the Capitol Grounds or Buildings
CAPSEL, Matthew	Knowingly entering or remaining in any restricted building or grounds without lawful authority; and knowingly engages in any physical violence against any

	person or property in any restricted building or grounds; or attempts or conspires to do so; Forcibly assaulted, resisted, opposed, impeded, intimidated, or interfered with any officer or employee of the United States or of any agency in any branch of the United States Government (including any member of the uniformed services) while engaged in or on account of the performance of official duties; Committed or attempted to commit any act to obstruct, impede, or interfere with law enforcement officer lawfully engaged in the lawful performance of his official duties incident to and during the commission of a civil disorder which in any way or degree obstructs, delays, or adversely affects commerce or the movement of any article or commodity in commerce or the conduct or performance of any federally protected function.

POINT SEVEN

THIS COUNT SHOULD NOT CONSIDER 18 USC 1512(C)(2) IN DETERMINING BOND.

98. As for the most serious felony offenses that Dom is charged with, *inter alia*, conspiracy, and one count of violating 18 U.S.C. 1512 (c)(2), that section does not apply to Dom's conduct. Section 1512 is entitled "Tampering with a witness, victim, or an informant" which suggests that its subsections deal with judicial-type proceedings where a "witness, victim, or informant" is expected to testify. Under Section 1512, the full subsection (c) states as follows:

(c) Whoever corruptly—

(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or

(2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.

99. Dom did not destroy documents used in the proceeding. His presence in at the Capitol did not directed to go after the vote counting was temporarily suspended does not constitute "corruptly…obstruct[ing], influenc[ing], or imped[ing]" the "official proceeding". As such, the government cannot argue that Dom's and other the protestors' lawful presence outside the Capitol was intended to "influence" the vote counting inside.

100. Senator Schumer was not deemed to have been ". . . corruptly . . . influencing" an official proceeding or protesting outside of the U.S. Supreme Court building in March 2020 before an angry pro-abortion crowd, where he threatened Associate Justices Gorsuch and Kavanaugh while oral argument was taking place during an abortion case.[18] FBI attorney, Kevin Clinesmith received mere probation, after being charged with violating this provision,

[18] *See* https://nlpc.org/2020/03/06/ethics-bar-complaints-filed-against-sen-schumer-on-supreme-court-threats/.

for altering a CIA email that was subsequentially used to improperly obtain a FISA warrant.[19]

101. Based on these above-mentioned examples, and the charges in this matter, as defense counsel for Dominic, we are duty bound to request discovery from the government to disclose the charging documents against "Code Pink" and other protestors who disrupted confirmation hearings ("official proceedings") for Justice Kavanaugh. *See* DOUG STANGLIN, CAROLINE SIMON, *Rise up, women!: Angry crowds flood Capitol Hill to protest Brett Kavanaugh nomination*, USA Today, available at https://www.usatoday.com/story/news/2018/09/28/brett-kavanaugh-hearing-protesters-christine-blasey-ford/1453524002/ (last visited April 23, 2021).

102. These individuals also were alleged to have blocked Congressional hallways and offices. *Id.* Discovery requests must be made to determine if those involved in "Code Pink" were charged with violating 18 U.S.C. 1512(c)(2) and their disposition.

103. At best, this is the only factor which weighs against Dom in favor of pretrial detention but is outweighed by all the other factors.

[19] *See also* https://nlpc.org/2021/01/29/miscarriage-of-justice-as-clinesmith-gets-slap-on-the-wrist/.

POINT EIGHT

THE DECISION IN *UNITED STATES OF AMERICA V. TIMOTHY LOUIS HALE-CUSANELLI*[20] *SHOULD NOT IMPACT THIS CASE*

104. On July 7, 2021, the U.S. Court of Appeals for the District of Columbia Circuit issued its opinion in *U.S. v. Hale-Cusanelli.* In the Court's decision, they concluded:

> a. that the non-violent nature of Hale-Cusanelli's alleged offenses weighed "just slightly[21]" in favor of release, as did his lack of criminal history[22];
>
> b. but that this was outweighed by factors including "overwhelming" evidence against him in the case, as well as a "well-documented history of racist and violent language"[23]; and
>
> c. that he "has been generally engaged in hateful conduct, if not necessarily violent conduct."[24]

105. None of the above-noted factors, and the others that the court discussed weigh against Dominic.

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[20] 2021 WL 2816245, *United States v. Hale-Cusanelli*, 21-3029, 2021 WL 2816245 (D.C. Cir. July 7, 2021).

[21] *Id.* at 3.

[22] *Id.*

[23] *Id.*

[24] *Id.*

106. Considering all of the above, there must be no delay in DOMINIC PEZZOLA's release.

VII. CONCLUSION

WHEREFORE, for the foregoing reasons, and any/all others which may appear in our reply brief, at a full hearing on this matter, and any others this Court deems just and proper, defendant through counsel, respectfully requests that he be released on personal recognizance.

FURTHERMORE, if that request is denied, defendant requests as an alternative, that he be released on Third Party Custody and placed into the High Intensive Supervision Program of the Pretrial Services Agency conditioned on reasonable conditions including but not limited to electronic monitoring, work release and curfew.

FINALLY, if all forms of pre-trial release are denied, undersigned counsel requests that this Court issue an order granting defendant Dominic Pezzola the right to possess in his cell at the D.C. Jail (or any place where he is incarcerated) a laptop[25] that contains:

a. All written discovery provided by the Government;

b. All audio and video discovery provided by the government;

[25] In the alternative to a laptop, another form of an electronic device, such as a tablet whereby Dominic can review all the discovery, including audio/video and documentary evidence, and email his attorneys.

c. The ability to email and receive emails from his attorneys;

d. The ability to generate notes, documents, and other relevant materials to aid in his own defense; and

e. A guarantee that no one shall access the laptop in an effort to gain access to attorney client privileged materials.

Dated: July 9, 2021

Martin H. Tankleff

MARTIN H. TANKLEFF, ESQ.
STEVEN A. METCALF, ESQ.
Metcalf & Metcalf, P.C.
Attorneys for Defendant
99 Park Avenue, 25th Floor
New York, NY 10016
Phone 646.253.0514
Fax 646.219.2012
mtankleff@metcalflawnyc.com
metcalflawnyc@gmail.com

STEVEN A. METCALF II, ESQ., Managing Attorney
NANETTE IDA METCALF, ESQ., Managing Attorney**
MARTIN TANKLEFF, ESQ., Associate Attorney
CHRISTOPHER DARDEN, ESQ., *Special Counsel**
JOSEPH D.MCBRIDE, ESQ., *of Counsel*
MARC HOWARD, ESQ. *of Counsel*

EXHIBIT A

Metcalf & Metcalf, P.C.
99 Park Avenue, 25th Floor
New York, NY 10016
646.253.0514 (*Phone*)
646.219.2012 (*Fax*)

Koffsky & Felsen, LLC
1150 Bedford Street
Stamford, Connecticut 06905
Tel. (203) 327-1500
Fax. (203) 327-7660
bkoffsky@snet.net

Via ECF

March 4, 2021

Hon. Judge Nelson S. Roman
United States District Judge
United States Courthouse
300 Quarropas Street
White Plains, N.Y. 10601

Re: United States v. Helbrans
7:19cr497 (NSR)

Dear Judge Roman:

I represent the pro se defendant, Nachman Helbrans, in the above referenced matter as stand-by counsel. Pro se defendant Nachman Helbrans has requested that I file the attached *Motion For Laptop Computer With Relevant Internet Access, A Copier And Printer For Defense Preparation* for the Court's consideration.

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Respectfully submitted,

_/s/ Bruce D. Koffsky _
Bruce D. Koffsky

BDK/me
cc: All Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

INDICTMENT NO.
7:19-cr-497 (NSR)

-against-

Oral Argument Requested

NACHMAN HELBRANS, ET. AL.
Defendants.

----------x

MOTION BY NACHMAN HELBRANS, Pro Se, FOR LAPTOP COMPUTER WITH RELEVANT INTERNET ACCESS, A COPIER AND PRINTER FOR DEFENSE PREPARATION

Back on July 8, 2019, Nachman Helbrans asked for self-representation in an open court. Your Honor told him explicitly that each and every motion he makes, even on the pro se matter, would have to be in writing. We fully agree with your Honor on this matter; that makes sense. Indeed, if a motion is not in writing, it could be extensively long, ambiguous, vague and confusing. Moreover, it does not give sufficient time and opportunity for the other parties to know on what exactly to respond. Additionally, it deprives the court of the opportunity to make the right decisions according to what is accurately requested and discussed by the parties. Let alone the famous issue of "reserved for appeal"; when there is no writing, it would be challenging, and at sometimes impossible, to determine what exactly was reserved for an appeal or alternatively waived by the parties. Clarifying unwritten issues by extending the oral arguments may sometimes confuse even more and complicate the matter even further. All the above are true even when all the arguers are native and fluent English speakers, let alone in a case, as in ours, where many of the arguers are nonnative English speakers. As such, we must agree with this court's prior advice and we must undertake that each and every substantial motion we will be making from now on will be in writing.

Oral arguments should be reversed for issues already well discussed in a prior writing, not to begin with.

The Fifth Amendment grants that no one shall be "deprived of life, liberty or property without due process of law." Due process includes a fair trial, that the person should have the opportunity to respond to the allegations made against him, and be given the opportunity to comply with his duty to present his answer before the court and jury, pretrial as well during the trial and post-trial. A fair trial means that both sides, the prosecution and the defense, have fairly the same chance to present their arguments and counter-arguments before the court. If one party gets an opportunity that the other party cannot compete with, it is obviously not fair. At this stage, for reasons self-explained by the essence of this motion, it is impossible for us to present a comprehensive memorandum of law regarding this matter of fair trial; therefore, we will simply leave this matter for common sense.

Now to the relevance to our situation: as we explained to your Honor in our last writing, I grew up and was educated in the Orthodox Hasidic Jewish community, and my primary language is Yiddish and Hebrew. Although I understand, read and communicate in English fairly well; still I cannot hand-write in English to such a level as drafting a substantial letter; however, I have regularly used a computer as part of my prior work experience, as well for important private matters, and as such I am able to write in English when assisted by a computer and relevant computer programs.

Furthermore, in today's world and with the current technology, even an educated and experienced lawyer could not draft and finalize a motion just by his first handwriting. In fact, I doubt if, in the last decade, any substantial motion prepared by an attorney could have been completed without a computer.

To particularize the matter, in my case, a computer is necessary for my defense for multiple reasons.

First, as I am use to computer writing since an early age, I can hardly finalize a substantial document in handwriting, should it even be in Yiddish or Hebrew, unless the document is finalized along with my first draft; otherwise, it would only result in a complicated hard-to-read document, and will probably miss the point. Let alone the fact that for safety reasons, pens provided here at the jail are special short, soft and small which barely serve to write a short letter to family or a friend, but by any means are not suitable to write complicated documents, letters or motions.

Second, since English is not my first language, I heavily rely on the computer to draft, edit and correct my motions by utilizing editing programs that I have used in the past to form any substantial document in English. Those computer programs assist, namely in spelling, grammar, synonyms, suggestions and translations. Generally, those programs require an internet connection to function properly. To exemplify the first and second reasoning above, I will share my and my co-defendants' past experience with document preparation in jail. We eagerly tried for over two years in jail to overcome the hardships and befriend with the poor pen and paper provided here. In fact, on the first day that we were incarcerated, some of our lawyers told us that we should write down the facts of our case and our arguments even in Hebrew or Yiddish, and they will arrange the translations to make use of them. We tried and then again tried, just to be proven that there is simply no way that any useful document, even six pages long, could be completed in a timely fashion in this manner.

I will give one particular example to your Honor. Just after I was denied bail in May 2020, my lawyer discussed with me the matter and the government's approach; I conclude that the first step should be to try to inform the government itself of the true story and background. I, together

with defendant Mayer Rosner, jointly drafted a comprehensive letter to the government. For convenience reason, it was formally addressed to then-attorney general Mr. Geoffrey Berman; however, in fact, we intended to present the letter to the entire prosecution team on this case, as well as to use it as an attachment to some of our motions. The letter explains our view on the case, what we believe would give the reader enough knowledge of the facts and truth about the allegations, the Teller children and our community. We were, and we are still convinced that if the prosecution had been receiving the letter, they would already have taken action to remedy the situation. However, since we had no computer access, we had no choice but to draft the letter in Hebrew. Despite working on it day and night, it took us three months to handwrite the letter due to the prison conditions. Finally, we sent it out for copy typing, but it took another seven months to typeset it due to the handwritten numerous additions and amendments. The translation will probably take at least six weeks. Calculating the time from writing to finalizing the translation should bring us to over a year just for one simple (albeit a relatively long) letter. Suppose we would need to write substantial motions and affidavits in such a manner. In that case, we will spend decades before they will be completed, or we will be forced to waive altogether our right to present any pretrial motions, not because of a strategic move, but rather simply to avoid spending behind bars ten or fifteen times more than any possible sentence we might get if somehow unjustly found guilty at trial.

Third, in this case, the proper knowledge and understanding of the law, both substantive law and procedural law, are vital for defense preparation. In this regard, district courts of various circuits, including the Second Circuit, clarified in various rulings that it is the duty of an attorney or a pro se defendant to study and verify every law he quotes to assure that this law is relevant to the case, complete and still considered good law and not overruled. In the same token, they

clarified that it would be against the duty of an attorney or a pro se defendant to quote any rule, case or law without study and verification of the jurisprudence developed around it.

Before the computer times, judges and lawyers always needed access to a comprehensive library of hundreds if not thousands of law books, in addition to a full correspondence of opinions and analysis by judges, professors and scholars. No lawyer could sit in his bureau (or his basement) and draft motions without them. This practice was always around since the establishment of US courts; even in common law times it never functioned differently.

As happened with most aspects of our life, when technology developed, we got dependent on it, since the previous pre-technology options disappeared or became extremely rare; and once so, it became virtually impossible to do the same vital task without the help of technology. One example, try to make banking, transactions and payments, sales and purchases, all without the use of technology. The same is true with the law field; since law libraries got computerized, especially by the two programs WestLaw and LexisNexis, it became almost impossible to draft any legal motion without using one of those (or similar) programs, especially when it comes to complicated motions which require so much knowledge in law, to distinguish so many cases in so many extensive issues, including constitutional issues, federal and state, criminal and civil, administrative and family law, international and uniform acts, all related to this trial.

There cannot be a fair trial if from one side there are the native English speaking prosecutors who have access to the best computers, desktops and laptops, and the best programs available, either to read the law and to draft motions, take notes and whatsoever, while on the other side there are pro se incarcerated defendants, secondary in English, who are not granted even a normal pen and an ordinary notebook, let alone that they cannot cope with writing even one line

in English handwriting without significant spelling and grammar errors, as long they are not granted access to a computer and relevant internet resources.

In the prison there is a so-called "law library", however with all the time-restrictions and conditions surrounding the library, it cannot be considered as a normal library that could enable one to prepare legal motions, but rather can be considered some sort of entertainment for inmates. Take into account the fact that there are just two slow computers for forty inmates who have to share the one or two hours available. Moreover, only published cases are available there, and for reading only. Let alone that most of the times when we arrive someone else already occupies or wants to occupy them, and if we got lucky to use it, it is almost useless due to the slowness of the computer and the system crashing when showing results of a search done, besides the poorness of the program installed there who does not allow to query a useful search. Moreover, even after finding some case, we have to copy write it by hand, since we usually have to wait two weeks to get it printed, and when finally printed, there is no way to cooperate the relevant content them into the motion.

The two typewriters available in the "library" are of the same faith. On a good chance they have ink, but if they do have ink, they lack paper; and then we have to fill out a complete form and beg around the clock to receive some paper. However, let us not forget that usually, one of them or both are out of order.

During the last 12 months, the law library was almost completely shut down; most of the time, the library was entirely closed. When it is luckily opened, it has so many restrictions that make it impossible to get some work done there. As of today, the library keeps opening and closing without too much prior notice.

Fourth, the government has produced voluminous discovery. We have much to say (actually to write) about the content of the discovery we received and much more about the content of the discovery not received yet. However, the government's conduct or misconduct is out of the scope of this motion. What is important here, that we have little use from the discovery received. While most of the days we cannot access the computer designated for discovery review, even we get to there, most of the files could not be opened due to many essential programs missing there, let alone the fact that the computer operating system software continually crashes.

There were extensive efforts from our side and from our counsels to partly solve the issue. We will not deny that it is possible that the government also tried to solve this problem in particular. However, to date, the problem remained unsolved. For a short time, we were provided a relatively new laptop on which many of the previous inaccessible files were accessible. However, this new laptop went somehow to another jail section and all the previous problems remain unsolved. In any case, we never had a chance to incorporate the discovery's content into our motion, nor were we able to type or translate their content in a reliable manner.

Fifth, we need to contact and have access to many persons and/or institutions in a timely manner and on a writing basis and receive a reply from them in a timely manner and on a writing basis. To name a few, we need access in a timely manner to the docket, the court clerk, our standby counsels, the government, as well as many witnesses and potential witnesses, including various experts. To contact them all and to receive a timely reply via the prison phone system or the prison mail system, will render all contacts meaningless and useless in the context of pretrial preparation. We will not waste the court's time to elaborate on this matter since all our counsels always complained about that and always suggested a contact on a writing basis, which was never available to us as mentioned above.

Given all the above, we cannot exercise our Fifth Amendment right of due process without given reasonable access to computers, a copier, a printer, and relevant internet resources, along with the most essential office/paper supplies. The computer will be used only for discovery, legal research, drafting of motions and other legal paperwork, and maintaining contact with those assisting as in preparing the in 2021, as none of those mentioned above tasks is possible to carry out without a relevant use of the internet.

Now in a direct reference to the government: dear prosecutors, there is no need to automatically object to each and every request that we put forward. The government is obligated for truth-seeking, not for overzealous prosecution. Objecting to our legitimate request for vital means of defense is not in line with the truth-seeking mission the government is obligated for. Let us say that all our pretrial motions will at the end of the day be resolved in favor of the government, still, to prevent it from being written in the first place is not what the government is entrusted and paid for; rather, they are entrusted and paid to secure a fair trial that includes a fair opportunity to raise any sincere issue of defense, pretrial, during the trial and post-trial.

In the famous case of Brady v. Maryland, 373 US 83 - Supreme Court 1963, the Supreme Court reminded the prosecutor and the public of the true mission. In their words: "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: "The United States wins its point whenever justice is done its citizens in the courts"." In footnote 2, the Supreme Court quoted the strong words of Judge Simon E. Sobeloff: "The Solicitor General is not a neutral, he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case. My client's chief business is not to achieve victory but to establish justice. We are constantly

reminded of the now classic words penned by one of my illustrious predecessors, Frederick William Lehmann, that the Government wins its point when justice is done in its courts."

In light of that, we expect the government to fully agree with our legitimate request, especially that the computer and the relevant internet resources will be used to establish an honest communication with the government that will solve many of the future challenges of this case with minimal wasting of judicial resources.

We appeal to the government not to fool us around with academic questions if there is an absolute constitutional right for a computer and internet for incarcerated pro se defendants. Everyone knows that the constitution was written before the computer and internet ever existed, so it could not exist a computer-related absolute constitutional right. However, the absolute right we are talking about is due process and fair trial. The computer and the internet are only means mandatory to achieve those goals. We further beg the government not to fool the court and us around with manufactured security concerns, since the computer and the internet and all activities can and probably be recorded and even monitored, so logically it should not be any security concern more than the regular prison phone system or ingoing and ongoing mail. In fact, many federal, state and county jails and prisons already have on some way or another an ingoing and outgoing email system for the prisoners, although that our request is somehow unique because our case and situation are unique as well.

The government shall also take into account that without a computer, we are de facto prevented from any possibility to take part in a legal discussion about the very same subject, so it will be unfair practice to begin with.

Finally, we will cite some cases that we noticed that computers and/or internet were specially allowed in jail when consideration about self-representation so required. In United States

v. Buswell, No. 11-CR-198-01 (W.D. La. January 18, 2013), the court found the defendant's Fifth Amendment right of due process was not being violated because "Buswell can utilize a laptop to read documents that are on DVD/CD, he can keep documents in his cell and internet access is available on request. There was no evidence to the contrary. …the facility where the defendant is housed will accommodate him by providing access to a conference room, a laptop computer that can read CD's (which he may even be allowed to keep in his cell with the permission of the warden), access to a printer and/or copier and access to his attorneys at all times other than during lockdown periods when meals are served twice a day…

The evidence adduced at the detention hearing is as set forth above-the defendant can have access to his attorneys at any time other than in two mandatory lockdown periods when meals are served, he can have access to a conference room to review documents with his attorneys, he can have access to a computer to review documents on CD/DVD, or he can have the documents themselves, as well as access to a printer or copier and the internet. He can telephone his attorneys and those calls, while recorded as part of normal security policy, are not monitored by the government and there is no evidence to the contrary. The only meaningful difference between this type of access to counsel compared with that of home incarceration is the location where conferences take place." Likewise in United States v. Dupree, 833 F. Supp. 2d 241 (E.D.N.Y. 2011) the court rejected Dupree's bail motion that his pretrial release was necessary to prepare his defense as the court relied on the fact that "MDC will arrange for the following to be provided to Dupree at MDC so that he can adequately prepare for and participate in his defense with counsel: (1) access to an attorneys' visiting room with a computer that can read DVDs from 9:00 a.m. to 3:30 p.m., with or without counsel, beginning on November 7, 2011 and until the start of trial on December 5, 2011; (2) Dupree's access to the aforementioned attorneys' visiting room can be

extended from 3:30 p.m. to 9:30 p.m., provided Dupree is with counsel during this time and twenty-four hour notice is given to MDC for each day an extension is requested; (3) access to counsel and agents of his counsel in an attorneys' visiting room with a computer that can read DVDs following each trial day until 9:30 p.m., provided that twenty-four hour notice is provided to MDC for each day such access is requested; and (4) access to a locked storage area for the storage of documents so that Dupree has additional space other than his detention cell to store documents... Dupree will have 12.5 hours of daily access to a computer that can read DVDs and be used to review documents." Similarly in U.S. v. Hazelwood, Case No.: 1:10 CR 150 (N.D. Ohio Feb. 16, 2011), "The court determined at a hearing held on January 12, 2011, that the Northeast Ohio Corrections Center ("NEOCC") must allow Mr. Hazelwood to use a new computer which he has been provided to review documents. An employee of the Center confirmed at the hearing that there are no special IT requirements for his doing so. Further, NEOCC has made substantial accommodations for Mr. Hazelwood well beyond those accorded most detainees based on the complex nature of this case. Among other things, he is allowed to possess more boxes of information than other inmates, and one of five video conferencing rooms is substantially devoted to his use."

It is worth noting that all three cases quoted above were not pro se and were represented by advocate counsel, and the special computer and/or internet access allowance were all related to a very limited issue of pretrial discovery; our case is much stronger. In the case United States v. Waddell, 151 F. Supp. 3d 1317 (S.D. Ga. 2015), the pro se defendant was allowed up the sixteen hours of internet connection, aberrantly for a limited discovery issue. The defendant was denied additional time beyond those sixteen hours only because a sincere defense cause was not provided.

In our case, the cause of motion drafting, legal research, communicating with the government, verifying the laws and rules etc., all are self-evidently required for the defense.

Therefore, we see it reasonable and legitimate to ask the Honorable court to order that we get laptop computers with relevant internet access, a copier and printer. Those should be available for all-day use, either in our cell or in a designated place where we can reach during all the hours of the day besides lockdown times. Those computers should not be monitored by the prosecution, rather they could be monitored by an appointed staff member of the prison with whom we would have the opportunity to discuss which kind of use of the computers and internet is essential for our defense. Should we ever use those devices for anything else than preparing our defense, such as for friendly family letters or videoconferencing or for religious books not related to the case, it should prompt a proper investigation by the prison personnel as a contempt of court; however, nothing should be handed over to the prosecution without ordinary electronics search warrant.

We thank your Honor in advance for taking into consideration to grant us our rights under the Fifth Amendment so we can adequately prepare our defense for a fair trial to prove our innocence.

Dated: Valhalla, New York
November 20, 2020

Respectfully Submitted,
Pro Se Defendant
Nachman Helbrans.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

NACHMAN HELBRANS and MAYER ROSNER,

Defendants.

19 cr 497 (01) and (02) (NSR)

NELSON S. ROMÁN, United States District Judge:

Pro se Defendants Nachman Helbrans (01) and Mayer Rosner (02) requested approval for the use of CJA funds to purchase laptops that they can use to prepare their defense while detained at Westchester County Jail ("the Facility"). (ECF Nos. 202, 203.) In their papers and during a status conference held on March 4, 2021, Defendants represented that without laptops they will not be able to write in English, conduct research, review discovery, or otherwise prepare their defense in an effective and timely manner.

The application is granted as follows:

1. Standby Counsel for Defendants Helbrans (01) and Rosner (02) are authorized to procure with CJA funds, a laptop computer or similar device (hereinafter, "Electronic Device") for each Defendant so that he may prepare his defense.[1] The Court also authorizes the use of CJA funds for necessary external hard drives, software programs, charging cables, or adapters.

2. Standby Counsel shall coordinate with the Facility to ascertain from the Facility what it will permit, to ensure that the Electronic Devices procured are acceptable to the Facility, to confirm who at the Facility will accept delivery of the Electronic Devices, and to confirm when Defendants will have access to the Electronic Devices and where they will be stored when not in use. Standby

[1] The Court reiterates that each Defendant represents himself and only himself. Each pro se Defendant must communicate with the Court (whether in writing or orally) on his own behalf and may not purport to represent any other Defendant.

Counsel shall also ensure that the Electronic Devices are compatible with any external drives upon which discovery has been or will be exchanged.

3. Once Standby Counsel have procured the devices, and prior to sending them to the Facility, Standby Counsel shall confirm that the wireless and printing capabilities are configured in a manner acceptable to the Facility and that necessary software is installed and functional for word processing, Hebrew/Yiddish to English translation, and reviewing discovery materials. If the Facility indicates that access to the internet is not possible or only possible on a very limited basis, Standby Counsel shall determine whether an inexpensive translation software program can be installed on the Electronic Devices that can be used without internet access and, if so, preload the Electronic Devices with said program. Standby Counsel shall also create a password protected administrative account on the Electronic Device that is separate from the defendant's password protected user account to prevent any user from making changes to the Electronic Device. Only Standby Counsels shall have access to this administrative account.

4. Before it is sent to the Facility, each Electronic Device shall be clearly marked with the name, ID number, and Marshal's registration number of the Defendant who has been assigned to receive that particular Electronic Device.

5. The Defendants can access and use their respective Electronic Devices on a temporary basis and at times approved by Facility personnel for the sole purpose of preparing their defense in this matter. The Electronic Devices may not be used for any other purpose, including, but not limited to, personal correspondence. Use of the Electronic Devices must take place in the Defendant's unit or a location where, to the extent possible, a Defendant is not disrupted. After a Defendant is finished using his Electronic Device for the day, Defendant shall return the Electronic Device to the designated Officer for safekeeping.

6. Because of the volume of discovery and the complexity of this matter, The Court requests that Defendants be afforded the ability to use the Electronic Devices as much as possible, but no less than several hours each day, to the extent consistent with the Facility's requirements. The Court also requests that, especially if they are not able to access the internet on their Electronic Devices, Defendants continue to have access to legal research tools in the Law Library and that, as needed, Defendants be permitted to print from their Electronic Devices directly or by using a flash drive to transfer documents to a computer from which they can print.

7. This Court will revisit this Order and any Defendant's access to his respective Electronic Device if it appears that any Defendant is not abiding by this Order.

8. No later than the conclusion of the proceedings against Defendants in District Court, whether through dismissal of the charges or sentencing, Defendants shall return their respective Electronic Devices to their respective Standby Counsel, who will promptly provide them to the Administrative Office of the U.S. Courts.

The Clerk of Court is directed to terminate the motions at ECF Nos. 202 and 203. Standby Counsel for Defendants Helbrans (01) and Rosner (02) are directed to send a copy of this order to their respective Defendants and to file proof of service on the docket.

Dated: March 5, 2021
White Plains, NY

SO ORDERED:

HON. NELSON S. ROMAN
UNITED STATES DISTRICT JUDGE

03/04/2021	Minute Entry for proceedings held before Judge Nelson Stephen Roman: Status Conference via telephone as to Nachman Helbrans, Mayer Rosner, Aron Rosner held on 3/4/2021. Pro se Defendant Nachman Helbrans (01) present with standby counsel Bruce Koffsky, Esq. and Peter Schaffer, Esq. Pro se Defendant Mayer Rosner (02) present with standby counsel Susanne Brody, Esq. Defendant Aron Rosner (03) present with counsel Evan Lipton, Esq. AUSAs Samuel Adelsberg and James Ligtenberg also present. Ruth Kohn is standby (Yiddish) Interpreter. Angela ODonnell is court reporter. The Court finds that each Defendant knowingly, intentionally and voluntarily waives his physical appearance and each Defendant consents to this proceeding to be conducted telephonically. After separate Faretta Hearings, the Court issued orders granting each Defendants Helbrans (01) and M. Rosner (02) leave to proceed pro se. The pro se Defendants have discovery but its very difficult to review. The Court will issue separate orders granting CJA funds to purchase a laptop for pro se Defendants Helbrans (01) and M. Rosner (02) to review the discovery and file supplemental motions. Motions had been submitted previously by counsel. A supplemental motion briefing schedule will be discussed at the next conference. Pro se Defendants Helbrans (01) and M. Rosner (02) need to discuss the issue of trial with their respective standby counsel. The Government will make an early production of 3500 materials but cant do so within the requested 30 day period. Protective Orders are needed and instructions must be given to pro se Defendants Helbrans (01) and M. Rosner (02) concerning accessing sensitive materials. The next Status Conference via teleconference for Defendants Helbrans (01), M. Rosner (02) and A. Rosner (03) is scheduled for March 26, 2021 at 11:00 am or, alternatively, for March 26, 2021 at 3:00 pm. The Court grants the exclusion of speedy trial time for Defendants Helbrans (01), M. Rosner (02) and A. Rosner (03) from today, March 4, 2021, until March 26, 2021 in the interests of justice and to permit Defendants time to review discovery, file motions and hold plea negotiations. Defendants Helbrans (01) and M. Rosner (02) remanded. Bail continued for Defendant A. Rosner (03). (jbo) (Entered: 03/26/2021)

STEVEN A. METCALF II, ESQ., Managing Attorney
NANETTE IDA METCALF, ESQ., Managing Attorney**
MARTIN TANKLEFF, ESQ., Associate Attorney
CHRISTOPHER DARDEN, ESQ., *Special Counsel**
JOSEPH D.MCBRIDE, ESQ., *of Counsel*
MARC HOWARD, ESQ. *of Counsel*

EXHIBIT B

Metcalf & Metcalf, P.C.
99 Park Avenue, 25th Floor
New York, NY 10016
646.253.0514 (*Phone*)
646.219.2012 (*Fax*)

Andrew G. Patel
Attorney-at-Law
80 Broad Street, Suite 1900
New York, New York 10004
apatel@apatellaw.com **Telephone 212-349-0230**

February 25, 2021

The Honorable Philip M. Halpern
United States District Judge
United States Courthouse
500 Pearl Street
New York, NY 10007

Re: U.S. v. Reid, et al, including Brandon Nieves
S3 20 Cr. 626 (PMH)

Dear Judge Halpern:

This letter is respectfully submitted on behalf of all appointed counsel seeking an Order authorizing counsel to use CJA funds to purchase laptop computers to permit our clients to review the large amount of discovery in this case.

Attached to this letter, please find a proposed Order which details the process by which the computers will be prepared, loaded with software and discovery. The Order also details how the computers will be delivered to the facility, accessed by the defendants and returned to the Administrative Office of the U.S. Courts at the end of the case. We anticipate that the process set forth in the proposed Order will serve as a template to permit retained counsel to provide laptops to their clients but without the use of public funds.

This application is the result of a joint effort by the Circuit Budgeting Attorney, the Coordinating Discovery Attorney, several members of the U.S. Attorney's Office, a number of my co-counsel and the staff of the Westchester County Jail.

As this is the first time that the Westchester County Jail has agreed to allow defendants to have access to laptop computers, we are proposing that the first laptop be provided to Brandon Nieves, who is represented by Daniel Hochheiser, Esq. Mr. Nieves will serve as a test case to see if any adjustments need to be made to the process before we scale up to include all of the codefendants who may wish to participate.

I am confident that I speak for everyone who has been working on this project when I say that we will make ourselves available to answer any questions that Your Honor may have about this request at Your Honor's convenience.

Respectfully submitted,

/s/Andrew Patel
Andrew G. Patel

cc: All counsel by ECF

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
-v-	:	ORDER
Dwight Reid, et al, including Brandon Nieves,	:	S3 20 Cr. 626 (PMH)
Defendants.	:	

PHILIP M. HALPERN, District Judge:

Counsel for Brandon Soto, acting on behalf of all Counsel, has requested approval for the use of CJA funds to purchase a laptop for defendant, Brandon Nieves and any codefendant who wishes to review discovery materials produced by the Government and therefore needs to have access to an electronic device under the terms ordered below. Defense counsel represents that without this laptop the defendant will be unable to review effectively the massive amount of discovery material that the Government has provided pursuant to Rule 16 of the Federal Rules of Criminal Procedure.

The application is granted as follows:

1. Defense counsel, is authorized to procure with CJA funds, a laptop computer[1] and any subsequent external hard drives and headphones that may be required to provide the defendant with access to the discovery (collectively, the "Electronic Device") for purposes of the discovery review. Counsel shall provide the electronic devise to Ms. de Almeida or her staff shall review the Electronic Device and confirm that the wireless and

[1] Counsel shall consult the CDA, Julie de Almeida, to determine the model of laptop computer that is acceptable to the facility where their client is housed.

printing capabilities are disabled in a manner acceptable to the facility in which the given defendant is lodged. Ms. de Almeida or her staff shall load on to the Electronic Device such software as the defendants will need to review and make notes on the discovery. Ms. de Almeida or her staff shall set a password protected administrative account on the Electronic Device that is separate from the defendant's password protected user account to prevent any user from making changes to the Electronic Device.

2. Either defense counsel or Ms. de Almeida shall provide the Electronic Device to the Government. Each Electronic Device will be clearly marked with the name and ID number and Marshal's registration number of the defendant who has been assigned to receive that particular Electronic Device.
3. The Government shall save the discovery onto the Electronic Device as well as on subsequent external hard drives that may be required to provide the defendant with access to the discovery.
4. The Government shall confirm that the discovery is viewable on the Electronic Device (for example, that the audio recordings and video play on the Electronic Device) prior to sending it to the facility where the inmate is housed.
5. Within 30 days of receipt of the Electronic Device, the Government shall send the Electronic Device to an Officer designated by each facility to receive the electronic device. The designated Officer shall keep the Electronic Device and charging wire in their office.
6. The Defendants can access the Electronic Device for review on a temporary basis and at times approved by prison personnel. This review must take place in the defendant's unit or a location where to the extent possible Defendant is not in the presence of any other

inmates. Because of the volume of discovery, Defendants should be afforded the ability to review it for several hours each day to the extent consistent with the conduct of the facility in which the defendant is lodged.

7. The Defendants are prohibited from copying any information from the discovery.
8. After he is finished reviewing the discovery for any given day, the Defendant shall return the Electronic Device to the designated Officer.
9. The Defendants are strictly prohibited from printing, copying, sending, publishing, or transferring any of the discovery materials on the Electronic Device. It is the intent of this Order that only Defendant assigned to a particular Electronic Device (and his counsel and any other members of his legal defense team, including investigators. Paralegals, and support staff, as needed to confer with the Defendant) will have access to the discovery materials on the Electronic Device.
10. This Court will revisit this Order and any Defendant's access to the Electronic Device if it appears that any Defendant is not abiding by this Order.
11. IT IS FURTHER ORDERED that no later than the conclusion of the proceedings against the defendant in the district court, whether through dismissal of the charges against the defendant or the sentencing of the defendant, the defendant shall return the Electronic Device to his counsel, who will promptly provide it to the Administrative Office of the U.S. Courts if it was purchased with CJA funds.

Dated: White Plains, New York
March 1, 2021

SO ORDERED

PHILIP M. HALPERN
United States District Judge

STEVEN A. METCALF II, ESQ., Managing Attorney
NANETTE IDA METCALF, ESQ., Managing Attorney**
MARTIN TANKLEFF, ESQ., Associate Attorney
CHRISTOPHER DARDEN, ESQ., *Special Counsel**
JOSEPH D.MCBRIDE, ESQ., *of Counsel*
MARC HOWARD, ESQ. *of Counsel*

EXHIBIT C

Metcalf & Metcalf, P.C.
99 Park Avenue, 25th Floor
New York, NY 10016
646.253.0514 (*Phone*)
646.219.2012 (*Fax*)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	--cr-- (DLC)
-v-	ORDER
,	
Defendant**[s]**.	

DENISE COTE, District Judge:

On **[date]**, CJA counsel requested approval for the use of CJA funds to purchase a laptop for defendant **[name]** to review discovery materials produced by the Government. Defense counsel represents that without this laptop the defendant will be unable to review effectively the discovery material that the Government is installing on the two drives defense counsel is providing to the Government (the "Attorney Drive" and the "Defendant Drive"). It is hereby

ORDERED that defense counsel's request for CJA funds to purchase a laptop for the defendant to review discovery is granted.

IT IS FURTHER ORDERED that the defendant shall not have access to material installed on the Attorney Drive, which is classified in the parties' protective agreement as "sensitive disclosure materials", except in the following circumstances:

1) in a meeting with defense counsel in which material on the Attorney Drive is reviewed by the defendant in the presence of counsel; or

2) in a video conference with defense counsel, who may use screen-sharing to permit the defendant to review the materials on the Attorney Drive.

IT IS FURTHER ORDERED that the defendant shall not download the "sensitive disclosure materials" shown to him by his attorney.

IT IS FURTHER ORDERED that the defendant may not use the laptop for any purpose other than reviewing discovery materials produced in this case, for communicating with his CJA counsel, and for other communications relating to his defense in this case.

IT IS FURTHER ORDERED that no later than the conclusion of the proceedings against the defendant in the district court, whether through dismissal of the charges against the defendant or the sentencing of the defendant, the defendant shall return the laptop to his counsel, who will promptly provide it to the Administrative Office of the U.S. Courts. If convicted, the defendant may not retain this laptop during any appeal.

Dated: New York, New York

[MONTH DAY], 2020

DENISE COTE
United States District Judge

STEVEN A. METCALF II, ESQ., Managing Attorney
NANETTE IDA METCALF, ESQ., Managing Attorney**
MARTIN TANKLEFF, ESQ., Associate Attorney
CHRISTOPHER DARDEN, ESQ., *Special Counsel**
JOSEPH D.MCBRIDE, ESQ., *of Counsel*
MARC HOWARD, ESQ. *of Counsel*

EXHIBIT D

Metcalf & Metcalf, P.C.
99 Park Avenue, 25th Floor
New York, NY 10016
646.253.0514 (*Phone*)
646.219.2012 (*Fax*)

COHEN & GRESSER LLP

800 Third Avenue
New York, NY 10022
+1 212 957 7600 phone
www.cohengresser.com

Christian R. Everdell
+1 (212) 957-7600
ceverdell@cohengresser.com

January 14, 2021

BY ECF

The Honorable Alison J. Nathan
United States District Court
Southern District of New York
United States Courthouse
40 Foley Square
New York, NY 10007

Re: *United States v. Ghislaine Maxwell*, 20 Cr. 330 (AJN)

Dear Judge Nathan:

We write on behalf of our client, Ghislaine Maxwell, to respectfully request that the Court order the Bureau of Prisons to give Ms. Maxwell access to the laptop computer provided by the government so that she can review discovery on weekends and holidays.

At the request of defense counsel, the government provided Ms. Maxwell with a laptop computer to review the voluminous discovery, which was produced on a series of external hard drives. Currently, Ms. Maxwell is given access to the laptop only on weekdays. On weekends and holidays, Ms. Maxwell must use the prison computer on her floor to review discovery. However, the prison computer is not equipped with the software necessary to read large portions of the discovery recently produced by the government. As a result, Ms. Maxwell loses several days of review time every weekend and every holiday because she does not have access to the laptop. If Ms. Maxwell is to have any hope of reviewing the millions of documents produced in discovery so that she can properly prepare her defense by the July 12, 2021 trial date, she must have access to the laptop every day, including weekends and holidays.

Defense counsel has raised this issue with the government and it has no objection to Ms. Maxwell having access to the laptop seven days a week. At the request of defense counsel, the government has contacted officials at the MDC on several occasions in the past few weeks to request that they lift this restriction, but without success.

There is no principled justification for this restriction. Ms. Maxwell was given access to the laptop every day (including weekends and the Thanksgiving holiday) for the entire 14-day period that she was quarantined in her isolation cell in November-December 2020 because she had come into close contact with a member of the MDC staff who had tested positive for COVID. In addition, the laptop is kept in a locker in the same room where the prison computer is located, so it

would not require any change in Ms. Maxwell's movements to give her the requested access. Furthermore, on at least three occasions since she was released from quarantine, Ms. Maxwell's security team gave her the laptop to review discovery on the weekend.

There is clearly no actual impediment preventing the MDC staff from providing Ms. Maxwell access to the laptop on weekends and holidays. Given the millions of documents that Ms. Maxwell must review before trial in order to prepare her defense, it is critical that she be given as much time as possible with the laptop to review the discovery. We therefore respectfully request that the Court order the BOP to give Ms. Maxwell access to the laptop on weekends and holidays during the hours that she is permitted to review discovery.

Sincerely,

/s/ Christian Everdell
Christian R. Everdell
COHEN & GRESSER LLP
800 Third Avenue, 21st Floor
New York, New York 10022
(212) 957-7600

cc: All Counsel of Record (By ECF)

COHEN & GRESSER LLP

800 Third Avenue
New York, NY 10022
+1 212 957 7400 phone

Christian R. Everdell
+1 (212) 957-7600
ceverdell@cohengresser.com

January 14, 2021

BY ECF

The Honorable Alison J. Nathan
United States District Court
Southern District of New York
United States Courthouse
40 Foley Square
New York, NY 10007

Re: *United States v. Ghislaine Maxwell*, 20 Cr. 330 (AJN)

Dear Judge Nathan:

We write on behalf of our client, Ghislaine Maxwell, to respectfully request that the Court order the Bureau of Prisons to give Ms. Maxwell access to the laptop computer provided by the government so that she can review discovery on weekends and holidays.

At the request of defense counsel, the government provided Ms. Maxwell with a laptop computer to review the voluminous discovery, which was produced on a series of external hard drives. Currently, Ms. Maxwell is given access to the laptop only on weekdays. On weekends and holidays, Ms. Maxwell must use the prison computer on her floor to review discovery. However, the prison computer is not equipped with the software necessary to read large portions of the discovery recently produced by the government. As a result, Ms. Maxwell loses several days of review time every weekend and every holiday because she does not have access to the laptop. If Ms. Maxwell is to have any hope of reviewing the millions of documents produced in discovery so that she can properly prepare her defense by the July 12, 2021 trial date, she must have access to the laptop every day, including weekends and holidays.

Defense counsel has raised this issue with the government and it has no objection to Ms. Maxwell having access to the laptop seven days a week. At the request of defense counsel, the government has contacted officials at the MDC on several occasions in the past few weeks to request that they lift this restriction, but without success.

There is no principled justification for this restriction. Ms. Maxwell was given access to the laptop every day (including weekends and the Thanksgiving holiday) for the entire 14-day period that she was quarantined in her isolation cell in November-December 2020 because she had come into close contact with a member of the MDC staff who had tested positive for COVID. In addition, the laptop is kept in a locker in the same room where the prison computer is located, so it

would not require any change in Ms. Maxwell's movements to give her the requested access. Furthermore, on at least three occasions since she was released from quarantine, Ms. Maxwell's security team gave her the laptop to review discovery on the weekend.

There is clearly no actual impediment preventing the MDC staff from providing Ms. Maxwell access to the laptop on weekends and holidays. Given the millions of documents that Ms. Maxwell must review before trial in order to prepare her defense, it is critical that she be given as much time as possible with the laptop to review the discovery. We therefore respectfully request that the Court order the BOP to give Ms. Maxwell access to the laptop on weekends and holidays during the hours that she is permitted to review discovery.

Sincerely,

/s/ Christian Everdell

Christian R. Everdell
COHEN & GRESSER LLP
800 Third Avenue, 21st Floor
New York, New York 10022
(212) 957-7600

cc: All Counsel of Record (By ECF)

The unobjected-to request is GRANTED. The Bureau of Prisons is ORDERED to give the Defendant access to the laptop computer on weekends and holidays during the hours that she is permitted to review discovery. SO ORDERED.

1/15/21

ALISON J. NATHAN
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

United States of America,

–v–

Ghislaine Maxwell,

Defendant.

20-CR-330 (AJN)

ORDER

ALISON J. NATHAN, District Judge:

On January 25, 2021, the Court received by email the attached letter from the Bureau of Prisons ("BOP"). In the letter, the BOP requests that the Court vacate its January 15, 2021 Order, Dkt. No. 116, which directed the BOP to give the Defendant access to her Government-provided laptop computer on weekends and holidays during the hours that she is permitted to review discovery.

The Defendant and the Government may respond to the BOP's letter within one week of this Order.

SO ORDERED.

Dated: January 25, 2021
New York, New York

ALISON J. NATHAN
United States District Judge

U.S. DEPARTMENT OF JUSTICE
Federal Bureau of Prisons
Metropolitan Detention Center

80 29h Street
Brooklyn, New York 11232

January 25, 2021

BY ECF

The Honorable Alison J. Nathan
United States District Court
Southern District of New York
40 Foley Square
New York, NY 10007

Re: ***United States v. Ghislaine Maxwell*, 20 Cr. 330 (AJN)**
Ghislaine Maxwell, Reg. No. 02879-509

Dear Judge Nathan:

This letter is written in response to Order granted on January 15, 2021, concerning Ghislaine Maxwell, Reg. 02879-509., an inmate currently confined at the Metropolitan Detention Center ("MDC") in Brooklyn, New York. The MDC Brooklyn respectfully requests that Your Honor vacate the Order given MDC Brooklyn was not given the opportunity to object to defense counsel's claims, although the objection had been reiterated to the U.S. Attorney's Office numerous times.

Defense counsel expressed various concerns regarding Ms. Maxwell's confinement limiting her access to discovery. However, Ms. Maxwell has received a significant amount of time to review her discovery. On November 18, 2020, the Government provided the MDC Brooklyn with a laptop for Ms. Maxwell to use to review discovery. Ms. Maxwell has been and will continue to be permitted to use that laptop to review her discovery for thirteen (13) hours per day, five (5) days per week. In addition to the Government laptop, she has access to the MDC Brooklyn discovery computers. Although defense counsel has indicated that the MDC Brooklyn discovery computers are not equipped to read all of her electronic discovery, the computers are capable of reviewing most of the electronic discovery. Despite defense counsel's claim that Ms. Maxwell's lacks sufficient time to fully review her discovery, her consistent use of Government laptop and MDC Brooklyn's discovery computers undercuts this claim.

Moreover, Ms. Maxwell continues to have contact with her legal counsel five (5) days per week, three (3) hours per day via video-teleconference and via telephone; this is far more time than any other MDC inmate is allotted to communicate with their attorneys.

We respectfully request that Your Honor vacate the order of January 15, 2021, and allow the institution to resume the prior schedule of laptop access, Monday through Friday, 7:00 AM – 8:00 PM.

Respectfully submitted,

/s/ *Sophia Papapetru*

Sophia Papapetru
Staff Attorney
MDC Brooklyn
Federal Bureau of Prisons

U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

February 1, 2021

BY ECF

The Honorable Alison J. Nathan
United States District Court
Southern District of New York
United States Courthouse
40 Foley Square
New York, New York 10007

Re: *United States v. Ghislaine Maxwell*, 20 Cr. 330 (AJN)

Dear Judge Nathan:

The Government respectfully submits this letter in response to the Court's January 25, 2021 order allowing the parties to respond to a letter from legal counsel at the Metropolitan Detention Center ("MDC") also dated January 25, 2021. (Dkt. No. 117). In particular, MDC legal counsel asks the Court to vacate its January 15, 2021 order directing the MDC to permit the defendant to use a laptop to review discovery on weekends and holidays. While the Government has no objection to the defendant's request for additional laptop access, the Government also generally defers to the MDC regarding how it manages its inmate population. The Government will continue to defer to the MDC here, particularly because the defendant has had ample access to discovery even without laptop access on weekends and holidays.

Given the volume of discovery in this case, which totals more than two million pages, the Government and the MDC have both made significant efforts to ensure that the defendant has extensive access to her discovery materials. Since the Government made its first discovery production in August 2020, the defendant has had exclusive access to a BOP desktop computer in the MDC on which to review her discovery. When the defendant complained of technical issues reviewing portions of her discovery on that desktop computer, the Government produced reformatted copies of discovery materials and instructions regarding how to open particular files. Because the defendant continued to complain that she was unable to review certain discovery files on the desktop computer, the Government agreed to provide a laptop for the defendant to use in her review of discovery. On November 18, 2020, the Government hand delivered the laptop to the MDC for the defendant's exclusive use.

As the Court is aware, the defendant has received, and continues to receive more time to review her discovery than any other inmate at the MDC. In particular, the MDC permits the defendant to review discovery thirteen hours per day, seven days per week. On weekdays, the MDC permits the defendant to use the laptop during her thirteen hours of daily review time. On weekends and holidays, the MDC would ordinarily only allow the defendant to use the BOP desktop computer, which provides access to much of the discovery material. While, as noted above, the Government has no particular objection to the defendant's request for weekend access

to the laptop, the Government generally defers to the judgment of the MDC in managing inmates at its facility, and sees no reason to depart from that practice here. In this respect, the Government notes that the trial date remains approximately six months away, the BOP was already affording the defendant access to the laptop for some 65 hours a week, and the BOP was further providing weekend access to a desktop computer should the defendant wish to spend more than 65 hours each week reviewing discovery.

Respectfully submitted,

AUDREY STRAUSS
United States Attorney

By: s/
Maurene Comey / Alison Moe / Lara Pomerantz
Assistant United States Attorneys
Southern District of New York
Tel: (212) 637-2324

Cc: All Counsel of Record (By ECF)

GHISLAINE MAXWELL

A Look at Ghislaine Maxwell's Life in Jail, And Why Prosecutors Say It's Better Than Most

While lawyers for Maxwell have criticized the conditions their client is being kept in and ask for more access to her, prosecutors say Maxwell gets more time to talk with her attorneys than other inmates, and more time to review discovery and use a computer

By **Tom Winter**, **Jonathan Dienst** and Sarah Fitzpatrick • Published February 5, 2021 • Updated on February 5, 2021 at 11:27 pm

A crane toppled onto a business in Astoria, Queens Friday morning. Gilma Avalos reports.

Federal prosecutors say that guards at the MDC facility in Brooklyn check in on Ghislaine Maxwell every 15 minutes at night by shining a flashlight against the roof of her cell to make sure she is breathing, conduct a body scan once a week

isolation cell in the morning and back to her cell at night, court filings say.

The filing comes in response to recent defense filings questioning Maxwel's conditions at the jail facility Specifically, her attorneys requested that Maxwell receive greater access to discovery and be allowed to speak with her attorneys for a longer period of time

Federal authorities arrested GhislaineMaxwell, the longtime confdant of Jeffrey Epstein, in July of last year in connection with the late accused sextrafficker.
Maxwell was charged on six counts for acts committed between 1994 and 1997 and then allegedly lyingot investigators in 2016. Four counts are related to allegedly helping transport minors for sexual activity and two for perjury, according to the criminal complaint

FEB 5
Jeffrey Epstein's Ex-Girlfriend Blames His Death for Her Arrest

JAN 26
Epstein's Ex-Girlfriend Seeks Dismissal of Charges She Faces

Prosecutors say Maxwell, "has as much, if not moe, time as any other MDC inmate to communicate with her attorneys" through video tele-conference calls after a rise in COVID-19 cases led to the suspension of in-person visits at the facility since December

"In particular, the defendant has VTC calls with her counsel every weekday for three hours per call", prosecutors write saying , "all of these VTCs and telephone calls take place in a room where the defendant is alone and where no MDC staff can hear her communications with counsel". They also say Maxwell "continues to receive more time to review discovery than any other inmate at the MDC" adding that she has access to a laptop computer 13 hours a day 7 days a week and she can send and receive emails with her attorneys.

Multiple young women have accused Maxwell, 58, the youngest daughter of the late British publishing magnate Robert Maxwell, of complicity in Epstein's alleged sex trafficking ring. They say she either recruited them directly or provided logistical support, like scheduling visits to Epstein's home.

Judge: Maxwell's Sex Relationships With Adults Can Be Secret

A judge says testimony by Jeffrey Epstein's ex-girlfriend about her sexual experiences with consenting adults can remain secret when a transcript is released next week

The abuse allegedly happened at Palm Beach, Florida; Santa Fe, New Mexico; and at Epstein's home on the Upper East Side of Manhattan, officials said Thursday.

Earlier this week NBC News reported that the fund set up to compensate women who were sexually abused by Jeffrey Epstein is suspending payouts because of uncertainty around its cash flow.

The Epstein Victims Compensation Fund has received more than 150 claims and paid out more than $50 million. But administrator Jordana Feldman said she was forced to pause the program after Epstein's estate informed her Wednesday that it did not have sufficient funds to satisfy the most recent request for replenishment and that it could not predict when the money would become available.

This article tagged under:

GHISLAINE MAXWELL · I-TEAM · JEFFREY EPSTEIN

STEVEN A. METCALF II, ESQ., Managing Attorney
NANETTE IDA METCALF, ESQ., Managing Attorney**
MARTIN TANKLEFF, ESQ., Associate Attorney
CHRISTOPHER DARDEN, ESQ., *Special Counsel**
JOSEPH D.MCBRIDE, ESQ., *of Counsel*
MARC HOWARD, ESQ. *of Counsel*

EXHIBIT E

Metcalf & Metcalf, P.C.
99 Park Avenue, 25th Floor
New York, NY 10016
646.253.0514 (*Phone*)
646.219.2012 (*Fax*)

No. 20-cr-30015
UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS, SPRINGFIELD DIVISION

United States v. Washington

Decided Mar 30, 2020

No. 20-cr-30015

03-30-2020

UNITED STATES OF AMERICA, Plaintiff, v. SHARNELL WASHINGTON, Defendant.

TOM SCHANZLE-HASKINS, U.S. MAGISTRATE JUDGE

OPINION :

The Court has received Defendant Sharnell Washington's Notice Regarding Motion to Possess Electronic Discovery (d/e 10) (Notice). The parties have complied with the Court's Text Order entered March 24, 2020 and have (1) configured two laptop computers (Laptops) owned by the Federal Public Defender in a manner agreed upon by the parties to permit Defendant to use the Laptops to review discovery stored on a disc provided by the Government and (2) secured the agreement of the Macon County Jail authorities to follow protocols (hereinafter referred to as policies and procedures) used at other jails in this District that allow federal defendants to review electronic copies of discovery. Notice, at 1-2. The Government has no opposition to providing Defendant Washington with CD or DVD discs containing electronic copies of discovery under
2 these conditions. See *2 United States' Response to Defendant's Motion to Possess Electronic Discovery (d/e 9) ¶ 6 ("The United States does not object to providing a disc containing the 65 pages of document discovery already tendered to defense counsel, for the defendant's review in the Macon County Jail . . . ."). Defendant Washington's request to possess electronic discovery, therefore, is now ALLOWED. The Court finds good cause to allow Defendant to review pretrial discovery electronically while in a correctional facility. See Local Rule 16.2(D).

Defendant shall be afforded electronic access to pretrial discovery in this cause pursuant to the policies and procedures used at other jails in this District that allow federal defendants to review electronic copies of discovery. The policies and procedures are set forth in the following documents used by other jails in the District: Rules Governing Use of Electronic Storage Media to View Legal Materials, Inmate Discovery Receipt, Electronic Discovery Viewing Log, Discovery Material Authorization Form, and Detainee Laptop Issuance Procedures.

Defendant's electronic access to pre-trial discovery in this cause is expressly conditioned on: (1) the ongoing compliance at all times by Defendant with the policies and procedures established by this Court; and (2) the ongoing willingness of the
3 correctional institution to afford Defendant *3 electronic access to the pre-trial discovery pursuant to the policies and procedures established by this Court. Should security concerns arise with respect to Defendant's access to pre-trial discovery, that access can be temporarily suspended without leave of Court but with notice to Defendant's counsel. Defendant may seek to regain access via petition to the Court.

This order shall modify only the application of Local Rule 16.2(B)(3) and (4) to this cause. All other provisions of Local Rule 16.2 remain applicable.

THEREFORE, IT IS ORDERED that pursuant to Defendant Sharnell Washington's Notice Regarding Motion to Possess Electronic Discovery (d/e 10) his Motion to Possess Electronic Discovery is now ALLOWED in full. ENTER: March 30, 2020.

/s/

TOM SCHANZLE-HASKINS

UNITED STATES MAGISTRATE JUDGE

STEVEN A. METCALF II, ESQ., Managing Attorney
NANETTE IDA METCALF, ESQ., Managing Attorney**
MARTIN TANKLEFF, ESQ., Associate Attorney
CHRISTOPHER DARDEN, ESQ., *Special Counsel**
JOSEPH D.MCBRIDE, ESQ., *of Counsel*
MARC HOWARD, ESQ. *of Counsel*

EXHIBIT F

Metcalf & Metcalf, P.C.
99 Park Avenue, 25th Floor
New York, NY 10016
646.253.0514 (*Phone*)
646.219.2012 (*Fax*)

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. DEFENDANT DOE Defendant.	**CR:** **[PROPOSED] ORDER RE USE OF DIGITAL TABLET IN CUSTODY**

TO: GREGORY J. AHERN, THE SHERIFF OF ALAMEDA COUNTY, AND TO THE ALAMEDA COUNTY SHERIFF'S OFFICE AT SANTA RITA JAIL:

Counsel for the defendant has represented that discovery in this case is voluminous or is in a digital format that can be efficiently reviewed by the defendant only on a digital tablet. The Court therefore orders that defendant **DOE** be permitted to use a digital tablet for the sole purpose of reviewing discovery and legal materials from the media storage device that relate to his/her criminal case, under the following conditions:

1. The Technical Support Unit of the Alameda County Sheriff's Office ("ACSO") will provide the make, model, and specifications required for the digital tablet. Password-protected software will be installed to lock down the tablet and prevent access to the internet or any and all wireless communication (including but not limited to, WI-FI, LTE, 4G, etc.), games, or entertainment programs of any kind. The digital tablet, and any media storage device provided to be installed into the tablet (such as an SD or micro-SD card) shall contain no image or files other than discovery, case law, and work product relevant to the criminal case.

2. The digital tablet, media storage device, headphones, and charging unit shall be purchased by retained or appointed counsel. The digital tablet, lockdown software, and installation protocol must

be that specifically identified by the Office of the Federal Public Defender for the Northern District of California and/or the Criminal Justice Act Unit, as approved by the Technical Support Unit of the ACSO. Only tablets procured with the assistance of the Federal Public Defender and/or the Criminal Justice Act Unit will be permitted.

3. Discovery, case law, and work product relevant to the criminal case will be stored only on the media storage device (such as an SD or micro-SD card) and may not be loaded on the digital tablet.

4. ACSO staff will provide only the tablet, with the media storage device installed, to the defendant. No power cord or any other type of cord will be provided to the defendant.

5. Before the digital tablet is provided to the defendant, it will be inspected to ensure that its internet lockdown software is operating properly and that the tablet is secure.

6. Counsel for the defendant will provide staff at Santa Rita Jail a digital media device (such as an SD or micro-SD card) loaded with discovery or case materials. Counsel may request that these cards be rotated with new cards containing updated discovery and case materials. Updated cards will be installed in the tablet by ACSO, and the previous cards will be returned to defense counsel for re-use. Counsel may not load digital media devices (SD cards or micro-SD cards) directly into the tablet without going through ACSO staff and may not provide digital media directly to the defendant. Tablets and digital media devices may only be provided through ACSO staff.

7. ACSO staff are authorized to scan the contents of the digital tablet and media storage devices provided (such as SD or micro-SD cards) to ensure they do not contain contraband; if the security measures of the tablet are suspected of being breached, the ACSO will conduct a security assessment of the tablet, confiscate the tablet, secure the tablet, and notify the United States Marshal's Service (USMS). The USMS will be responsible for notifying the appropriate law enforcement agency if criminal activity is suspected.

8. The digital tablet will be stored in the office of the housing floor or housing unit deputy and/or in the Inmate Services' office. The tablet will be secured and charged at that location and will be accessible to defendant **DOE** in the housing unit at the Sheriff's sole discretion.

9. Neither the Sheriff's Office nor the County of Alameda will be responsible for any damage to the digital tablet.

10. Defendant **DOE** shall use the digital tablet for the sole purpose of reviewing discovery and legal materials from the media storage device that relate to his/her criminal case. Defendant **DOE** shall not share the digital tablet, the digital storage device, or the materials loaded onto the tablet or digital storage device with any other inmate or with any attorney not appointed to this case without an order of this Court. Defendant **DOE** shall not access or attempt to access the internet or any form of wireless communication (including but not limited to WI-FI, LTE, 4G, etc.) with the device.

11. Before defendant **DOE** is provided with this digital tablet, he/she must execute a waiver (a copy of which has been provided to and reviewed by defense counsel).

12. Any violation of this order by the defendant or any use of the tablet that jeopardizes jail security will result in the immediate confiscation of the digital tablet by the ACSO, and the inmate will not be allowed to use the tablet.

13. Among other consequences, any violation of the limitations of this order by counsel may result in the loss of visiting privileges for counsel at Santa Rita Jail.

IT IS SO ORDERED.

Dated

INSERT
United States District Judge

STEVEN A. METCALF II, ESQ., Managing Attorney
NANETTE IDA METCALF, ESQ., Managing Attorney**
MARTIN TANKLEFF, ESQ., Associate Attorney
CHRISTOPHER DARDEN, ESQ., *Special Counsel**
JOSEPH D.MCBRIDE, ESQ., *of Counsel*
MARC HOWARD, ESQ. *of Counsel*

EXHIBIT G

Metcalf & Metcalf, P.C.
99 Park Avenue, 25th Floor
New York, NY 10016
646.253.0514 (*Phone*)
646.219.2012 (*Fax*)

M E M O R A N D U M

To: CJA PANEL
From: Diana Weiss
Date: June 28, 2019
Re: CJA Panel – Tablets and accessories to enable clients to access e-discovery at Santa Rita Jail

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This memo compiles information regarding the new tablets and accessories needed for clients housed at Santa Rita County Jail to access e-discovery. Also included in this memo is information about the contact person at the jail and the documentation needed so that the Sheriff will allow the tablet into the jail.

Court Order, Client and Attorney Waivers Required

In order for your client to have access to a tablet, Santa Rita requires 1) Court Order, 2) Attorney Waiver, and 3) Inmate Waiver. The forms for the Attorney and Inmate Waiver are attached. A word version of a Proposed Order is also attached. You will need to modify the Proposed Order to reflect the specifics of your case.

Tablet and accessories

The manufacturer/provider of the new tablets is Scott Brissenden. His contact info is:

Scott Brissenden
Blue Lock Technology Solutions
(512) 364-3493
sales@bluelocktech.com
www.bluelocktech.com
Link to tablet: http://bluelocktech.com/product/h1-tablet/
You will need to put in Coupon cade: CJA2019 to get the reduced price of $300.

The tablet comes with a power cord and a cord to plug into your computer.

Accessories for the tablet:

- MICRO-SD CARD The tablet will need a Mini-SD Card with a max capacity of 64GB. It is suggested that you purchase two SD Cards so that you can have one SD Card in use and the other on stand-by (for loading additional discovery). Any brand will work, here is a link to the SanDisk card: https://www.amazon.com/Micro-SD-Memory-Cards/b?ie=UTF8&node=3015433011
- Card Reader: While many PCs and laptops come with an SD Card Reader built in, some do not. A Reader is necessary to efficiently transfer the files onto the SD Card. The following Reader will work: https://www.amazon.com/UGREEN-Reader-Adapter-Simultaneously-Windows/dp/B01ARAH6O0/
- Case: The Sheriff requires that the tablet have a case. The link to the approved case is: https://www.amazon.com/M-Edge-Universal-Multifit-Tablets-Nextbook/dp/B072Q4L9DC/ref=sr_1_3?ie=UTF8&qid=1526066509&sr=8-3&keywords=universal+11+inch+tablet+cover&dpID=41nZQkFWgyL&preST=_SY300_QL70_&dpSrc=srch
- Earbuds (optional): If the e-discovery includes audio/video, you'll need to include a set of earbuds. Per the Sheriff, the earbuds must not have the volume control on the cord;

usually the least expensive sets are the ones that are best for the jail.

Contact person at Santa Rita

Dep. Sheriff Ryan Bauman #1979
925-551-6873/ rbauman@acgov.org

Documentation needed:

The following documentation is needed:

- Court Order: A signed order authorizing the use of a digital tablet in custody. A model order accompanies this memo. This language has been approved by the Sheriff; the language must not be altered.
- Attorney waiver: The ACSO E-Discovery Tablet Rules And Liability Waiver must be executed by counsel. The Waiver form accompanies this memo.
- Inmate Agreement: The ACSO Inmate Discovery Tablet Agreement must be completed and executed by the client. The Agreement form accompanies this memo.

This documentation, along with the tablet with its SD Card, should be provided to Dep. Bauman. Please email or call before you drop off a tablet. It is best to hand it directly to the deputy.

Alameda County Sheriff's Office
Santa Rita Jail
5325 Broder Boulevard, Dublin, CA 94568-3309

Gregory J. Ahern, Sheriff
Director of Emergency Services

SANTA RITA JAIL E-DISCOVERY TABLET RULES AND LIABILITY WAIVER

- TABLET DEVICES: Tablets are defined as a mobile computer with display, circuitry, and battery as a single panel unit; with a screen size of 7" or larger. For the purposes of e-discovery use, the tablet's camera, wireless Wi-Fi, and cellular access must be disabled. Accessories such as keyboards, stands and stylus' are not permitted. The only approved device for e-discovery use is an Android device manufactured by Blue Lock Technology Solutions.
- Attorneys will communicate with the Office of the Federal Public Defender, Northern District of California and/or the Criminal Justice Act Unit to coordinate the purchase of approved tablets for use at the Santa Rita Jail.
- Attorneys must provide a charging device, sleeve (protection cover when available), and headphones. No exceptions.
- Attorneys must sign this acknowledgement and waiver prior to tablet use. Any violation of this waiver and/or Court Order will result in the loss of privileges for the attorney.
- Once approved. Attorneys will coordinate with the Sheriff's Office Inmate Services Unit for proper introduction of the tablet to the inmate. Attorneys are responsible for training their clients in the use of the tablet.
- All discovery will be stored on a SD/Micro SD card and forwarded to the Inmate Services Unit to deliver to the inmate. Under no circumstances are attorneys to give discovery directly to an inmate.
- The purpose of the tablet policy is to allow the inmate to review materials directly related to federal charges or sentencing. Appropriate materials that may be provided on the SD / Micro SD card include discovery provided by the government, materials secured by the defense that are directly related to the charges or sentencing of the defendant, and legal research. Inappropriate materials include, but are not limited to, music or other audio files, video files, or image files that are entertainment or are personal in nature and that have no relation to the defense of the case. Even if provided by the government in discovery, sexually explicit images are expressly prohibited under this policy and must be redacted before discovery is loaded onto the SD / Micro SD card. Violators of this policy will lose their privileges and may be referred to the District Attorney's Office and/or U.S. Attorney's Office.
- Any violation of these rules may result in the termination of e-discovery tablet use, as well as revocation of site clearance.

By signing below, I acknowledge that I have read and agree to the terms stated herein.

Name: _____ CA State Bar Number: _____

Signature: _____ Date: _____

Alameda County Sheriff's Office
Santa Rita Jail
5325 Broder Boulevard, Dublin, CA 94568-3309

Gregory J. Ahern, Sheriff
Director of Emergency Services

INMATE DISCOVERY TABLET AGREEMENT

Make	
Model	
FCC Identifier	
Serial Number	

I. TABLET PROCEEDURE:

A.) The computer tablet and SD card will be issued by the housing floor deputy at the request of the inmate between the hours of 0600 and 2300.

B.) At 2300 hours, inmates are required to return the computer tablet and SD card to the housing floor deputy to be charged overnight.

C.) Inmates assigned to general population are not allowed to bring the computer tablet out of their cell during recreation time when other inmates are out. Tablets are not to be shared or used by other inmates.

D.) Inmates are not permitted to bring their tablet with them to court, visitations, or internal/external appointments. Inmates are permitted to bring their tablet to contact/non-contact interviews with their attorney of record.

E.) Inmates who abuse, damage or violate the rules associated with the computer tablet will lose the privilege of the computer tablet.

F.) Santa Rita Jail staff are authorized to scan the contents of the computer tablet and media storage devices provided (SD card / micro SD card) at any time to ensure they do not contain contraband or the tablet is being misused.

G.) The Alameda County Sheriff's Office is not responsible for any damage to the tablet. If the tablet becomes broken or inoperable, a deputy must immediately be notified.

II. TABLET CHARGING PROCEEDURE:

A.) When the computer tablet requires charging, the inmate shall notify a housing floor deputy. The deputy will take possession of the computer tablet and secure it in the deputy office to be charged.

I _____ agree with the terms of the computer tablet and electronic discovery and agree to adhere to the rules set forth. Any violation of the rules established will result in loss of the computer tablet.

Signature: _____
PFN:_____
Date:_____

*A copy of this signed agreement will be retained by inmate services and a copy provided to the inmate being issued the computer tablet. *

STEVEN A. METCALF II, ESQ., Managing Attorney
NANETTE IDA METCALF, ESQ., Managing Attorney**
MARTIN TANKLEFF, ESQ., Associate Attorney
CHRISTOPHER DARDEN, ESQ., *Special Counsel**
JOSEPH D.MCBRIDE, ESQ., *of Counsel*
MARC HOWARD, ESQ. *of Counsel*

EXHIBIT H

Metcalf & Metcalf, P.C.
99 Park Avenue, 25th Floor
New York, NY 10016
646.253.0514 (*Phone*)
646.219.2012 (*Fax*)

Guidance for the Provision of ESI to Detainees

Joint Electronic Technology Working Group
October 25, 2016

Contents

Guidance

I. An Approach to Providing e-Discovery to Federal Pretrial Detainees

After the publication of the 2012 JETWG Recommendations for ESI Discovery in Federal Criminal Cases, the Joint Electronic Technology Working Group turned to specific challenges regarding the delivery of discovery in digital format ("e-discovery" or "ESI"—electronically stored information) to indigent pretrial detainees.[1] Most information is now created, stored, and processed electronically, and most discovery in federal criminal cases is now in digital format. But most facilities that house federal pretrial detainees remain structured to enable detainees to review paper discovery, not digital discovery. With proper safeguards, we believe that the provision of e-discovery to pretrial detainees—inevitable in any event—will also result in greater efficiency, reduced delay, and cost savings for the entire criminal justice system. We believe that facilities must necessarily transition to enabling pretrial detainees to review e-discovery, but we also recognize systemic institutional reasons, often influenced by limited resources, why this evolution from paper-based review to e-discovery review will take time to implement. In the meantime, we have developed some practical guidance for jurisdictions to address the specific challenges in delivering e-discovery in digital format. This Guidance reflects the observations of Government and defense attorneys, litigation support experts, Bureau of Prisons and U.S. Marshal officials, and United States Magistrate Judges, who participated in the project. [2] As with the JETWG Recommendations, this Guidance is intended to be practical, and is not intended to create or define any legal rights. Baseline understandings for the provision of ESI in criminal discovery remain the 2012 JETWG Recommendations. Comments and developments from the field relating to this Guidance may be freely sent to the national points of contact listed later.

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[1] While this project was initiated with concern for the provision of ESI to indigent detainees, much of what is said here will also be applicable to detainees with retained counsel, because the main limitations on provision of ESI to detainees are not likely to derive from the cost of equipment, but rather from constraints within the facility on the management and use of equipment. At the opposite end of the spectrum, detained defendants who have refused counsel will present additional issues we have not attempted to address in this first edition of this Guidance. That being stated, all stakeholders must recognize their obligations to provide to all pretrial detainees access to their criminal electronic discovery.

[2] Members of the JETWG subcommittee addressing the provision of ESI to detainees include U.S. Magistrate Judges Laurel Beeler (N.D. Cal.) and Jonathan W. Feldman (W.D.N.Y.); Administrative Office of the U.S. Courts, Defender Services Office, National Litigation Support Administrator Sean Broderick; Federal Defender Donna Elm, (M.D.Fla.); Bureau of Prisons Assistant General Counsels Corinne Nastro and Monya Phillip; U.S. Marshals Service Prisoner Operations Division Assistant Chief Heather Lowry; Associate Deputy Attorney General and National Criminal Discovery Coordinator Andrew Goldsmith, Assistant U.S. Attorneys John Haried, Criminal eDiscovery Coordinator at the Executive Office for U.S. Attorneys; John McEnany (S.D.N.Y.); Fred Sheppard (S.D. Cal.); David Joyce (D.Me.); and U.S. Attorney's Office Litigation Support Manager Craig Bowman (W.D.N.Y.).

The U.S. Marshals Service ("USMS") has general responsibility for the custody of federal pretrial detainees. The USMS safeguards approximately 10,000 detainees in Federal Bureau of Prisons ("BOP") facilities; another 10,000 detainees in private facilities under contract to the USMS; and more than 31,000 detainees in approximately 1,800 state and local facilities under USMS contract.[3] Discovery review computers with a standardized configuration are available in most BOP facilities, but there is currently no single standard for ESI review equipment in the state, local and private USMS contract facilities. We do not now foresee development of a single protocol for the provision of ESI to pretrial detainees, given the multitude of facilities; the variety in file format and volume of ESI; the equipment available within, or acceptable to, a given facility; inventory control and technical support staffing within the facility; and other considerations, such as prisoner separations and protective orders. On the other hand, growing experience shows that as long as due regard is given at the local level to the accommodations needed to introduce ESI into a given facility, workable procedures can be developed to handle the common run of e-discovery. This Guidance is intended to aid those necessary accommodations by identifying the specific concerns of each of the various stakeholders, as well as the areas where each stakeholder may need to accept specific responsibilities, to ensure that detained defendants get adequate access to e-discovery in a workable and collaborative manner. This Guidance will also introduce some of the technical aspects of providing ESI to detainees, for example, how, with commonly available software, and some expertise, a PC[4] laptop can be configured to permit review of the most common types of criminal e-discovery.

II. Special Concerns in the Delivery of ESI to Detainees

In preparing this Guidance, we identified the following special concerns in the delivery of ESI to detainees:

A. Defense Concerns

To mount an effective defense, a represented defendant who is detained pending trial must generally have the opportunity to personally review some or all of the discovery and disclosure, which is now commonly in ESI format. The defendant may need to review it in discussion with his counsel or expert as well. But defense counsel may not have the equipment or personnel to do

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[3] *See* United States Marshals Service Fact Sheet, Prisoner Operations 2016 and Facts & Figures 2016, available at https://www.usmarshals.gov/duties/factsheets. (Note that the Department of Justice is phasing out the use of private facilities. *See* https://assets.documentcloud.org/documents/3027877/Justice-Department-memo-announcing-announcing.pdf.)

[4] Because the Department of Justice (including the Bureau of Prisons), like most other government agencies, uses PC machines with Windows operating systems, defense teams are encouraged to use PC devices to manage e-discovery. PC devices are typically less expensive than Apple devices; conversion and compatibility issues will be lessened; and problems will be easier to troubleshoot if all parties use PC/Windows devices.

so, and the client who can afford counsel may not be able to additionally pay counsel to bring discovery for him or her to review.

B. CJA and FDO Budgeting Concerns

Criminal Justice Act ("CJA") administrators, including the Court, which administers the CJA panel in many jurisdictions, and Federal Defender Organizations ("FDOs") (including both Federal Public Defender Organizations and Community Defender Organizations that provide indigent defense representation services), have an interest in avoiding the expenses incurred when an attorney or other member of the defense team must travel to lengthy legal visits merely to permit a detained client to review ESI on a defense team device. Subject to facility concerns discussed below, an investment in devices for use within a facility can result in substantial savings in this regard.

C. Court Concerns

The Court has an overriding interest in the delivery of e-discovery to detainees, among other reasons to avoid delays in cases resulting from the inability of detainees to access and review discovery necessary to participate in their defense. The Court also has an interest in minimizing discovery costs and discovery litigation and in avoiding collateral issues, such as motions for new counsel by detainees complaining about delays in reviewing discovery.

D. Facility Concerns

Constraints on detention facilities—the original bricks-and-mortar institutions—will probably pose the greatest challenges. These include most notably:

Personnel. The management of inmate movement, separation, and monitoring is personnel intensive and subject to strict scheduling. Maintaining and tracking devices and media; loading (and updating) discovery data; re-charging portable devices, etc., make intensive demands on IT personnel. But facilities may have little or no flexibility with available personnel.

Security. Weaponization of optical disk shards and other equipment, is a concern. Also, writable media may be used to pass messages to another inmate. Wireless and Internet capabilities have to be removed from devices used by detainees. (The BOP has a national policy against Internet and WiFi access for inmates.) Counsel (principally the Government) will need to screen ESI for disruptive contraband, such as pornography.

Sudden Change. Facilities' procedures can be changed to meet new needs. But attempts to suddenly impose new procedures to handle special circumstances may result in unintended breaches of standard security procedures, to potential great risk.

Space. It is optimal to allow inmates time and space to view their electronic discovery, and facilities should designate an area for discovery review. Consistent with the need to maintain security in a facility (to include, where appropriate, visual monitoring), efforts should be made to enable detainees to review their electronic discovery individually.

E. U.S. Marshals Service Concerns

At the national level, the USMS contracts with facilities to house pretrial detainees. At the local level, the USMS transports and safekeeps detainees. Transportation may be to and from court, or involve transferring a detainee from one facility to another. An occasionally used alternative to in-institution review of ESI is transporting inmates to locations that can accommodate discovery review. But that option has significant drawbacks of concern to the USMS. Specifically, given personnel and other restrictions, the Marshal has little capacity to transport detainees to, and safeguard detainees at, special facilities for the review of ESI. (In some jurisdictions, transportation time to and from the facility will render that impossible in any event.) Further, a detainee may not be placed in a facility that has superior ESI review resources if that facility does not fit the security designation of the detainee. For the USMS, providing a means of reviewing e-discovery within the detaining facility is optimal.

F. Government Concerns

The provision of e-discovery to detainees, although well under way in many districts, remains a process in development nationally. The Government's main concern is that the provision of e-discovery to detainees, which involves both technical challenges and new security challenges including unauthorized dissemination of discovery materials within and outside of the institution, should not be viewed as something the Government can make happen by pushing a digital button. Instead, these Guidelines reflect the multiple considerations that must be taken into account in preparing and providing ESI to detention facilities. In addition—it scarcely bears noting—different United States Attorney's Offices ("USAOs") have at this time varying capabilities to process and troubleshoot the production of e-discovery.

III. Practical Steps

A. Government, Defense, Facility and Judicial Points of Contact/Working Group

Points of Contact ("POCs") and a Working Group. Identifying POCs at the institutions listed below is our most important recommendation. Through informal meetings and direct dealings on individual cases POCs will develop an understanding of what devices are most readily acceptable to or available at a facility, what file formats are most readily reviewable by a detainee, and what particular obstacles may need to be addressed. The court should establish a Working Group, consisting at the least of judicial, CJA, FDO, DOJ, BOP, and U.S. Marshal representatives, to stimulate that process and to provide a forum for periodic reporting on developments and issuing useful local guidance.

USAO and facility POCs, as representatives of two government entities, will likely have the most frequent and direct communication. Ideally the contacts should include senior IT or litigation support specialists directly involved in the preparation and delivery, and receipt and mounting, of ESI for detainees. Within facilities, an appropriate POC may be someone involved in making the ESI available to inmates, such as unit managers or correctional counselors. There should also be USAO and facility POCs at the management level who can address policy issues and requests for exceptions (e.g., wardens, associate wardens, agency counsel).

A USMS POC can be helpful in arranging for POCs to be designated in contract facilities and in suggesting other methods for the delivery of ESI.

Public Defenders and their IT or litigation support specialists, and knowledgeable CJA attorneys, are likely to be productive POCs who can help other defense counsel in their jurisdiction. Defense POCs will be especially knowledgeable about exactly what electronic media the defense team may bring to a given facility for client review, the practical issues attendant thereto, and detainee experiences with the process.

Within the judiciary, CJA Supervisory Attorneys or other CJA administrators may have an overview of how discovery ESI has been handled, and can be cognizant of measures, such as the provision of laptops for a given case, that may engender substantial savings. Even more significantly, a judicial POC will be helpful in convening project status meetings, evaluating local CJA issues, and serving as a conduit for the expression of concerns to and from the court. As noted above, we specifically recommend that the court convene a Working Group to share issues, developments and solutions in the area.

On a national level, the following POCs may help with unique questions, or just getting an inmate e-discovery review program started: the Department of Justice's National Criminal Discovery Coordinator, Associate Deputy Attorney General Andrew Goldsmith (Andrew.Goldsmith@usdoj.gov); Criminal eDiscovery Coordinator John Haried (John.Haried@usdoj.gov); Associate U.S. Attorney (SDNY) John McEnany (John.McEnany@usdoj.gov); Administrative Office of the U.S. Courts National Litigation Support Administrator Sean Broderick (sean_broderick@fd.org); Federal Public Defender (Tampa, Florida) Donna Lee Elm (donna_elm@fd.org); Bureau of Prisons Assistant General Counsels Corinne Nastro (cnastro@bop.gov) and Monya Phillip (maphillip@bop.gov); U.S. Marshals Service Prisoner Operations Division's Heather Lowry (Heather.Lowry@usdoj.gov).

B. Identify Facility e-Discovery Capabilities

Recognizing that any inventory will be imperfect and subject to unexpected change, a working compilation by the POCs of the following information can be very useful:

a. How facilities allow detainees to review discovery: how do they determine who needs to review discovery; how much time do they typically provide detainees to review discovery; where do they allow detainees to review discovery (cell, law library, etc.); do detainees review discovery alone or in a group; if devices are used, do detainees share devices?

b. Facility devices: inventory facility equipment, broken out by pertinent inmate housing unit. This would include specifications of devices available; specification of installed software (including version); location of devices; number of devices; management of inmate access to devices; and hours of availability.

c. Facility Internet access, WiFi coverage, and policies, applicable both to detainees and to attorney visits.

d. Facility device limitations: e.g., hardware or other limits on installing specialized reviewing software; inability of facility devices to handle hardware-encrypted drives or

software-encrypted media; read/write restrictions (affecting not only a detainee's ability to tag items, but also a device's ability to handle viewing software that requires write-access to function).

e. Inmate-permitted media and devices: identify devices and media that the facility will generally accept for an inmate to use in a given case: e.g., CDs, DVDs, thumb drives, hard drives, .mp3 players, laptops.

   (i) Identify facility restrictions on devices for inmates: e.g., software restrictions (no games); hardware restrictions (no wireless); no built-in camera; no built-in microphone; no capability of connecting to an Ethernet network connection.

   (ii) See the comment on laptops under Special Responsibilities of Facilities.

f. The method that the facility uses to secure and inventory devices and storage media: the manner of storage, checkout, and checkin of storage media; and which personnel are trained and available to handle these tasks.

g. The methodology (if any) the facility can follow to update discovery provided on a rolling basis. For example, is the facility able and willing to use USAfx (a secure Dropbox-like file sharing platform) to accept ESI for inmates? (Note that supplementing, updating, or replacing storage media in a case where ESI has already been made available to a detainee may be difficult.)

h. Attorney devices: identify devices and media the facility will generally permit defense teams to bring for client visit, and practicalities attendant thereto.

C. Starting Up

Districts that are just beginning to consider provision of ESI to detainees may profitably begin considering: first, the types of ESI that are most voluminous and yet come in the most easily readable formats (such as wiretap intercepts in common audio formats and .pdfs of documents); second, the devices that the facilities have or will accept for review of that ESI; third, if devices need to be procured, how that will be done (e.g., by CJA funds for a given detainee in a given case); fourth, how procured devices will be configured for security and viewing; and fifth, how the devices will be loaded with ESI.

IV. Special Responsibilities of Participants

As noted above, this Guidance is not intended to create or define any legal rights. This section is intended only to articulate what we see as the practical division of labor in the collaborative venture of providing ESI to pretrial detainees.

A. Special Responsibilities of the Government

Early ESI Case Assessment. As an investigation begins and develops, an AUSA will have an increasingly refined idea of what types of ESI will be gathered, what platforms will be used to manage, review and produce the ESI; and which defendants may be detained in which facilities. Using available information and consulting with POCs as appropriate, the Government should identify anticipated e-discovery issues and prepare—even before arrest—a plan for speedy and

efficient provision of e-discovery to anticipated detainees. This will include ESI expected to be gathered at the time of arrest, such as cellphone data and other search warrant material. The Government will then be in a position to make a considered proposal to the defense and the court regarding provision of e-discovery. (For such planning purposes, we note again that rolling discovery may be difficult for facilities to manage.)

Provision of Trusted-Source and Screened Media. To provide assurance to the facility, ESI media and devices may have to be prepared (although not necessarily purchased) by the Government, and delivered by the Government to the facility. The Government should also screen out or redact material that may be disruptive to the institution (e.g., victim information, PII, CI information, obscene images, trade secrets, etc.) before production of the material to the pretrial detainee. (Screening out images such as cellphone pictures from an initial production of ESI to detainees may also substantially reduce the volume of data that needs to be produced.)

B. Special Responsibilities of the Defense

In keeping with the ESI Protocol, we anticipate that the defense will be a knowledgeable and constructive participant in discussions and meet-and-confers on this subject. In cases where difficulties derive from the volume of or unusual technical issues concerning ESI, the defense will prioritize what materials (whether select portions or all of the discovery) it provides to its client. Given software tools that can search and review voluminous discovery, the defense may be able to identify key documentation for the defendant's review.

In cases where the defense has selected key documentation for the defendant to review, it may be necessary for the defense to deliver the selected e-discovery to the facility and facility staff directly, without going through the government, in order to avoid revealing its work-product selection to the Government. The same may be true where the defense investigation has generated its own ESI. Some BOP facilities allow a defense attorney to mail in ESI directly to inmates via the special mail process upon submission of a form certification that the material on the media is in fact discovery related to the federal criminal proceeding and has not been altered in any way. Similar arrangements, perhaps endorsed by a court order, or involving a mutually trusted vendor, may be possible to satisfy security concerns at other facilities.

C. Special Responsibilities of the Court

The Court will consider the need of counsel and detainees to have adequate opportunity to review discovery in setting a trial schedule. Recognizing that the detention facility is not a party to the criminal litigation, and that both facility management and ESI discovery involve inherent limitations, the Court should generally afford the Government attorney an adequate opportunity to investigate and respond to asserted discovery review problems (including an opportunity to confer with facility and USMS representatives) before entering an order imposing specific procedures to govern the delivery and review of detainee ESI discovery. In cases presenting unusual technical or logistical issues, the court may also need to mediate the practical difficulties in providing discovery and the defendant's need to adequately assist counsel. Judicial participation in the Working Group referenced above will help judges stay abreast of developments in this area.

D. Special Responsibilities of the Facility

The facility must recognize its obligation to provide a reasonable opportunity for detainees to review ESI discovery. The need to provide ESI to detainees should be emphasized in USMS contracts with state, local and private facilities. Because laptops are inexpensive, have substantial storage, and can be configured to permit review of a wide variety of file formats, all USMS contract facilities should undertake to allow laptops as a routine method of providing ESI to detainees. (Many BOP facilities have standalone computers for inmate use that have been specially configured to handle most forms of e-discovery which should make consideration of laptops at BOP facilities unnecessary except in the most unusual of cases. Other BOP facilities have allowed the use of portable hard drives depending on the type of case and the volume of discovery.)

E. Special Responsibilities of the U.S. Marshals Service

At a national level, and with a view to eventually developing standards, the U.S. Marshals Service should begin to consider inmate e-discovery access in selecting and contracting with detention providers. At the local level the U.S. Marshals Service should, consistent with its resources and primary duties, assist in proposing solutions to e-discovery challenges.

V. Technical Considerations for the Non-Specialist

Obviously, most of those involved in the provision of ESI to detainees are not technology specialists. But following are some of the more technical points that non-technical personnel involved in the process will need to understand. The Technical Appendices contain other more detailed information gathered during preparation of these Guidelines that may also be useful for those approaching the subject.

A. Devices and Device Configuration

When a facility is willing to acquire, or to accept a laptop from the Government and/or the defense, either as part of its inventory,[5] or for a particular defendant in a particular case, the laptop will need to be configured to meet security concerns as well as to serve as an effective ESI review platform. The appendix contains suggested hardware specifications and application configurations that may provide a starting point in this regard. Facilities interested in obtaining their own ESI review devices may explore kiosks (housing for a publicly-used computer) designed specifically for the prison environment. (In 2016, kiosks priced at about $2200.)

MP3 players, iPods, DVD players, etc., can be inexpensive, Internet-free devices for reviewing common audio, video, and some document formats. However, smart phones and tablets (with WiFi and Internet capabilities) are largely pushing such media out of the market place. Note that it is not easy to modify devices to eliminate wireless capabilities, which may be required by a facility. Where iPads or other tablets do seem advisable, secure mounting of such devices may be an option to consider. *See, e.g.*, http://www.imageholders.com/collections/ipad-kiosks-tablet-enclosures-

[5] Note that the BOP, because of the anti-supplementation principle of federal appropriations, cannot itself take ownership of a device from an outside source.

wall-mounted; http://www.lilitab.com/blogs/news/13361673-the-ultimate-guide-to-configuring-your-ipad-for-kiosk-use.

As frequently discussed herein, portable hard drives are inexpensive and may be an excellent choice for producing ESI to facilities where detainees have access to computers.

B. Common File Types and Review Possibilities

General Viewers and Players. ESI discovery can involve an almost overwhelming number of potential file formats. The list of file formats (see the appendix) compiled by the BOP for its July 2014 RFI for inmate electronic discovery support services, hardware, and software is daunting. On the positive side, it is encouraging how many file formats commercial viewers and players can support. By way of example, the files supported by Quick View Plus 13 Professional, and Windows Media Player 12, are also listed in the appendix.

Forensic Image Viewers. Seized media is often forensically imaged via AccessData's Forensic Toolkit® (FTK®) or Guidance Software's EnCase Forensic, both of which provide viewers that can be loaded onto a laptop to view forensic images contained in an attached hard drive. These viewers are not very simple to use, and it may be most effective to provide extracted user files. Extracted files may also be necessary where the underlying forensic image contains inappropriate material, such as pornography or hacker tools.

Native or Proprietary Formats. The extent to which user files must be viewable via native software; the existence of files in proprietary format; the significance of hyperlinks; and other matters not here imagined, will create additional issues. Application of this Guidance and of the 2012 JET-WG Recommendations will assist in bringing things down to manageable elements.

Litigation Support Databases. Databases such as Concordance, iPRO Eclipse SE, and Relativity (all commonly used by the Government) as well as CaseMap and Summation (commonly used by the Defense) may present a greater level of complexity. Concordance and iPRO Eclipse SE are desktop-based and can (subject to volume) be loaded onto a laptop. Relativity can export data for use on standalone devices. If an Internet (remote access)-based platform is used, the ability to export relevant portions to a laptop- or iPad-viewable format will have to be considered.

Read-Write Access. Some review platforms and programs, such as video players, require read-write access to the computer to function, for example to write .tmp files. This may require workarounds when write access to devices available to detainees is restricted.

Note-Taking by Detainees. Because many facilities, including BOP facilities, will not allow users write-access to discovery review devices for security and device-maintenance reasons, detainees will not be able to flag or tag documents electronically. Counsel should anticipate developing paper-based charts or forms that will facilitate flagging items of interest.

Remote (Web- or Cloud-Based) Data. Although data and electronic devices are increasingly configured to store and access data and software remotely—in the cloud—limitations or prohibitions on Internet access within facilities will largely preclude their use in providing e-discovery to detainees, at least in the foreseeable future. Accordingly, in selecting platforms for

attorney review, the ability to download data to standalone devices in a useable format for detainee review will remain key.

C. Encryption

In all instances a determination must be made whether the ESI can be produced in encrypted format (the Government default) and still be effectively reviewed; whether encrypted hard drives (e.g. Addonics) will be suitable; or whether data must be produced in unencrypted format, and any additional security measures that may entail.

Technical Appendices

I. Identification of Installed Software

A useful tool for the identification of software (and version) installed on a facility computer may be the Windows Management Instrumentation Command, e.g., running **`wmic product list brief`** at the command line.

II. E-Discovery Review Laptop Configuration Suggestions

A. General Suggestions

Where laptops are available for ESI review, following are some configuration suggestions:

- Hardware modifications—remove or disable
  - RJ-45 network jack for standard network cable
  - Wi-Fi cards/antennas. (Even if there is no WiFi in the facility, someone could possibly smuggle in a WiFi hotspot.
  - Phone modems (usually found only on older equipment).

- Processing and storage specifications
  - Processor: 1 gigahertz (GHz) or faster.
  - RAM: 1 gigabyte (GB) (32-bit) or 2 GB (64-bit)
  - Minimum Hard Drive Size: 250+GB, or even a partitioned drive with 500 GB D: drive.
  - Graphics card: Microsoft DirectX 9 graphics device with WDDM driver

- Operating System
  - Windows 10, which will soon be the standard in many federal agencies, and will not soon need to be upgraded.
    - Contains Windows Media Player (verify)

- Security Software, to reduce the possibilities for unauthorized use and to reset the laptop during reboot to its previous-state configuration, as set by the administrator.

  - Lockdown software, to inhibit users from making changes. For example,
    -Mirabyte http://www.mirabyte.com/en/products/frontface-lockdown-tool/features.html
    -Inteset Systems http://shop.inteset.com/lock-down-windows-with-inteset-secure-lockdown

  - Restore software, to reset the laptop during reboot to its previous-state configuration. For example:
    -Deep Freeze, http://www.faronics.com/products/deep-freeze/enterprise/
    -Reboot Restore RX (free, but additional testing required): http://www.horizondatasys.com/en/products_and_solutions.aspx?ProductId=18#Benefits

- Reviewing Software
    - Eclipse SE Data format. Where the Government has ESI in Eclipse SE format, the Government is licensed to use Eclipse Publish to create a stand-alone version of selected data to load onto a laptop. Commencing in summer 2016, the Government has been licensed to make Oracle's Outside In Viewer (which is used in Eclipse) available for viewing databases created via Eclipse Publish. The Outside In Viewer can handle hundreds of file formats, similar to Quick View Plus, whose supported file formats are listed below.
    - Custom video surveillance software, where it is easier to install a custom program, rather than to convert non-standard video files into a format viewable by standard Windows Media Player.
    - (This list is expected to change and grow.)

B. BOP July 2015 Specifications

For information only, to help guide thinking, the following is taken from BOP's February 2015 specifications for detainee discovery viewing devices inside BOP facilities:

1. Operating System and Software Security Features

a. Operating system

Windows 7 Professional

b. Third-Party Software

Romaco Timer (Free Commercial) is a utility used to set a time limit on the user usage. It is currently set to logoff the current user in two hours. Prior to being logged out the user will receive a prompt indicating that they have five minutes remaining before the system automatically logs them off. This mechanism was put in place to ensure that the needs of a large inmate population; needing the use of discovery workstations with a limited supply, are met. If no other inmate needs to use the workstation, a given inmate can log back in and use it. A new Timer created in Visual Basic (VB) may replace the Romaco Timer and help support future operating systems.

Reboot RX Free takes a snapshot of the pc environment.

Quick View Plus 12 (BOP Licensed) is a file viewer for a variety of different file formats.

VLC Player (Free Commercial) is a media player for playing a variety of different media formats not supported by Windows Media Player.

For The Record (FTR) software to support proprietary video.

2. Security Features

The security/lockdown of the e-discovery pc comes from Group Policies built into Windows 7. A Local Group Policy was created that is assigned to the "Users" group.[6] The policy is located in in the C:\Windows\system32\GroupPolicyUsers\ folder. Security features configured in the LGPO (Local Group Policy Object) for the inmate environment are:

- The C:\ drive is not visible to the user under Windows Explorer
- Disabled the use of programs that could be used to generate scripts and environment configuration changes such as Control Panel, cmd.exe, powershell.exe, notepad.exe, taskmanager.exe etc.
- Disabled writing to USB drives
- Disabled writing to CDR's
- Desktop right click disabled
- CTRL+ALT+DEL does not display any options such as Task Manager.
- Start Menu only shows "Log Off" option. "Log Off" option is tied to a batch file that forces the system to restart. This forces the system back to the original snapshot of the system in Reboot Restore RX.
- Profile folders such as My Documents, Picture, and Video etc. are accessible to the user. They can write to these locations. This helps support encrypted files that need to be extracted and written to the local drive.
- Desktop icons available are the My Computer, VLC Player, Windows Media Player, Quick View Plus 12 icons
- Drives available in the user environment are the local CDROM drive and any USB external drives plugged into the system.
- Added a visual security feature. Two distinct wallpapers were created to specify whether the current environment is a "Users" or an "Administrator". This will ensure the inmate is logged into the appropriate locked down environment.

[6] BOP's detailed list of Windows GPO settings is not reproduced here.

III. Common File Types and Review Applications

A. File Types Listed in the BOP July 2014 Electronic Discovery RFI

The following is taken from the July 7, 2014, BOP RFI for support services, hardware and software for inmate electronic discovery.,
https://www.fbo.gov/index?s=opportunity&mode=form&id=fa1f57c38041cf651e1297aeb33f295c&tab=core&_cview=1

The following introduction to the BOP RFI is a useful presentation of BOP thought and restrictions in this area.

> The Federal Bureau of Prisons (BOP), Information Technology Planning and Development Branch has created a Request for Information to seek information related to support services, hardware, and software for inmate electronic discovery (eDiscovery). The goal of this RFI is to obtain detailed information for a secure computing device which can be used by inmates to view discovery materials related to their criminal defense against federal prosecution or their civil litigation against a federal entity. The BOP seeks information on available solutions for an eDiscovery system that incorporates actual hardware, any necessary software to view litigation material, and support services for BOP IT staff to troubleshoot issues or seek repair of equipment. Interested parties shall not be reimbursed for any costs related to the development and submission of information in response to this RFI.
>
> . . . .
>
> These will be stand-alone read-only devices used to view as many different types of data as possible. The device should have the ability to receive updates to read additional types of data as needed. The task of updating the devices to include more capabilities could be done by the vendor or the vendor could provide a simple update for local staff to perform. These devices WILL NOT have internet connectivity.

Word Processing Formats
Adobe FrameMaker (MIF) 6.0, text only
Corel WordPerfect for Windows through X4
Lotus WordPro 96 – Millennium Edition 9.6, text only
Lotus Symphony Documents 1.2
Microsoft Windows Works through 4.0
Microsoft Word for Windows and Mac through 2010
Microsoft WordPad
Open Office Writer 2.0, 3.0
StarOffice Writer 5.2 - 9
ANSI Text 7 & 8 bit
ASCII Text 7 & 8 bit
EBCDIC all
HTML through 3.0
IBM Revisable Form Text all
Microsoft Rich Text Format (RTF)
Unicode Text all
WML 1.2
XML
MacWrite II 1.1
DOS Word Processors
DisplayWrite 2 & 3 (TXT) all
DisplayWrite 4 & 5 through Release 2.0
Professional Write through 2.1

Spreadsheet Formats
Corel QuattroPro for Windows through X4
Lotus 1-2-3 (DOS & Windows) through 5.0
Lotus 1-2-3 (OS/2) through 2.0
Lotus 1-2-3 for SmartSuite 97 – Millennium Edition 9.6
Lotus Symphony 1.0, 1.1 and 2.0

Microsoft Excel for Windows or Mac through 2010
Microsoft Works through 4.0
OpenOffice Calc 2.0 and 3
StarOffice Calc 5.2, 6.x, 7.x - 9

Database Formats
Access through 2010
dBASE through 5.0
Microsoft Works through 4.0

Presentation Formats
Corel Presentations 3.0 – X4
Harvard Graphics for Windows
Lotus Symphony Presentations 1.2
Microsoft PowerPoint through 2010
OpenOffice Impress 1.1 - 3
StarOffice Impress 6 – 9

Graphic Formats
Adobe Acrobat (PDF) 6.0 – 10.0
Adobe Illustrator 7.0, 9.0
AutoCad Interchange & Native Drawing Formats (DXF & DWG) 2.5 – 2.6, 9.0 – 14.0, 2000i, 2002, 2005 - 2010
Bitmap (BMP, RLE, ICO, CUR, OS/2 DIB & WARP) all
Corel Clipart (CMX) 5 – 6
Corel Draw (CDR) 6.0 – 8.0
Corel Draw (CDR with TIFF header) 2.0 – 9.0
DCX (multipage PCX) Microsoft Fax
Encapsulated PostScript (EPS) TIFF header only
Graphics Interchange Format (GIF)
Hewlett Packard Graphics Language (HPGL) 2
JPEG all
MacPaint (PNTG)
OpenOffice Draw 3
Portable Network Graphics (PNG) 1.0
Star Office Draw 9
TIFF through 6
TIFF CCITT Group 3 & 4 through 6
WordPerfect Graphics 7 and 10 (WPG & WPG2)

Video Formats
MPEG-1/2
DIVX (1/2/3)
MPEG-4 ASP, DivX 4/5/6, XviD, 3ivX D4
H.263 / H.263i
H.264 / MPEG-4 AVC
Cinepak
Theora
MJPEG (A/B)
WMV-9 / VC-1 1
Quicktime
DV (Digital Video)
Indeo Video 4/5 (IV41, IV51)
Real Video ¾

Audio Formats
MPEG Layer 1/2
MP3 (MPEG Layer 3)
AAC - MPEG-4 part3
Vorbis
WMA 1/2
WMA 3 1
FLAC
ATRAC 3
Wavpack
APE (Monkey Audio)
Real Audio 2
AMR (3GPP)
MIDI 3
DV Audio
QDM2/QDMC (QuickTime)

B. Quick View Plus 13 Professional, Supported File Formats

This gives an idea of the variety of file formats one commercially available viewing platform can present. See Quick View Plus 13 Professional, Fact Sheet and Supported File Formats, available at http://avantstar.com/metro/reference?path=A1x478ex1y1x4794x1x66y1x4a6fx1x65y8x656bx8x1.

WORD PROCESSING VERSIONS

GENERIC TEXT
ANSI Text—7 & 8 bit
ASCII Text—7 & 8 bit
EBCDIC—all
HTML—through 3.0 (with limitations)
IBM FFT—all
IBM Revisable Form Text—all
Microsoft Rich Text Format (RTF) —all
Trillian text
Unicode Text —all
WML —1.2
XML

DOS WORD PROCESSORS
DEC WPS Plus (DX)—through 4.0
DEC WPS Plus (WPL)—through 4.1
DisplayWrite 2 & 3 (TXT)—all
DisplayWrite 4 & 5—through Release 2.0
Enable—3.0, 4.0 and 4.5
First Choice—through 3.0
Framework—3.0
IBM Writing Assistant—1.01
Lotus Manuscript—2.0
MASS11—through 8.0
Microsoft Word—through 6.0
Microsoft Works—through 2.0
MultiMate—through 4.0
Navy DIF—all
Nota Bene—3.0
Office Writer—4.0 – 6.0
PC-File Letter—through 5.0
PC-File+ Letter—through 3.0
PFS:Write—A, B and C
Professional Write—through 2.1
Q&A —2.0
Samna Word—through Samna Word IV+
SmartWare II—1.02
Sprint—through 1.0
Total Word—1.2
Volkswriter 3 & 4—through 1.0
Wang PC (IWP)—through 2.6
WordMARC—through Composer Plus
WordPerfect—through 6.1
WordStar—through 7.0
WordStar 2000—through 3.0
XyWrite—through III Plus

WINDOWS WORD PROCESSORS
Adobe FrameMaker (MIF)—6.0, text only
AMI/AMI Professional—through 3.1
Corel/Novell WordPerfect
for Windows—through X5
Hangul—97, 2002, 2010
JustSystems Ichitaro
—5.0, 6.0, 8.0 – 13.0, 2004, 2010
JustWrite —through 3.0
Kingsoft WPS Office Writer—2010
Legacy —through 1.1
Lotus WordPro
—96 – Millennium Edition 9.6, 9.8 (text only)
Lotus Symphony Documents—1.2
Microsoft Windows Works—through 4.0
Microsoft Windows Write—through 3.0
Microsoft Word for Windows—through 2013
Microsoft WordPad—all
Novell Perfect Works—2.0
OpenOffice Writer—1.1 – 3.0
Oracle Open Office Writer—3.0
Professional Write Plus—1.0
Q&A Write for Windows—3.0
StarOffice Writer—5.2 – 9.0
WordStar for Windows—1.0

MACINTOSH WORD PROCESSORS
MacWrite II—1.1
Microsoft Word
—3.0, 4.0, 98, 2001, v.X, 2004, 2008
Microsoft Works—through 2.0
Novell WordPerfect—1.02 – 3.0

SPREADSHEETS VERSIONS
Corel QuattroPro for Windows
—through X5
Enable—3.0, 4.0 and 4.5
First Choice—through 3.0
Framework—3.0
KingSoft WPS Office Spreadsheet—2010
Lotus 1-2-3 (DOS & Windows)—through 5.0
Lotus 1-2-3 Charts (DOS & Windows)
—through 5.0
Lotus 1-2-3 (OS/2) —through 2.0
Lotus 1-2-3 Charts (OS/2)—through 2.0
Lotus 1-2-3 for SmartSuite
—97 – Millennium Edition 9.6, 9.8
Lotus Symphony—1.0 – 1.2 & 2.0
Microsoft Excel Charts—2.x – 7.0
Microsoft Excel for Macintosh
—3.0 – 4.0, 98, 2001, v.X, 2004, 2008
Microsoft Excel for Windows
—2.2 through 2013
Microsoft Multiplan—4.0
Microsoft Windows Works—through 4.0
Microsoft Works (DOS)—through 2.0
Microsoft Works (Mac)—through 2.0
Mosaic Twin—2.5
Novell Perfect Works—2.0
OpenOffice Calc—1.1, 2.0 (text only), 3.0
Oracle Open Office Calc—3.0
Quattro Pro for DOS—through 5.0
PFS:Professional Plan—1.0
SmartWare II—1.02
StarOffice Calc—5.2, 6.x, 7.x, – 9.0
SuperCalc 5—4.0
VP Planner 3D—1.0

DATABASES VERSIONS
Access—through 2.0, 95-2000
dBASE—through 5.0
DataEase—4.x
dBXL—1.3
Enable—3.0, 4.0 and 4.5
First Choice—through 3.0
FoxBase—2.1
Framework—3.0
Microsoft Windows Works—through 4.0
Microsoft Works (DOS)—through 2.0
Microsoft Works (Mac)—through 2.0
Paradox (DOS)—through 4.0
Paradox (Windows)—through 1.0

Personal R:BASE—1.0
Q & A—through 2.0
R:BASE 5000—through 3.1
R:BASE System V—1.0
Reflex—2.0
SmartWare II—1.02

PRESENTATIONS VERSIONS
Corel/Novell Presentations—3.0 – X5
Freelance for Windows
—through Millennium Edition 9.6, 9.8
Freelance for OS/2—through 2.0
Harvard Graphics for DOS—2.x & 3.x
Harvard Graphics for Windows
KingSoft WPS Office Presentation—2010
Lotus Symphony Presentations—1.2
Microsoft PowerPoint for Macintosh
—3.0 – 4.0, 98, 2001, v.X, 2004, 2008
Microsoft PowerPoint for Windows
—3.0 through 2013
OpenOffice Impress—1.1 – 3.0
Oracle Open Office Impress—3.0
StarOffice Impress —5.2 (text only), 6.0 – 9.0

COMPRESSED VERSIONS
7z
GZIP
JAR
LZA Self Extracting Compress
LZH Compress
Microsoft Binder—7.0 – 97
MIME (Text Mail)
RAR
UNIX Compress
UNIX TAR
UUEncode
ZIP—PKWare through 2.04g

OTHER VERSIONS
Apple iWork 09 Keynote
Apple iWork 09 Numbers
Apple iWork 09 Pages
Executable (EXE, DLL)
Executable for Windows NT

Lotus Notes DXL
Microsoft Outlook
Express (EML)—97 – 2003
MBOX
Microsoft Cabinet
Microsoft Live Messenger—10
Microsoft Office 2003 XML (text only)
Microsoft OneNote 2007-2010 (text only)
Microsoft Outlook Folder (PST)—97 – 2003
Microsoft Outlook Forms Template (OFT)
Microsoft Outlook Offline Folder (OST)
—97 – 2003
Microsoft Outlook Message (MSG)
Microsoft Project—98, 2000, 2002,
2003, 2007, 2010 (Gantt chart view)
vCard—2.1

GRAPHIC VERSIONS

Adobe Acrobat (PDF)—2.1, 3.0 – X
Adobe PDF Package
Adobe PDF Portfolio
Apple Mail Message—2.0
Adobe Illustrator—7.0, 9.0, CS5, CS6
Adobe Photoshop (PSD)—4.0, CS5, CS6
AmiDraw (SDW)—all
AutoCad Interchange & Native
Drawing Formats (DXF & DWG)
—2.5 – 2.6, 9.0 – 14.0, 2000i,
2002, 2005 – 2012
Autoshade Rendering (RND)—2.0
Binary Group 3 Fax
—'2005 - 2007 (with limitations)
Bitmap (BMP, RLE, ICO,
CUR, OS/2 DIB & WARP)—all
CALS Raster—Type I and Type II
Computer Graphics Metafile (CGM)
—ANSI, CALS NIST 3.0
Corel Clipart (CMX)—5 – 6
Corel Draw (CDR)—6.0 – 8.0
Corel Draw (CDR with TIFF header)
—2.0 – 9.0
DCX (multipage PCX)—Microsoft Fax
GEM Paint (IMG)
Graphics Interchange Format (GIF)
Hewlett Packard
Graphics Language (HPGL)—2
JFIF (JPEG not in TIFF format)—all
JPEG—all
Kodak Flash Pix (FPX)—all
Kodak Photo CD (PCD)—1.0
Lotus 1-2-3 Picture File Format (PIC)—all
Lotus Snapshot—all
Macintosh PICT1 & 2—Bitmap only
MacPaint (PNTG)
Micrografx Draw (DRW)—through 4
Micrografx Designer (DSF)—Windows 95,
6.0
Novell PerfectWorks (Draw)—2.0
OpenOffice Draw—3.0
Oracle Open Office Draw—3.0
Paint Shop Pro (PSP)—5.0 – 7.04
PC Paintbrush (PCX & DCX)—all
Portable Bitmap (PBM)
Portable Graymap (PGM)
Portable Network Graphics (PNG)—1.0
Portable Pixmap (PPM)
Progressive JPEG
Star Office Draw—9.0
Sun Raster (SRS)
SVG (XML display only. Content will be
rendered as an XML file, not a multimedia
file.)
TIFF—through 6
TIFF CCITT Group 3 & 4—through 6
Truevision TGA (TARGA)—2
Visio—4 (preview only), 5, 2000, 2002,
2003
WBMP
Windows Enhanced Metafile (EMF)
Windows Metafile (WMF)
WordPerfect Graphics
—through 2.0, 7 and 10 (WPG & WPG2)
X-Windows Bitmap (XBM)—x10
compatible
X-Windows Dump (XDM)—x10
compatible
X-Windows Pixmap (XPM)—x10
compatible

C. Windows Media Player 12

Following is a list of audio and video files supported by Windows Media Player 12. *See* https://support.microsoft.com/en-us/kb/316992

Windows Media formats (.asf, .wma, .wmv, .wm)
Windows Media Metafiles (.asx, .wax, .wvx, .wmx)
Windows Media Metafiles (.wpl)
Microsoft Digital Video Recording (.dvr-ms)
Windows Media Download Package (.wmd)
Audio Visual Interleave (.avi)
Moving Pictures Experts Group (.mpg, .mpeg, .m1v, .mp2, .mp3, .mpa, .mpe, .m3u)
Musical Instrument Digital Interface (.mid, .midi, .rmi)
Audio Interchange File Format (.aif, .aifc, .aiff)
Sun Microsystems and NeXT (.au, .snd)
Audio for Windows (.wav)
CD Audio Track (.cda)
Indeo Video Technology (.ivf)
Windows Media Player Skins (.wmz, .wms)
QuickTime Movie file (.mov)
MP4 Audio file (.m4a)
MP4 Video file (.mp4, .m4v, .mp4v, .3g2, .3gp2, .3gp, .3gpp)
Windows audio file (.aac, .adt, .adts)
MPEG-2 TS Video file (.m2ts)

D. Litigation Support Database Applications

Concordance
iPRO
iPRO Eclipse SE
Relativity
Access Data – Summation
Intella
Nuix
Epiq
CaseLogistics
Masterfile
iConnect
Lateral Data

* * *

STEVEN A. METCALF II, ESQ., Managing Attorney
NANETTE IDA METCALF, ESQ., Managing Attorney**
MARTIN TANKLEFF, ESQ., Associate Attorney
CHRISTOPHER DARDEN, ESQ., *Special Counsel**
MARC HOWARD, ESQ., *Special Counsel*
JOSEPH D. MCBRIDE, ESQ., *of Counsel*

EXHIBIT I

Metcalf & Metcalf, P.C.
99 Park Avenue, 25th Floor
New York, NY 10016
646.253.0514 (*Phone*)
646.219.2012 (*Fax*)

	DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS **POLICY AND PROCEDURE**	**EFFECTIVE DATE:**	June 20, 2017	**Page 1 of 40**
		SUPERSEDES:	4160.3I May 19, 2015	
		OPI:	DOC GENERAL COUNSEL	
		REVIEW DATE:	June 20, 2018	
		Approving Authority	Quincy L. Booth Director	
	SUBJECT:	**ACCESS TO LEGAL COUNSEL (Attorney Visits)**		
	NUMBER:	**4160.3J**		
	Attachments:	Attachment A – Inmate Consent Form Attachment B – Request for Legal Visit Attachment C – Attorney Acknowledgement and Waiver of Liability Form of the D.C. Department of Corrections Recorded Audio and Video Surveillance and Voluminous Documents Review Procedures Form Attachment D – Inmate Acknowledgment and Release Attachment E – Attorney Visitation Entrance Checklist		

SUMMARY OF CHANGES:

Section	Change
Changes	*Minor changes made throughout policy.*

APPROVED:

Quincy L. Booth, Director

6/20/17
Date Signed

1. **PURPOSE AND SCOPE.** To establish procedures for inmate attorney/legal visits at the Central Detention Facility (CDF) and Correctional Treatment Facility (CTF).

2. **POLICY.** It is the policy of the District of Columbia Department of Corrections (DOC) to ensure inmates' rights to have access to counsel and the courts.

3. **APPLICABILITY.** This procedure applies to attorneys, inmates' attorney of record, their agents, embassy and consular officers, DOC employees, contract staff, volunteers and inmates.

4. **PROGRAM OBJECTIVES.** The expected results of this program are:

   a. Inmates shall have access to courts, counsel and/or their authorized representatives via telephone communications, uncensored correspondence and visits. Legal telephone calls and correspondence are addressed in other policies (see directives referenced).

   b. Inmates' constitutional right to access counsel shall be protected while maintaining facility safety, security and order.

5. **NOTICE OF NON-DISCRIMINATION**

   a. In accordance with the D.C. Human Rights Act of 1977, as amended, D.C. Official Code §§ 2-1401.01 *et seq.*, (Act) the District of Columbia does not discriminate on the basis of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, matriculation, political affiliation, genetic information, disability, source of income, status as a victim or an intrafamily offense, or place of residence or business. Sexual harassment is a form of sex discrimination that is also prohibited by the Act. Discrimination in violation of the Act will not be tolerated. Violators will be subject to disciplinary action.

6. **AUTHORITY.** D.C. Code § 24-211.02, Powers; Promulgation of Rules;

   The Vienna Convention on Consular Relations (1963), Article 36 "Communication and Contact with Nationals of the Sending State"

D.C. Code §§ 22-2603.01, *et seq.*, "Introduction of Contraband into Penal Institution"

7. DIRECTIVES AFFECTED

a. Directives Rescinded

PP 4160.3I Access to Legal Counsel (5/19/15)

b. Directives Referenced

1) PP 1280.2 Reporting and Notification Procedures for Significant Incidents and Extraordinary Occurrences

2) PP 1282.1 Duty Administrative Officer

3) PP 4070.1 Inmate Telephone Access

4) PP 4070.4 Inmate Correspondence and Incoming Publications

5) PP 5009.2 Searches of Inmates, Inmate Housing Units, Work and Program Areas

6) PP 5010.2 Accountability for Inmates

7) PP 5010.3 Contraband Control

8) PP 5020.1 Entrance and Exit Procedures

9) PM 5300.1 Inmate Disciplinary and Administrative Housing Hearing Procedures

10) PM 5300.2 Juvenile Disciplinary and Administrative Housing Hearing Procedures

8. STANDARDS REFERENCED

a. American Correctional Association 4th Edition, Performance-Based Standards for Adult Local Detention Facilities: 4-ALDF-6A-01, 4-ALDF-6A-02, and 4-ALDF-6A-03.
b. National Standards to Prevent, Detect, and Respond to Prison Rape Under the Prison Rape Elimination Act (PREA), 28 C.F.R. 115.

9. ATTORNEY VISIT REQUESTS

a. Attorney Visits. An Attorney shall be allowed to visit their inmate client without advance approval when they are the attorney of record and a member of the District of Columbia Bar and present a D.C. Bar Card and a photo identification at entrance. CJA and PDS attorneys may show their valid work ID to access the facility. They do not need to present a bar card and additional photo identification.

b. Advance Approvals For Attorney Visits. Advance approval from the Warden's Office is required If the attorney seeking a legal visit is not a member of the DC Bar, and the attorney must provide a Bar Card or credentials from another jurisdiction and a valid photo identification (State ID, Driver's License). In obtaining approval from the Warden's Office, an attorney that is not licensed in any of the United States but licensed in a foreign country must present a letter from his/her country's embassy on embassy letterhead confirming he/she is a licensed attorney in his/her native country and a valid form of identification such as a passport.

c. Attorneys Who Are Not Attorneys of Record in Criminal Matters

1) Any attorney who is not the attorney of record in an inmate's criminal case(s) and/or represents an inmate in a matter other than their criminal case(s) must request their attorney visit(s) through the Warden's Office in advance.

The attorney shall fax to (202) 698-4877 Attn: Warden a request for an attorney visit at least three (3) business days in advance including the following:

a) The attorney letterhead including a current address and phone number.

b) The attorney's state and bar license number. If the attorney is not licensed in the District of Columbia, they shall provide a copy of their bar card or other license credentials.

c) The name and DCDC number of the inmate with whom they are seeking to visit.

d) The jurisdiction, case name and case number of the matter in which they represent the inmate or a brief description of the nature of the legal matter. For example, if the representation does not involve an open case, the letter should provide a general reference as to what it relates to such as child custody, divorce, bankruptcy, property transfer, etc.

e) The general purpose of the attorney visit.

f) The number and duration of attorney visits being requested.

g) Proposed dates for the visits.

h) The attorney shall indicate in the letter whether the attorney has a personal relationship with the inmate such as friend, relative, spouse, co-parent, romantic partner, or other relationship. Individuals who are attorneys or attorney agents shall not conduct personal visits in attorney visitation.

d. Attorney Visit Approvals/Disapprovals. Warden shall advise the attorney in writing whether or not the request is approved. If approved, the attorney is required to follow all procedures contained herein. The inmate must consent to the visit(s) approved by the Warden.

10. GENERAL PROCEDURE

a. *Attorney Decorum.* Attorneys and their agents shall not display over-familiarity with inmates, they shall not give inmates any items other than printed legal materials to be reviewed during visitation and/or taken back to their cells, and they shall, at all times, maintain a professional decorum and adhere to protocols consistent with a correctional environment. Attorneys shall not give their clients cds/dvds, tapes or other audio/visual recordings of legal materials to keep after visitation.

b. *Visiting Hours.* Attorneys and their agents (i.e., investigators, law clerks, law students, and interpreters) shall have twenty-four (24) hour access to their clients, seven (7) days a week.

c. *Point of Entry.* Attorneys and their agents shall enter the facility via the Visitors Control entrance.

d. Visiting Areas

1) *12:00 noon to 8:00 p.m.* Legal visits shall be conducted in the Visiting Hall on the same floor as the inmate's assigned housing unit, except as stated below:

a) In the event that all legal booths are occupied on the respective floor, the Visiting Hall Officer shall contact Visiting Hall Officers on other floors to arrange for a booth and inform the attorney or agent of the change. The Administrative Module Officer shall inform the inmate of the change and record the change on the inmate's pass accordingly.

b) Attorneys and their agents shall be moved to other floors as needed if booths on a particular level are unavailable. If an attorney or agent requests to use the visiting phone instead of waiting for a booth, this request shall be granted and documented in the Visiting Hall logbook.

2) *8:00 p.m. and 11:30 p.m.* All legal visits shall be conducted in Visiting Hall Two on the second floor.

3) *11:30 p.m. and 8:00 a.m.* All legal visits shall be conducted in front of the Command Center.

4) *8:00 a.m. and 12:00 noon.* All legal visits shall be conducted in Visiting Hall Two on the second floor.

5) *Saturday and Sunday.* All legal visits shall be conducted in Visiting Hall Two on the second floor.

6) Overflow Visiting Hall. An alternate Visiting Hall shall be designated for overflow legal visits.

e. Visiting Multiple Inmates

1) The Attorney of record or their agents requesting to successively or simultaneously meet with more than one inmate during a visit to the facility shall fax their request to the Deputy Warden for Programs and Case Management not less than twenty-four (24) hours in advance of the interview date. This will ensure that separations are checked, and to the extent possible, that accommodations are made consistent with the safety and security of the facility.

2) With twenty-four (24) hour notice, and agency approval, the attorney of record and their agents may arrange to visit all of his/her clients at one location regardless of their housing unit. Otherwise attorneys and agents may have to go to each floor where his/her clients are housed.

f. Inmate Hospital Visits

1) The attorney or agent should go to the D.C. Jail and advise the staff that their client is in the hospital.

2) The officers at the Jail will provide the attorney with the hospital and room number of the inmate and the paperwork necessary to present to the correctional officers at the medical outpost.

3) DOC staff will contact the officers at the hospital and notify them that the

attorney or agent is coming over directly for a visit.

4) Officers on medical outposts cannot terminate sight supervision of the inmate during the attorney visit in the hospital room, but efforts will be made to allow as much sound privacy as possible under the circumstances.

g. Arrestee Visits at Central Cell Block and the Hospital

1) The attorney should go to the Central Cell Block at MPD Headquarters at 300 Indiana Ave. NW, Washington, DC. If the arrestee is in the CCB, the visit will take place in the attorney visitation room on site. If the arrestee is in the hospital. The officers at the Jail will provide the attorney with the hospital and room number of the inmate and the paperwork necessary to present to the correctional officers at the medical outpost.

2) DOC staff will contact the officers at the hospital and notify them that the attorney or agent is coming over directly for a visit.

3) Officers on medical outposts cannot terminate sight supervision of the arrestee during the attorney visit in the hospital room, but efforts will be made to allow as much sound privacy as possible under the circumstances.

11. TITLE 16 JUVENILES

a. Attorneys and their agents shall fax a request to visit Title 16 Juveniles held in the Juvenile Unit of the CTF to (202)-698-4877 Attn: Deputy Warden for Programs and Case Management.

b. The CTF will contact the D.C. Jail staff to ensure advance notice for escort to visitation.

c. Failure to provide one day notice in advance of visitation may result in delays.

12. ENTRY OF SUBPOENAED CHILD WITNESSES, AGES 14 TO 17, FOR PAROLE HEARINGS

a. Witnesses for parole hearings will not be permitted to bring non-witness children under 18 years of age into the facility. The United States Parole Commission (USPC) shall formally notify witnesses in advance to make appropriate child care arrangements because children under 18 are not permitted entry.

b. Witnesses subpoenaed by the USPC who are 14 to 17 years old will be allowed entry into the facility provided that: (a) the witness is accompanied by a guardian, (b) under the direct supervision and control of a Victim Witness Services representative the entire time they are in the facility, (c) their testimony is expedited in the proceedings to the greatest degree practicable by calling them as soon as possible to limit their time in the facility, and (d) they are escorted out as soon as their testimony is completed and their presence is no longer necessary for testimony. Non-witness siblings or other children will not be allowed entry with them.

13. PRE-APPROVAL OF AGENTS

a. Investigators and Practicing Law Students

1) Law firms, agencies, and attorneys shall submit a list of the names of their agents *in each case* to the Wardens Office for the Central Detention Facility, at 1901 D Street, SE, Washington, D.C. 20003. This list shall be submitted on the law firm's official letterhead stationery.

2) Attorney letters on behalf of their agents that conform with 10(a)(1) above are valid for one (1) year or until rescinded in writing by the attorney, whichever comes first.

3) If an attorney wishes to submit a request for entry of agents *without specifying the cases*, the attorney must submit a request every thirty (30) days.

4) Criminal Justice Act (CJA) and Public Defenders Service (PDS) or other government investigators do not require advance approval to enter the facility but must show their valid work ID to access the facility. All other agents must show a copy of the letter on letterhead and present a valid photo ID.

b. Experts

1) Law firms, agencies and experts shall fax their request for an expert to visit an inmate not less than twenty-four (24) hours in advance of the interview date to (202)-698-4877 Attn: Deputy Warden for Programs and Case Management.

2) The request shall be submitted on the law firm's official letterhead stationery and include the name of the expert, the inmate(s) he/she wishes to visit and any electronic or other equipment the expert will bring into the facility.

3) If visiting more than one inmate, the request shall include the order in which he/she wishes to visit the inmates.

c. Notaries

1) Notaries will be permitted to access attorney visitation with any equipment needed to notarize documents so long as they are accompanied by the inmate's otherwise authorized attorney or agent.

2) Notaries are required to present photo identification as listed in ¶20(a)(1-3) herein.

3) All notary equipment will be inspected and searched pursuant to ¶22(d) herein.

d. Diplomatic Representation

Individuals from foreign embassies who seek to visit an inmate must submit a request on embassy letterhead containing the name and DCDC number of the inmate that they

wish to visit, the date and time they wish to visit, the legal authority for the visit, and the name and a copy of the embassy photo identification for each visiting official.

14. EX-OFFENDERS AS AGENTS

a. Law firms, agencies, and attorneys shall submit a written request to the Warden in advance of a legal visit seeking approval before an agent with a felony or misdemeanor conviction in any jurisdiction can be permitted entry into the facility and have contact visits with inmates.

15. LIST OF APPROVED AGENTS

a. The Deputy Warden for Programs and Case Management shall ensure that a current list of approved agents is forwarded to the Visitors Control and Staff Entrance.

b. A list of approved agents and contacts shall be maintained in the Office of the Deputy Warden for Programs and Case Management, should questions arise regarding the validity of the identification card.

c. Law firms, agencies, and attorneys are responsible for updating the lists of approved agents in conformity with 10(a) above, or earlier if necessary.

d. The Deputy Warden for Operations (or after hours the Shift Major or Duty Administrative Officer (DAO) on duty) shall be contacted for further disposition when the attorney or agent is not on the approved list.

16. REQUESTS FOR USE OF ELECTRONIC EQUIPMENT IN ATTORNEY VISITATION

a. TV/VCR/DVD Player Availability

1) Upon receipt of a written request from an attorney, agency or law firm, DOC will provide a TV/VCR/DVD player in Attorney Visitation to allow an inmate to review official videotapes/discs.

2) The attorney, agency or law firm shall fax notice requesting such equipment to the Deputy Warden for Programs and Case Management at least two (2) business days in advance.

3) TV/VCR/DVD player usage shall be restricted to between 8:00 a.m. and 9:00 p.m. including Saturday and Sunday.

4) The Warden's written permission shall be faxed to the attorney, agency or law firm with a copy to the Visitors and the Staff Entrance at least one (1) working day in advance of the requested visit date.

17. REQUESTS TO PHOTOGRAPH/AUDIO RECORD INMATE CLIENTS OR SPECIFIC AREAS OF THE FACILITY

a. The following procedures shall be followed when an attorney or agent requests to photograph, videotape, tape record or use other forms of electronic devices, i.e., other audio equipment to record the likeness of an inmate or photograph specific areas of a DOC facility:

1) Request Process for Photographing, Videotaping, or Tape Recording an Inmate:

a) The law firm, agency or attorney shall fax a copy of a court order to photograph, videotape, tape record or use other electronic equipment to photograph or record an inmate at least twenty-four (24) hours in advance of the interview date to the Deputy Warden for Programs and Case Management.

b) Absent a court order, a law firm, agency or attorney may photograph, videotape or tape record an inmate so long as the inmate is their own client and consents. The law firm, agency or attorney shall fax a request to photograph, videotape, tape record or use other electronic equipment at least two (2) business days in advance of the interview date to the Deputy Warden for Programs and Case Management. The request shall include:

(1) The inmate's name and DCDC number along with a statement

as to why the photographs, videotaping, or recordings are needed;

(2) The requested date for the photographing or recording;

(3) A complete list of equipment the requestor is seeking to bring into the facility. Phones (e.g., smart phones) may not be used or brought in to take the photograph or recording; and

(4) The name, title, address and contact information of the photographer or recorder.

(5) No other photographs or recordings may be taken while on the premises.

c) The Deputy Warden for Programs and Case Management shall notify the law firm, agency or attorney in writing via fax that the request has been approved or disapproved within one (1) working day prior to the requested interview date. Written correspondence shall include an explanation when the request is disapproved.

d) The Deputy Warden for Programs and Case Management shall ensure that the approval and a list of the approved equipment is forwarded to Visitors Control and Staff Entrance.

e) Inmate Consent. Absent a court order, an inmate to be photographed and/or tape recorded shall first sign a written Inmate Consent Form (Attachment A). The original consent form shall be placed in the inmate's official institutional record. A copy of this consent form shall be provided to the inmate and the attorney or agent.

b. Nothing and no one else in the facility shall be photographed or recorded other than the subject approved by the Court Order or Deputy Warden for Programs and Case Management. Violation of this requirement may result in

immediate removal of the attorney or agent and may result in a temporary or permanent ban from the facility.

a. Attorney or Agent Using the Equipment When Recording Client

1) Transporting the Equipment. The Shift Supervisor or designee shall escort the attorney or agent who shall carry his/her own equipment to and from the designated area.

2) Attorneys and agents shall only be permitted to use the photographic, video or electronic equipment once at the designated area. Inmates and DOC employees are prohibited from operating the equipment.

3) The Shift Supervisor or designee shall be present with the attorney or Agent from the time the individual is escorted into the facility until the attorney or agent exits the facility.

18. DISCONTINUED USE OF EQUIPMENT

a. The Shift Supervisor or designee may at any time discontinue the use of photographic, video or electronic equipment for security purposes.

b. Attorneys and agents shall be permitted to resume the use of equipment when the Shift Supervisor determines that there is no longer a safety or security concern.

c. Attorneys or agents may reschedule the recording or photographing with the Deputy Warden for Programs and Case Management if he/she cannot complete it during the visit because of safety or security concerns.

d. If an attorney or agent believes the Shift Supervisor or designee stopped his/her use of photographic, video, or other electronic equipment for reasons other than safety or security concerns, the attorney or agent should contact the Shift Major or designee for a decision on whether the attorney can resume the photographing or recording of the inmate or area.

19. REQUEST PROCESS FOR PHOTOGRAPHING AREAS OF THE CENTRAL DETENTION FACILITY

a. **Attorneys and their agents are prohibited from taking facility photos at any time**. Upon approval by the Office of General Counsel, A DOC staff member will take all requested photographs and provide them to the requesting attorney after they have been approved for release.

b. b) Any attorney who requests that photographs of a DOC Facility be taken in relation to an ongoing case involving an incident that occurred at the facility shall submit a request on letterhead to the DOC Office of the General Counsel at least seventy-two (72) hours in advance of the date on which they request to enter. The request must include the following:

1) The Court that is hearing the case, the case name, and case number;

2) The attorney's client's name and DCDC number;

3) The location within the CDF where the attorney is requesting to take photographs along with a statement explaining why the photographs are needed;

4) The date and time the attorney is requesting to enter the facility to have photographs taken, and

5) The name, title, address and contact information of the individual who will be entering the facility.

c. The DOC Office of the General Counsel will provide written approval or disapproval to the requestor at least one (1) day prior to the requested entry date.

d. The DOC Office of General Counsel will coordinate with CDF and CTF staff to ensure that a list of individuals approved to enter the facility is forwarded to Visitors Control and Staff Entrance.

e. Photos shall not reveal sensitive security information, or contain images of staff or inmates. Photos shall not include reenactments or staged scenes. Attorneys and agents shall not conduct interviews of staff or inmates while visiting to photograph areas of the facility. Their clients may not accompany them on the visit.

20. REQUESTS TO TAKE AN INMATE'S DEPOSITION

a. A request by an attorney to take the deposition of an inmate shall be accompanied by an order of the court in the underlying legal matter consistent with Fed.R.Civ.P.30, Fed.R.Crim.P.15, and their local counterparts.

21. REQUESTS TO COLLECT BUCCAL (CHEEK) SWAB SAMPLES FROM INMATES

a. The following procedures shall be followed when an attorney or agent requests to collect a buccal swab sample from a client:

1) The law firm, agency or attorney shall fax a copy of a court order to collect a buccal swab twenty-four (24) hours in advance of the visit date to the Deputy Warden for Programs and Case Management.

2) Absent a court order, the law firm, agency or attorney shall fax a request on letterhead to collect a buccal swab of their client at least two (2) business days in advance of the visit date to the Deputy Warden for Programs and Case Management. The request shall include:

(1) The name title, address and contact information of the requestor;

(2) A statement asserting that the requestor is the legal representative of the inmate;

(3) The inmate's name and DCDC number along with the related

case name and number, and

(4) The requested date for the collection of the buccal swab.

3) The Deputy Warden for Programs and Case Management shall notify the law firm, agency or attorney in writing via fax that the request has been approved or denied within one (1) working day prior to the requested visit date. Written correspondence shall include an explanation when the request is denied.

4) The Deputy Warden for Programs and Case Management shall ensure that a list of the approved equipment is forwarded to Visitors Control and Staff Entrance.

5) Inmate Consent. Absent a court order, an inmate from whom a buccal swab is to be collected shall first sign a written consent form (Attachment A). The original consent form shall be placed in the inmate's official institutional record. A copy of this consent form shall be provided to the inmate and the attorney or agent.

22. REQUESTS TO SERVE INMATES

a. Requests to deliver personal service of legal documents by a process server such as a summons shall be accommodated by a request to the Office of General Counsel, which shall facilitate the process server's escort in the facility to hand deliver the service to the inmate. The Department of Corrections shall not deliver the document on behalf of the requestor.

23. DRESS CODE. Attorneys and agents are to adhere to the agency's dress policy governing visitation to the facility by the public and shall not wear prohibited attire during legal visits. Prohibited attire includes, but is not limited to:

a. Revealing (sheer and see through) clothing;

b. Form fitting, clinging or skintight clothing of any type, e.g., spandex/lycra

outfits, latex leggings and body stockings;

c. Multi-layer garments, e.g., two shirts, two pairs of pants, two dresses or skirts and shorts under pants. This does not preclude an attorney or agent from wearing an outer garment over a single layer of clothing and under garments;

d. Shorts and hot pants;

e. Dresses or skirts more than three (3) inches above the knee;

f. Dresses, skirts and pants with splits that exceed mid-thigh length;

g. Wrap around dresses and skirts that are not buttoned;

h. Halter tops, tank tops and other garments that expose the upper torso;

i. Flip-flops and shower shoes;

j. Sweat suits, warm up suits, gym suits or swimwear of any type;

k. Military camouflage clothing; and

l. Any other items that may compromise the safety and security of the facility.

m. *Questionable Attire*. If attire is questionable, a Visitors Control or Staff Entrance Officer shall call for a Shift Supervisor. The Shift Supervisor shall respond and determine the appropriateness of the attorney's or agent's clothing.

1) Attorneys and agents not adhering to the dress code shall not be permitted to enter the facility.

2) In the event that a legal visit is denied due to prohibited attire, the Shift Supervisor shall immediately contact the Deputy Warden of Operations or the next highest ranking official prior to denying the visit and will prepare a written report to the Warden.

24. AUTHORIZED ITEMS. Attorneys may bring in with them:

a. Small purses and/or wallets sufficient in size to carry personal identification;

b. Official identification cards, keys, and feminine hygiene items;

c. Briefcases, attaché cases, backpacks, satchels, portfolios, messenger bags, tote bags and laptop bags containing only work related material;

d. Life-sustaining, condition-stabilizing medication on their person. All medication shall be in its original pharmacy container with the patient's name indicated on the pharmacy label;

e. Legal books, legal papers such as case law, correspondence and pleadings, and

f. Electronic Equipment. Without prior approval from the Warden or designee, *only attorneys* are authorized to enter a DOC facility with laptop computers, kindles, iPads, calculators, cds/dvds, videotapes, pagers and any legal documentary materials to include, but not be limited to, photographs and diagrams.

25. PROHIBITED ITEMS. Any other items not listed in Section 17 are prohibited. Attorneys may not bring in any of the following (without limitation):

a. Cellular phones and/or their accessories, Personal Digital Assistants (PDAs), blackberries and other communication devices;

b. iPods, MP3 players, Walkmans, and other such devices;

c. Walkie-talkies, audio and video recorders, cameras, radios and televisions, batteries, cords or plugs;

d. Any item that is unlawful to possess under local or federal law;

e. Any unauthorized, non-legal letter or message intended to be received by an inmate;

f. Alcohol or tobacco;

g. Firearms, ammunition, flammable liquid or explosive powder;

h. Knife, screwdriver, needle, razor or other item that can be used for stabbing or cutting;

i. Hypodermic needle or syringe;

j. Tear gas or pepper spray;

k. Layered civilian clothing, officer, medical or other staff uniforms;

l. Gang related personal property such as clothing;

m. Magazines and newspapers;

n. Items which may facilitate escape, such as hacksaws, files, wire cutters;

o. Rope, handcuffs, handcuff keys, security restraints;

p. Picks, gum, paste or other materials that can interfere with locking devices;

q. Food, or

r. More than $20.00 in cash.

26. SIGN-IN/REGISTRATION. All attorneys and agents shall sign in the designated logbook indicating:

a. Name;

b. Agency or organization representing;

c. Destination;

d. Purpose of Visit , and

e. Time In and Time Out.

27. IDENTIFICATION. Staff shall follow the guidance of the Attorney Visitation Entrance Checklist (Attachment E) when processing individuals into the CDF for legal visits in order to ensure that only authorized and approved legal visits occur. The attorney of record and the attorney's agents shall present approved identification which he/she shall surrender at the entrance to be held until he/she exits the facility.

a. Attorneys. The attorney of record shall present approved photo identification and a current DC Bar card or authorized government attorney ID to enter into the facility. The following documents are approved photo identifications:

1) A valid DC or state issued driver's license;

2) A valid DC or state issued non-driver's ID card with picture and address, or

3) A picture ID card issued by a federal, state or local government agency.

b. CJA and PDS attorneys may show their valid work ID to access the facility. They do not need to present a bar card and additional photo identification.

c. Practicing Law Students. Practicing Law Students shall present photo identification as listed above in section 20(a)(1-3) and their law school identification card to enter into the facility.

d. Investigators. Investigators shall present photo identification as listed above in section 20(a)(1-3) and an ID card issued by the respective law firm, agency or attorney.

1) Photo Identification. Law firms, agencies or attorneys can furnish their investigators with a photo identification card. The ID cards must bear the

name of the attorney of record, agency or law firm, investigator's signature, full name, height, weight, the attorney's bar number, attorney signature, telephone number and date card was issued.

2) Attorney Letters. An approved letter on the law firm's letterhead stationery containing the social security number and date of birth of the investigator, name of the inmate, time and date of the visit, may be substituted for a photo identification card issued by the respective firm. The letter shall be faxed to the Deputy Warden for Programs and Case Management and shall include the attorney's bar number and signature. The fax must be submitted at least twenty-four (24) hours in advance of visits and by 12:00 p.m. on Friday for all weekend visits.

3) Investigators may accompany attorneys during all legal visits. The investigator must present the required identification as stated in this section of this directive.

e. Experts. Experts shall present proper photo identification as listed above in section 20(a)(1-3) and an approved letter from the respective law firm, agency or attorney.

28. REQUEST FOR LEGAL VISIT FORM

a. Attorneys and agents requesting to visit with an inmate shall complete a Request for Legal Visit Form (Attachment B) and submit it to the Visitor Control or Staff Entrance Officer.

b. The Visitors Control or Staff Entrance Officer shall then enter the information from the legal visit form into the Jail and Community Corrections System (JACCS).

c. The Visitors Control or Staff Entrance Officer shall be responsible for informing an attorney or agent of the inmate's special status.

29. SEARCH PROCEDURES

a. *Search of Person*

1) Attorneys and agents that enter the facility shall remove outer layers of clothing such as jackets, coats, hats, large jewelry items, belts and shoes and place them in a container for x-raying screening. Additionally, attorneys and agents must remove all items located in their pockets and on their person and place those items in the same container for x-raying.

2) Attorneys and agents will proceed to be screened by walking through a body scanner.

3) If the body scanner does not give an "OK", Staff Entrance staff will inform the attorney or agent of the alarmed area and will allow that person to remove any missed item(s). If there is no item to be removed from the alarmed area, a same gender pat search will be required. Staff Entrance staff will decide if a person requires an additional body scan for clearance.

4) All personal property shall be subject to search. Items not permitted in the institution may be stored in lockers at the visitor's own expense.

5) The facility shall not be responsible for the loss or theft of personal items left in lockers.

b. *Inconclusive Searches*. When a pat or visual search does not eliminate staff suspicions that an attorney or agent may be introducing contraband, a Shift Supervisor shall be notified. The Shift Supervisor shall:

1) Determine whether to allow or deny the visit;

2) Prior to denying the visit, immediately contact the Deputy Warden of Operations or the next highest ranking official, and

3) Prepare a written report to the Warden if the visit was denied.

4) All persons entering the DOC staff entrance area are required to comply with this directive and instructions given by Staff Entrance staff. Any individual that is unwilling to comply with instructions shall be denied entry into the facility.

c. *Refusal to be Searched.* Attorneys or agents who refuse to be searched shall be denied entry and referred to the Shift Supervisor on duty who shall prepare a written report to the Warden.

d. *Searching Approved Equipment*

1) The Visitors Control or Staff Entrance Officer shall inspect and search any approved equipment.

2) It is advisable that film should not be loaded into any approved equipment until after the search is completed.

3) The attorney or agent shall be responsible for opening the electronic device, including storage areas and cover, and removing all batteries for a security inspection.

4) Refusal to disassemble equipment shall be grounds for denial of equipment access.

30. CONTRABAND. If an item of contraband that is prohibited by law as set forth in D.C. Code §§ 22-2603.01 and 22-2603.02, or threatens the safety, security and order of the facility is found in the possession of an attorney or his/her agent or representative, staff shall notify the Shift Supervisor.

a. Items prohibited by D.C. Code §§ 22-2603.01 and 22-2603.02 include:

1) Cellular telephones or other portable communication devices and accessories thereto that are carried, worn, or stored that are designed, intended, or readily converted to create, receive or transmit oral or written messages or visual images, access or store data, or connect electronically with the Internet, or any other electronic device that enables communication in any form. These devices include 2-way

pagers, hand-held radios, cellular telephones, Blackberry-type devices, personal digital assistants or PDAs, computers, cameras, and any components of these devices. This also includes any new technology that is developed for communication purposes and includes accessories that enable or facilitate the use of the cellular telephone or other portable communication device;

2) Any item it is illegal to possess under District of Columbia or federal law;

3) Any controlled substance prohibited under District of Columbia law or scheduled by the Mayor;

4) Any dangerous weapon or object which is capable of such use as may endanger the safety or security of a penal institution or any person therein;

5) A firearm or imitation firearm, or any component of a firearm;

6) Ammunition or ammunition clip;

7) A stun gun, taser, or other device capable of disrupting a person's nervous system;

8) Flammable liquid or explosive powder;

9) A knife, screwdriver, ice pick, box cutter, needle, or any other object or tool that can be used for cutting, slicing, stabbing, or puncturing a person;

10) A shank or homemade knife;

11) Tear gas, pepper spray, or other substance that can be used to cause temporary blindness or incapacitation;

12) Any object designed or intended to facilitate an escape;

13) Handcuffs, security restraints, handcuff keys, or any other object designed or intended to lock, unlock, or release handcuffs or security restraints;

14) A hacksaw, hacksaw blade, wire cutter, file, or any other object or tool that can be used to cut through metal, concrete, or plastic;

15) Rope;

16) When possessed by, given to, or intended to be given to an inmate, a correctional officer's uniform, law enforcement officer's uniform, medical staff clothing, any other uniform, or civilian clothing;

17) Any alcoholic beverage or liquor;

18) A hypodermic needle or syringe or other item that can be used for the administration of unlawful controlled substances; or

19) Any article or thing which a person confined to a penal institution is prohibited from obtaining or possessing by rule.

b. Items that are not prohibited by law but threaten the safety, security and order of the facility include anything other than printed legal materials given to inmates to take back to their cell during Attorney Visitation. This includes but is not limited to cds, dvds, zip drives or other information storage materials, eyeglasses, felt markers, butterfly clamps and binder clips. Also Items such as non-legal reading and photographic materials, non-legal notes and mail brought in on behalf of others to pass to the inmate, prescription and over the counter medications, food and beverage items, cash, cigarettes, gum, matches and lighters.

c. If an item of contraband as described in a. or b. above is found in the possession of an attorney or agent, the Shift Supervisor shall be contacted and he/she shall:

1) Immediately contact the Deputy Warden of Operations or the next highest ranking official prior to denying the legal visit;

2) Prepare a written report to the Warden detailing the denial of the visit; and

3) Notify the Office of Investigative Services and the appropriate law enforcement agency, if applicable.

d. As to any other items that are not prohibited by law as set forth in D.C. Code §§ 22-2603.01 and 22-2603.02, and do not threaten the safety, security and order of the facility, but are not permitted within a DOC facility, such as more than $20 cash in their wallet, etc., the individual will be permitted to return the item(s) to their personal vehicle or store them in a locker at Visitors Control or Staff Entrance.

e. Attorneys or their agents who introduce or attempt to introduce into the institution an item of contraband that is prohibited by law as set forth in D.C. Code §§ 22-2603.01 and 22-2603.02, or threatens the safety, security and order of the facility, or who engage in inappropriate, overly familiar, unsafe or threatening conduct, may be subject to immediate suspension of the visit, suspension from entering any DOC facility for a specified period of time or indefinitely, a permanent ban from entering any DOC facility in the future, and/or referral for possible criminal prosecution.

1) In the event that the DOC determines that an attorney or their agent(s) should be suspended or banned from DOC facilities, the DOC Warden shall issue a written notification to the suspended or banned individual. The notification shall contain:

a) Notice that the individual is being suspended for a definite period of time, is being suspended indefinitely, or is permanently banned from DOC facilities,

b) A brief statement that informs the individual of the general underlying facts that gave rise to the suspension or ban, and

c) A statement informing the individual that they can appeal the suspension or ban, in writing, to the DOC Warden within

fifteen (15) days of the postmark date on the written notification.

2) Attorneys and agents shall have fifteen (15) business days from the postmark date of the written notification to submit a written appeal of their suspension or ban.

3) The DOC Warden shall prepare a written response within thirty (30) days of receipt of any appeal. The response shall include the facts upon which the suspension or ban of visitation privileges is based and the duration of the suspension. The Warden's decision will be final.

31. VISITOR'S IDENTIFICATION CARD. Following proper identification, registration, and search, attorneys and agents shall surrender their photo identification card to the Visitor Control or Staff Entrance Officer and shall be issued a visitor's pass to be displayed in plain view on their person at all times while inside the facility.

32. ESCORTING ATTORNEYS AND AGENTS. Attorneys and agents who enter the facility through Visitors Control shall proceed to the visiting area without an escort.

33. COUNTS

a. Authorized Persons. Attorneys or agents shall not be held at Visitors Control or Staff Entrance pending the count. They shall be allowed entrance to the interview area to await their client.

b. Inmates. Inmate movement shall cease in accordance with PP 5010.2, *Accountability for Inmates*, except upon approval of the Count Supervisor.

c. Exception: When an attorney or agent is present in the legal visiting area prior to the start of the actual count, the Count Supervisor may authorize the inmate's escort. The following procedures shall be followed:

1) The Visiting Hall Officer shall call the cellblock and advise the officer that a legal visit is authorized.

2) The inmate shall be escorted to the visiting area once the unit count is conducted.

3) The Visiting Hall Officer shall submit the required out-count sheet.

4) If the Count Supervisor denies the inmate's movement, the attorney or agent shall be notified and informed of the reason it was denied.

d. *Official Count Times.* Counts are conducted daily at the following times: 12:00 midnight, 1:00am, 2:00am, 3:00am, 4:00am, 8:00am, 3:00pm, and 10:00pm. Emergency counts are conducted as needed.

34. NOTIFICATION OF LEGAL VISITS

a. The Visitors Hall Officer (or Command Center for after-hour visits) shall call the cellblock and inform the Cellblock Officer that a legal visit is authorized.

b. The Cellblock Officer shall:

1) Immediately inform the inmate that he/she has a legal visit;

2) Verify each inmate's identity before the inmate exits the unit, and

3) Pat search all inmates having legal visits prior to their leaving the cellblock.

35. INMATE REFUSAL OF LEGAL VISITS

a. If an inmate refuses a legal visit, the Cellblock Officer shall:

1) Document the refusal in the cellblock logbook;

2) Notify the appropriate Visiting Hall Officer;

3) Notify the Shift Supervisor, and

4) Prepare a DCDC Form 1.

b. The Visiting Hall Officer shall:

1) Document the refusal in the cellblock logbook, and

2) Notify the attorney or agent that the inmate has refused the legal visit.

36. ESCORTS

a. *Female, juvenile/youth and inmates on the mental health unit.* These inmates shall be escorted to the visiting area at all times.

b. *Status Inmates*. Status inmates, (i.e., inmates in a restrictive housing unit) shall be escorted to the visiting area in handcuffs and leg irons. The escorting officer shall remain with the inmate until the visitor arrives.

c. If an inmate is not escorted to the Visiting Hall within fifteen (15) minutes from the initial call to the housing unit, the Visiting Hall Officer shall call the housing unit officer to determine the cause of the delay.

d. If the inmate is not in the Visiting Hall after ten (10) more minutes, the Visiting Hall Officer shall notify the Shift Supervisor and enter the same in the logbook.

e. The Shift Supervisor shall personally contact the inmate's housing unit to determine the reason for the delay and promptly notify the legal visitor of the approximate time the inmate will be escorted to the Visiting Hall.

37. VISITING HALL PROCEDURES

a. Inmate Identification. The Administrative Module Officer shall verify the inmate's identity before allowing the inmate to enter into the visiting area.

b. Inmate Search

1) The Administrative Module Officer shall pat search the inmate prior to

him/her entering the visiting area.

2) An inmate who refuses to be searched, either before or after a visit, shall be placed on Administrative Restriction pending disciplinary procedures in accordance with PM 5300.1, *Inmate Disciplinary and Administrative Housing Hearing Procedures* or PM 5300.2, *Juvenile Disciplinary and Administrative Housing Hearing Procedures*.

3) Documents related to legal representation are the only items which inmates may take to the visiting area.

c. Restraints. The restraints on status inmates shall only be removed and removed from only one (1) hand when the inmate has to write or sign a document. Otherwise the inmate shall remain in full restraints.

d. Visiting Hall Officers

1) Officers assigned to the Visiting Hall shall monitor and coordinate all social and legal visits. Officers shall record the names of attorneys, agents and inmates and their time of arrival and departure into the computer-based Inmate Visitation program. In addition to the information listed, officers can also enter miscellaneous information pertaining to inmate refusals, tardiness, attorney/inmate conduct, etc.

2) Attorneys and agents may give inmates printed legal materials to be reviewed in visitation or taken back to the inmate's cell, but are prohibited from giving an inmate any other items.

3) The attorney or agent shall inform the Visiting Hall Officer when there is a need to give the inmate printed legal materials and shall surrender them to the Officer. The Officer shall inspect the materials but shall not read them before giving them to the inmate.

38. INMATE DISCOVERY REVIEW

a. Defense attorneys are responsible for providing their clients with the printed discovery materials associated with their cases. Attorneys who do not wish to

print voluminous discovery on paper may review the printed discovery with their clients on discs they bring with them into attorney visitation on their own laptops.

1) If an inmate has discovery documents that contain sensitive information or documents that are sealed by order of the Court, it is the defense attorney's responsibility to protect the information by reviewing it with their client in attorney visitation. The Department of Corrections cannot take responsibility for documents provided to an inmate to take back to his or her cell and cannot protect them from dissemination.

b. The Department of Corrections cannot accept printed discovery on discs or laptops; only audio and video surveillances subject to the conditions below except where the defense attorney certifies that the printed discovery is voluminous and unduly burdensome to produce in a hard copy format and requests the accommodation of electronic discovery review as set forth in section III below. Otherwise, documentary discovery must be provided in hard copy format. In cases where the printed discovery will not fit in "legal mail" envelopes, defense counsel may make advance arrangements with the Office of the General Counsel for delivery to the D.C. Jail or CTF of up to 2 boxes of printed material at a time. When counsel for the inmate indicates the review of documents is complete, the inmate's counsel may, through advance arrangements with the Office of the General Counsel, exchange the two boxes for two more for that inmate. This courtesy is not an obligation by the DOC or the General Counsel to the inmate or counsel, but a professional courtesy and accommodation subject to the availability of staff and resources. Copies of original materials shall be submitted for inmate use, the originals maintained by defense counsel.

39. INMATE REVIEW OF Law Enforcement Recorded Audio/Video Surveillance and Unduly Burdensome Voluminous Printed Discovery Review

The procedure for inmates to review law enforcement video and audio surveillance and unduly burdensome voluminous printed discovery in their underlying criminal cases in Attorney Client Visitation is as follows:

A. Review in Attorney Visitation

1) The inmate's defense attorney, (or the attorney's staff including investigators, law clerks, law students, and interpreters) shall enter the Jail and CTF in accordance with DOC rules and procedures with a laptop computer with the surveillance and printed discovery recordings downloaded on cds/dvds and/or the hard drive of the computer and review the surveillance/discovery with their client in attorney visitation.
2) The visitor shall not give the cds/dvds to the inmates to bring back to their cells. The visitor must account for the cds/dvds at departure from the Jail. Cds/dvds are contraband in the Jail and if passed to an inmate by an attorney, the attorney may have their visiting rights suspended or revoked and may be reported to the bar and the court.

B. Review in the Central Detention Facility and Correctional Treatment Facility

The DOC has implemented an alternative procedure whereby **defense** attorneys may request that inmates be allowed to review their audio/video surveillance or unduly burdensome voluminous printed documentary evidence on cds/dvds on a laptop computer provided by the DOC as a courtesy and accommodation. It does not transfer to the D.C. Department of Corrections defense counsel's responsibility and burden to their client relating to discovery. Pursuant to this courtesy, the inmate identified for surveillance/voluminous document review shall be moved from his or her housing unit and placed in administrative restrictive housing (lockdown). This protects the discs and the laptop, which are contraband, from floating around, in order to protect the safety, security and order of the facility. The inmate will be provided a laptop in his cell and his discs full time. While on lockdown for the surveillance review, the inmate will receive the same out of cell time as other inmates in administrative restrictive housing including

recreation, canteen, social and legal visits and calls absent other security or disciplinary limitations. When the inmate has completed his review, he shall notify the unit officer and shall be returned to his original unit. Most inmates complete their review in one to three days.

Under this procedure, the DOC Office of the General Counsel will accept custody of audio and video surveillance cds/dvds for an inmate only after receiving **from the defense attorney of record:**

1) A duly executed **Attorney Acknowledgement and Waiver of Liability Form of the D.C. Department of Corrections Recorded Audio and Video Surveillance and Voluminous Documents Review Procedures** form (Attachment C) which certifies that:

A) The cds/dvds provided contain only audio and video surveillance and that the discs contain no contraband,

B) The cds/dvds contain documentary evidence that is voluminous and unduly burdensome to print and produce, thereby warranting electronic submission and review, and that the discs contain no contraband,

C) The defense attorney has marked each disc with the reviewing inmate's name and DCDC number,

D) The defense attorney acknowledges and abides by the terms of participation and waives liability for the use of the accommodation.

E) The inmate signs an acknowledgement and liability waiver form provided to him or her at the time of discovery review (Attachment D.)

2) Imbedded and formatting information contained in the video and audio surveillance supplied by the government shall not be deemed contraband and may remain in the cds/dvds. Only copies of cds/dvds shall be submitted to the Office of the General Counsel; defense counsel shall maintain the originals. By accepting the disks, the DOC and the General Counsel shall not be responsible for them as bailors in fact or law. Printed discovery material shall not be included on the discs and must be submitted in hard copy unless the attorney certifies that the printed discovery is voluminous and unduly burdensome to print and produce to the inmate. Any other printed material or otherwise unauthorized material concealed in the disks shall be deemed contraband and the attorney introducing it to the DOC may be banned from the facility or face disciplinary action by the Court and Bar.

3) The alternative review procedure does not guarantee that an inmate will review any/all cds/dvds provided. The alternative procedure is subject to the availability of DOC staff to facilitate the program, laptop computers and available cells. The alternative procedure is triaged on a first-come, first-served basis and the DOC cannot guarantee that any inmate will review his/her cds/dvds within any allotted period of time. Additionally, the inmate will be required to sign an acknowledgement and waiver of liability when presented with the opportunity for surveillance/voluminous document review. The inmate can refuse to review his/her surveillance when presented with this alternative review procedure. If an inmate refuses to sign the form or refuses the opportunity to review his/her surveillance in accordance with the alternative review procedures, all cds/dvds will be returned to the defense attorney who provided the discs.

4) An inmate shall be allowed to use this surveillance/voluminous document review program for up to two weeks at a time. If the inmate requires more than two weeks to review discovery and there is a wait list for the program, the review will be ended and s/he will be added to the waitlist to re-enter the program for another 2 week cycle. If there is no waitlist, s/he may continue in the program until such time a waitlist occurs, if any. This is to ensure that inmates are able to access the program on a revolving basis in order of first come, first serve. Inmates are not limited to the number of times they may utilize this program. Inmates shall not check into and out of surveillance review on an intermittent or part time basis for the safety, security, order of the facilities, housing reasons and to maximize the availability of limited resources.

5) If the alternative surveillance review program is in any way delaying the inmate's ability to review the recorded audio and video surveillance, it is defense counsel's responsibility to review the cds/dvds with their client in attorney visitation. Defense counsel may contact the DOC Office of the General Counsel to have the inmate's cds/dvds returned to them.

6) The inmate's defense counsel should advise the inmate of the surveillance review procedure in advance in order to reduce the likelihood that the inmate will refuse the procedure because of a misunderstanding regarding the lockdown procedures.

7) Chargers for the laptops are located on the Unit and laptops shall be recharged by the staff when the battery runs low. It takes approximately 4-5 hours to recharge a battery in full and the computer should run for 4 to 12 hours. Some cells are wired with an electrical outlet subject to availability. It should be noted that some surveillance review will run down a charge must faster and will require more frequent charging. If an inmate or attorney is not satisfied with the time required for battery charging, this accommodation shall be terminated and they shall review the cds/dvds with their clients in attorney visitation.

40. Extra Law Library Hours

All inmates are accorded adequate weekly law library access by housing units and in accordance with custody level and separations. Inmates on protective custody and disciplinary segregation receive weekly law library services on the unit from the law library staff. Inmates at the D.C. Jail and CTF SHALL NOT be accorded additional time in the law library, which is limited as to availability and would infringe on other units' access to those services. However, if an inmate requires additional law library time, he may be allowed to access a laptop loaded with Lexis legal research software upon written request to the Office of the General Counsel. The inmate shall be placed in administrative restrictive housing in order to protect the equipment, and upon

completion and request, returned to his original cell. An inmate cannot check in and out of restrictive housing on a part time or intermittent daily basis, but must instead remain in lockdown until his project is completed. Nor can an inmate who is in lockdown anyway receive a laptop for an unlimited or open ended period of time, due to the limited availability of laptops and the resources required in providing extra time. Access shall be triaged and provided on an as needed basis, to meet legal deadlines and obligations and shall prioritize *pro se* litigants over those represented by counsel. Court Orders for extra law library time shall be immediately submitted to the General Counsel to determine whether the order can be complied with through the laptop program or requires the order to be lifted.

No inmate can be provided extra law library time to review surveillance or unduly burdensome voluminous documentary evidence.

41. EXIT PROCEDURES

a. Attorneys and Agents

1) At the completion of the visit, attorneys and agents shall exit the facility through the same point in which they entered the facility unless correctional staff direct them otherwise.

2) Attorneys and agents shall turn in their visiting forms and numbered visitor's passes.

3) Under no circumstances shall an attorney or agent be allowed to exit the facility without positive identification by comparing the person to their photo identification card.

4) If there is any question regarding the identity of a person, a Shift Supervisor shall be contacted. The Shift Supervisor shall not approve an attorney or agent to exit the facility until all inmates are accounted for.

5) Attorneys and agents shall sign out in the designated logbook.

6) When the requirements listed in section (1) through (5) above have been

met, the Visitors Control or Staff Entrance Officer shall allow the attorney or agent to exit the facility.

b. Inmates

1) When the visit is completed, each inmate shall be escorted to the strip search room and strip-searched by the Administration Module Officer.

2) Strip searches shall be performed in accordance with PP 5009.2, "Searches of Inmates, Inmate Housing Units, Work and Program Areas," the National Standards to Prevent, Detect, and Respond to Prison Rape Under the Prison Rape Elimination Act (PREA), 28 C.F.R. Part 115. Cross-Gender Strip Searches of female inmates shall only occur under circumstances specifically permitted by that policy.

3) If the inmate is on status and is in restraints, he/she shall remain in the strip search room until the Escort Officer arrives. At that time, the restraints shall be removed and the inmate shall be strip-searched. Both officers shall be present when the restraints are removed and during the search. The restraints shall be placed back on the inmate before leaving the strip search room for escort back to their housing unit.

42. CONTRABAND FOUND ON INMATES

a. Any contraband or unauthorized item(s) found in an inmate's possession shall be confiscated and processed in accordance with PS 5010.3, *Contraband Control.*

b. The inmate shall be subject to disciplinary action in accordance with PM 5300.1, *Inmate Disciplinary and Administrative Housing Hearing Procedures,* or PM 5300.2, *Juvenile Disciplinary Administrative Housing Hearing Procedures.*

c. Attorneys and agents shall be subject to action as stated in Section 23 of this directive.

43. ATTORNEY SUGGESTIONS/COMMENTS

a. Attorneys and agents should contact the Shift Major or designee when an incident occurs or a question needs to be addressed concerning this visiting procedure. The telephone number for the Major's office is (202) 523-7033.

b. Attorneys and agents may provide informal feedback on their visit by filling out a comment card found at the exit area of each visiting hall and submitting it in the secured suggestion box.

44. COMPLAINTS AND APPEAL PROCESS. If an attorney has a complaint having to do with a visit with his/her client, the attorney may bring their complaint to the attention of the DOC.

a. Complaints may initially be reported verbally, however, all complaints should be submitted in writing to the Warden.

b. The complaint should contain as much detail as possible, including but not limited to, the date, time, location of the incident, name of the staff involved and the badge number if uniform staff is involved.

c. The Shift Major shall contact the complainant within three (3) business days to acknowledge receipt of the complaint and/or to request additional information as needed.

d. The Shift Major shall notify the complainant in writing of the findings of the investigation within fourteen (14) business days of the filing of the complaint.

e. If legal visitation is restricted or prohibited, the complainant may appeal the Shift Major's decision to the Warden within fourteen (14) business days of receipt of the findings and conclusions.

f. The Warden shall review the basis for the decision including all documentation and notify the complainant in writing of his/her decision within three (3) business days of receipt of the appeal.

Attachments:

Attachment A – Inmate Consent Form
Attachment B – Request for Legal Visit
Attachment C – Attorney Acknowledgement and Waiver of Liability Form of the D.C. Department of Corrections Recorded Audio and Video Surveillance and Voluminous Documents Review Procedures Form
Attachment D – Inmate Acknowledgment and Release
Attachment E – Attorney Visitation Entrance Checklist

DOC/PP4160.3J/6/20/2017

D.C. DEPARTMENT OF CORRECTIONS
INMATE CONSENT FORM
(Please Print)

Inmate Name: _____ Inmate DCDC#: _____

Attorney/Agent Name: _____

Name of Entity Represented by Attorney/Agent and Address: _____

_____

Please initial. I, the above named inmate, authorize the above named attorney/agent to:

_____ Interview me on _____.

_____ Make recordings of my voice during this interview and/or to take photographs of me (still, movie or video).

_____ Collect a buccal (cheek) swab from me for DNA testing.

I recognize that I have a right to consult with my attorney and should do so if any information I release could have an impact on any civil or criminal litigation.

If the Attorney/Agent presents a Court Order or request and the inmate refuses, the inmate refusal MUST be documented below:

Please initial. I, the above named inmate, DO NOT authorize the above named attorney/agent to:

_____ Interview me.

_____ Make recordings of my voice, or take photographs of me (still, movie, or video).

_____ Collect a buccal (cheek) swab from me for DNA testing.

Inmate Name (Print): _____ DCDC#:_____

Inmate Signature: _____ Date: _____

Witness Name (Print): _____ Title: _____

Witness Signature: _____ Date: _____

Attach the Request or Court Order to this document for the file

Institutional File - Original
Inmate Copy
Warden/Designee Copy
Attorney/Agent Copy

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CORRECTIONS
Central Detention Facility

REQUEST FOR LEGAL VISIT

_____
DATE

_____ _____ _____
Inmate's Name DCDC Number Housing Unit

_____ _____
Attorney/Agent's Name Bar # (If an Attorney)

1. ☐ I am a member of the D.C. Bar. I represent the above named inmate in case number _____ in _____ Court.

2. ☐ I am an investigator/agent for attorney/law firm/agency _____ who represents the above named inmate in case number _____ in _____ court.

3. ☐ I am an attorney. I am not counsel of record for the above named inmate in any matter presently before the Court.

4. ☐ I am investigator/agent for attorney/law firm/agency _____ . The attorney/law firm/agency for whom I am employed is not counsel of record for the above named inmate in any matter presently before the court.

The inmate must sign an Inmate Consent Form (Attachment A) prior to entering the Visiting Hall if box 3 or 4 is checked.

_____ _____
Inmate's Signature/DCDC No. Witness' Signature/Title

_____ _____
Date/Title Witness Title

ATTORNEY ACKNOWLEDGEMENT AND WAIVER OF LIABILITY FORM OF THE D.C. DEPARTMENT OF CORRECTIONS RECORDED AUDIO AND VIDEO SURVEILLANCE AND VOLUMINOUS DOCUMENTS REVIEW PROCEDURES

I understand that the procedure for an inmate in the custody of the D.C. Department of Corrections (DOC) to review recorded audio and video surveillance and electronic documentary evidence is for the inmate's attorney (or the attorney's agents including interns, investigators, law clerks, law students and interpreters) to enter the Jail and/or CTF in accordance with DOC rules and procedures with a laptop computer with the surveillance and/or the documentary evidence recordings downloaded on cds/dvds and/or the hard drive of the computer and review the surveillance and documents with their client in attorney visitation. Attorney visitation is available twenty-four (24) hours per day, seven (7) days per week with no limitation on the duration of visits. Documentary evidence may also be printed and submitted to the inmate to keep in the cell and review.

I understand that, as a convenience, the DOC has implemented an alternative procedure whereby attorneys may request that inmates be allowed to review their audio and video surveillance or their voluminous documentary evidence on cds/dvds on a laptop computer provided by the DOC. Under this procedure the DOC Office of the General Counsel will accept custody of audio and video surveillance/voluminous documentary evidence cds/dvds for an inmate only after receiving **from the defense attorney**:

1) This certification that the cds/dvds provided contain only audio and video surveillance and that the discs contain no contraband,
2) This certification that the cds/dvds contain documentary evidence that is voluminous and unduly burdensome to print and produce, thereby warranting electronic submission and review, and that the discs contain no contraband,
3) This certification that the defense attorney has marked each disc with the reviewing inmate's name and DCDC number, and that
4) The defense attorney has signed this acknowledgement and waiver of liability form.

Imbedded and formatting information contained in the video and audio surveillance supplied by the government shall not be deemed contraband and may remain on the cds/dvds. Only copies of cds/dvds shall be submitted to the Office of the General Counsel; I, as defense counsel, shall maintain the originals. By accepting the discs, the DOC and the General Counsel shall not be responsible for them as bailors in fact or law.

I understand that the alternative review procedure does not guarantee that an inmate will review any/all cds/dvds that I provide. The alternative procedure is subject to the availability of DOC staff to facilitate the program, laptop computers, and electronically outfitted cells. The alternative procedure is triaged on a first-come, first-served basis and the DOC cannot guarantee that any inmate will review his/her cds/dvds within any allotted period of time. Additionally, I understand that an inmate will be required to sign an acknowledgement and waiver of liability when presented with the opportunity for surveillance/voluminous documents review. The inmate can

refuse to review his/her surveillance/voluminous documents when presented with this alternative review procedure. If an inmate refuses to sign the form or the opportunity to participate in accordance with the review procedures, the inmate refusal will be documented and all cds/dvds will be returned to the attorney who provided the discs.

I understand that if the alternative surveillance/voluminous documents review program is in any way delaying the inmate's ability to review audio and video surveillance/voluminous document evidence, it is my responsibility to review the cds/dvds with my client in attorney visitation. I may contact the DOC Office of the General Counsel to have the inmate's cds/dvds returned to me.

I understand that as the inmate's defense counsel, I shall advise the inmate of the surveillance review procedure in advance in order to reduce the likelihood that the inmate will refuse the procedure because of misunderstanding. If an inmate refuses the procedure, s/he will be provided a waiver indicating it was offered to him and then declined. If s/he refuses to sign the waiver, it shall be noted by the staff on the document. The inmate identified for surveillance/voluminous document review shall be moved from his housing unit and placed in administrative restrictive housing. The inmate will be provided a laptop in his/her cell and his/her discs full time. While in surveillance/voluminous document review restrictive housing, the inmate will receive the same out of cell time as other inmates in administrative restrictive housing, including recreation, canteen, social and legal visits and calls, absent other security or disciplinary restrictions. Inmates shall be placed in designated cells on South 1 that have been wired with electrical outlets for the use of the laptop equipment. If those cells are not available, they may use the laptop battery. Charges for the laptops are located on the Unit and laptops shall be recharged by the staff when the battery runs low. It takes approximately 4-5 hours to recharge a battery in full and the computer should run for 4 to 12 hours. It should be noted that some surveillance review will run down a charge much faster and will require more frequent charging. When the inmate indicates that s/he has completed his review, s/he will return to his previous housing unit. An inmate shall be allowed to use this surveillance/voluminous document review program for up to two weeks at a time. If the inmate requires more than two weeks to review discovery and there is a wait list for the program, the review will be ended and s/he will be added to the waitlist to re-enter the program for another 2 week cycle. If there is no waitlist, s/he may continue in the program until such time a waitlist occurs, if any. This is to ensure that inmates are able to access the program on a revolving basis in order of first come, first serve. Inmates are not limited to the number of times they may utilize this program, but they may not check into and out of surveillance review on an intermittent or part time basis for the safety, security, order of the facilities, housing reasons and to maximize the availability of limited resources.

In order to maintain the safety, security and order of the DOC facilities, maintain separations and classification requirements, and allow the general inmate population adequate access to the law library, no inmate will be provided extra law library time to review surveillance/voluminous documents evidence. I understand that I will not directly give my client cds or dvds to review while incarcerated. Discs are contraband and may be converted into weapons, be used to pass or distribute contraband by inmates and are prohibited to be maintained in inmate cells with the exception of use as described in this program.

I hereby, for myself, my heirs, executors, administrators and assigns, do release and forever discharge the District of Columbia, a municipal corporation, its officers, agents, servants and employees officially and individually, of and from any and all actions, damages, claims and demands whatsoever (including any claims for attorney's fees) which I have against the said District of Columbia, its officers, agents, servants and employees, or which I or any person or persons claiming by, through or under me now or hereafter can or may have against the forenamed parties by reason of or in any way arising out of my election to utilize the D.C. Department of Corrections alternative surveillance/voluminous document review process.

I hereby waive any claim that the District of Columbia or any of its officers, agents, servants and employees are bailors in law or in fact of any cds/dvds provided by me and I acknowledge that the District of Columbia, its officers, agents, servants and employees shall incur no liability if cds/dvds provided by me become damaged or lost.

I expressly warrant that I am legally competent to execute this release, and that I have fully informed myself of its contents and meaning. This form must be executed by the inmate defense counsel of record and will not be accepted if executed by counsel of records' agents, representatives or employees.

I acknowledge that after reading and understanding the procedures explained herein, I am electing to provide recorded audio and/or video surveillance/voluminous documentary evidence cds/dvds for inmate review to the DOC Office of General Counsel in accordance with the alternative review procedures. I hereby certify that I am providing a copy of audio and/or video surveillance cds/dvds and that I retain the original recordings. I further certify that the cds/dvds provided contain only audio and video surveillance and documentary evidence that is voluminous and unduly burdensome to print and produce and that the discs contain no contraband. I certify that I have indelibly marked each disc with the reviewing inmate's name and DCDC number.

____ Check Here to certify that the discs contain audio and video surveillance review evidence.
____ Check Here to certify that the discs contain _____ (insert number of documents) printed discovery documents that are unduly burdensome to print and produce for the inmate to review.

Number of cds/dvds being provided to DOC Office of the General Counsel:

_____

Name and DCDC# of inmate(s) receiving cds/dvds:

_____

_____

_____

_____

_____

Case Caption and Number: _____

Attorney Name: _____ **Attorney Bar No.**_____

Attorney Signature: _____**Date:**_____

D.C. DEPARTMENT OF CORRECTIONS
INMATE ACKNOWLEDGEMENT AND RELEASE
RECORDED AUDIO AND VIDEO SURVEILLANCE AND VOLUMINOUS DOCUMENTS REVIEW PROCEDURES

I understand that it is the responsibility of my defense attorney to review all recorded audio/video surveillance and discs containing voluminous documentary evidence with me in attorney visitation. Attorney visitation is available twenty-four (24) hours per day, seven (7) days per week with no limitation on the duration of visits. I understand that documents may be printed by my attorney and provided to me to review and keep in my cell. I understand that alternatively, I may be offered the opportunity to participate in the D.C. Department of Corrections (DOC) Surveillance and Voluminous Documents Evidence Review Program whereby I can review on a laptop computer provided by the DOC cds/dvds of recorded audio/ video surveillance and documents that are voluminous and unduly burdensome to print and produce. I understand that this is not an obligation of the Department of Corrections and does not shift my responsibility or my attorney's professional responsibility to me to review discovery to the Department of Corrections but is a program that is provided as a convenience, accommodation and courtesy.

I understand that if I elect to participate in the alternative Surveillance/Voluminous Documents Review Program, I will be moved from my current housing location to a restrictive housing cell until I complete review of all cds/dvds and ask to return to my regular housing location. When I complete review, I understand that I will be moved back to my regular housing location and all discs will be returned to my attorney. I shall be allowed to use this surveillance/voluminous document review program for up to two weeks at a time. If I require more than two weeks to review discovery and there is a wait list for the program, the review will be ended and I will be added to the waitlist to re-enter the program for another 2 week cycle. If there is no waitlist, I shall continue in the program until such time a waitlist occurs, if any or I complete my review. This is to ensure that inmates are able to access the program on a revolving basis in order of first come, first serve. I am not limited to the number of times I may utilize this program, but I may not check into and out of surveillance review on an intermittent or part time basis for the safety, security, order of the facility, housing reasons and to maximize the availability of limited resources.

I understand that I must return all discs to correctional staff upon completion of review and cannot bring any discs back to my cell and the discs are contraband in the facility with the exception of use as described in this program. I am responsible for the proper care, safe and appropriate use of the equipment and discs while in my possession and responsible for any damage to the equipment I incur therein.

I hereby, for myself, my heirs, executors, administrators and assigns, do release and forever discharge the District of Columbia, a municipal corporation, its officers, agents servants and employees officially or individually, of and from any and all actions ,damages, claims and

demands whatsoever(including any claims for attorney's fees) which I have against the said the District of Columbia ,its, officers, agents, servants and employees or which I or any person or persons claiming by, through or under me now or hereafter can or may have against the forenamed parties by reason of or in any way arising out of my election to utilize the D.C. Department of Corrections alternative surveillance/voluminous document review process.

I hereby waive any claim that the District of Columbia or any of its officers, agents servants and employees are bailors in law or in fact of any cds/dvds provided by me and I acknowledge that the District of Columbia, its officers, agents, servants, and employees shall incur no liability if cds/dvds provided to me become damaged or lost.

I expressly warrant that I am legally competent to execute this release, and that I have fully informed myself of its contents and meaning.

I acknowledge that after reading and understanding the procedures and release explained herein, I am:

_____Accepting participation in the Alternative Surveillance Review Program

_____ Refusing Participation in the Alternative Surveillance Review Program

Print Name:_____ DCDC: _____

Signature:_____ Date:_____

Witness Name:_____ Title:_____

Witness Signature:_____ Date:_____

Unit/Cell NO: _____ Laptop :(____) CDs/DVDs :(_____) Ref:_____

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CORRECTIONS

Attorney/Agent Entrance Checklist

For Attorneys:

___ Attorney is a member of the DC Bar* and has shown a DC Bar card,**

___ Attorney is the attorney of record for the inmate he/she is seeking to visit,

___ Attorney has confirmed that they are not a family member or friend of the inmate they are seeking to visit,*** and

___ Photo ID checked (State ID or Driver's License)

For Investigators/Agents:

___ **PDS and CJA Investigator/agent** - has shown a Public Defender Service (PDS) or Criminal Justice Act (CJA) photo ID

OR

___ **Law firm Investigator/agent -** Law Firm has submitted a letter to the Warden's Office for approval of named investigator/agent to enter the facility and they have shown photo ID (State ID or Driver's License)

For Other Legal Visits:

___ Legal visit (ex. embassy visit, expert visit, DC agency employee, attorney-not-of-record, lawyer who is a family member) has received advance Warden's Office approval and the individual has shown photo ID (State ID, Diver's License)

***If the attorney seeking a legal visit is not a member of the DC Bar**, they must be granted advance clearance from the Warden's Office to have legal visits with the inmate.

****If an attorney forgets their DC Bar card**, a supervisor may be contacted to check the attorney's status online:

1) Go to https://www.dcbar.org/
2) Click on "Find a Member" in the red box on the upper right hand side
3) Enter the attorney's first and last name as indicated
4) If the attorney is licensed with the DC Bar, the website will show you their name, contact information and whether or not their membership is active

*****If the attorney is related to, or is a friend or family member of the inmate**, they must be granted advance clearance from the Warden's Office to have legal visits with the inmate.

STEVEN A. METCALF II, ESQ., Managing Attorney
NANETTE IDA METCALF, ESQ., Managing Attorney**
MARTIN TANKLEFF, ESQ., Associate Attorney
CHRISTOPHER DARDEN, ESQ., *Special Counsel**
MARC HOWARD, ESQ., *Special Counsel*
JOSEPH D. MCBRIDE, ESQ., *of Counsel*

EXHIBIT J

Metcalf & Metcalf, P.C.
99 Park Avenue, 25th Floor
New York, NY 10016
646.253.0514 (*Phone*)
646.219.2012 (*Fax*)

NewsRoom

10/29/88 Newsday 7
1988 WLNR 171272

Newsday (USA)

October 29, 1988

Section: NEWS

2 ASST. DAS BARRED IN TANKLEFF TRIAL

Shirley E. Perlman

A county court judge yesterday barred two Suffolk assistant district attorneys from acting as prosecutors in the case against a Belle Terre youth charged in the deaths of his parents.

Judge Thomas Mallon also ordered that the youth, Martin Tankleff, 17, remain free on $1-million bail after arraigning him on second-degree murder charges in his father's death.

Tankleff was arrested Sept. 7 and charged with second-degree murder in the stabbing death of his mother, Arlene, and the attempted murder of his father, Seymour. The father, who also suffered multiple stab wounds and head injuries, was taken to University Hospital in Stony Brook, where he was in a coma until his death Oct. 6.

Assistant District Attorney Edward Jablonski, chief of the homicide bureau, and Assistant District Attorney Timothy Mazzei were barred from acting as prosecutors in the case after defense attorney Robert Gottlieb indicated he intended to subpoena both as witnesses.

"We knew we had a problem," Jablonski said in an interview yesterday. "You can't be a witness and also be an attorney in the case." Jablonski did not contest Gottlieb's request, which he said had been "expected."

According to Jablonski, the problem stemmed from admissions Jablonski said he heard Tankleff make during a telephone conversation between Tankleff and his older sister, Shari Rother, at police headquarters in Yaphank.

Rother has testified before a grand jury that Tankleff made no admissions in that conversation, which occurred after his arrest, and has said only that police coerced statements from him, court papers said.

Gottlieb said he will call Mazzei to testify about a telephone call Gottlieb made to Mazzei at police headquarters in which he "specifically told Mazzei not to call Shari Rother." Homicide detectives placed a call to Rother, who declined a request that a conversation between her and her brother be taped, court papers said.

During yesterday's hearing in Riverhead, Assistant District Attorney John Collins, now prosecuting the case, asked that Tankleff be held without bail.

Collins argued unsuccessfully that a Sept. 20 decision to set bail by State Supreme Court Justice James Gowan was based partly on assurances from Gottlieb that Tankleff would return to school, and also on the suspicious circumstances surrounding the disappearance of Jerry Steuerman, a business partner of Seymour Tankleff who was at the Tankleff home the night the parents were attacked.

Steuerman has since been found and Tankleff has been suspended from Earl L. Vandermeulen High School in Port Jefferson and is being tutored at home, Collins said.

In an interview, Gottlieb said Tankleff had been suspended last week. He said he has requested a hearing with school officials.

He said the school district based its suspension on "the fact that he has been indicted," Gottlieb said, adding that the district officials referred to "that May 26 alleged incident involving a switchblade." A police source said two weeks ago that the incident occurred when Tankleff allegedly drew a switchblade knife on a classmate and said "I ought to kill you.

"They have absolutely no right to suspend an individual based solely on an indictment when the laws of this country say that every individual is presumed innocent . . . "Gottlieb said.

Gottlieb said he intended to show "very clearly" that the knife incident "was nothing more than horseplay between friends and that the district took absolutely no action against Martin Tankleff . . . " School officials declined comment yesterday.

PHOTO
Newsday Photo by Dick Yarwood-Martin Tankleff, right, with attorney Robert Gottlieb in court yesterday

---- Index References ----

News Subject: (Violent Crime (1VI27); Crime (1CR87); Judicial (1JU36); Legal (1LE33); Social Issues (1SO05); Criminal Law (1CR79))

Language: EN

Other Indexing: (BELLE TERRE; STATE SUPREME COURT; TANKLEFF; UNIVERSITY HOSPITAL) (Collins; DAS BARRED; Dick Yarwood; Earl L. Vandermeulen; Edward Jablonski; Gottlieb; Jablonski; James Gowan; Jerry Steuerman; John Collins; Martin Tankleff; Mazzei; PHOTONewsday Photo; Robert Gottlieb; Rother; Shari Rother; Steuerman; Tankleff; Thomas Mallon; Timothy Mazzei)

Edition: NASSAU AND SUFFOLK

Word Count: 738

End of Document

NewsRoom

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1988 WLNR 158438

Newsday (USA)

October 8, 1988

Section: NEWS

SEYMOUR TANKLEFF DIES OF INJURIES

Kinsey Wilson

After lying in a coma for a month, Seymour Tankleff died at Stony Brook's University Hospital Thursday night, succumbing to injuries from a brutal attack in his Belle Terre home in which his son has been charged.

Prosecutors yesterday said they would ask a Suffolk County grand jury to file a second set of murder charges against Tankleff's adopted son, Martin, who was arrested Sept. 7, less than 12 hours after he called police to report an attack on his parents.

The 17-year-old youth has been charged with the murder of his mother, Arlene Tankleff, who was found with her throat slashed on the bedroom floor, and the attempted murder and assault of his father, who was found lying in the family den bleeding profusely from the neck. The attacks occurred after 3 a.m. following a weekly poker game at the home, which was attended by several friends and business associates.

Martin Tankleff has pleaded not guilty and is being held in the Suffolk County Jail in lieu of $500,000 cash bail or $1 million bond.

Martin Tankleff's lawyer, Robert Gottlieb, said he visited the youth early yesterday morning to inform him of his father's death before Tankleff could learn of it through the media. "He was devastated," Gottlieb said.

Family members have been attempting to raise bail for Tankleff, but have had difficulty because they have not had access to the parents' sizable estate, Gottlieb said.

If bail cannot be raised in the next day or two, Gottlieb said he would ask the court to free Tankleff long enough to attend his father's funeral. Tankleff was allowed to attend his mother's funeral Sept. 10 under police guard, a request prosecutors did not oppose.

Funeral arrangements for Seymour Tankleff had not been completed yesterday.

John Williams, a spokesman for the district attorney's office, declined to say yesterday whether prosecutors would oppose an application to attend the funeral, or whether they would seek higher bail if, as expected, the grand jury files additional murder charges.

Gottlieb, however, said he did not believe the upgraded charges should result in a higher bail. "There are the same doubts about the case today as there were before Mr. Tankleff's death," he said. Those doubts, Gottlieb said, have been heightened by the authorities' failure to turn over to the defense the results of forensic tests conducted after the attacks. Gottlieb said prosecutors have repeatedly told him there is a "backlog at the lab" and that test results have not been completed.

He said he mailed a letter to District Attorney Patrick Henry yesterday demanding immediate access to the evidence. "I don't accept the cavalier remark that there is a backlog," Gottlieb said. "I don't care whose fault it is, a backlog is not an excuse for not obtaining forensic reports in a murder case."

Gottlieb said he was concerned that the delay might prevent defense lawyers from performing their own tests on the evidence.

Williams said he did not know whether there had been a delay but said Gottlieb "will get everything he's entitled to," including evidence gathered in the case.

Hospital officials said Tankleff died of cardiac arrest. Deputy Medical Examiner Vernard Adams said the death was a result of the injuries Tankleff received in the Sept. 7 beating. He declined to discuss specific autopsy findings, saying the death was still under criminal investigation. Tankleff died at 9 p.m. Thursday.

Tankleff, 62, founded Tankleff Associates, an insurance agency, about 30 years ago, eventually moving the business from Hempstead to Port Jefferson Station. He sold the agency in 1985, in part due to health problems, but remained active in community and business affairs, serving as Belle Terre's commissioner of the constabulary and investing in a variety of private ventures. In addition to his son, he had a daughter by a previous marriage, Shari Rother.

PHOTO
Photo-Seymour Tankleff

---- Index References ----

News Subject: (Violent Crime (1VI27); Crime (1CR87); Social Issues (1SO05))

Language: EN

Other Indexing: (ARLENE TANKLEFF; DEPUTY MEDICAL; HOSPITAL; MARTIN TANKLEFF; PHOTOPHOTO SEYMOUR TANKLEFF; SEYMOUR TANKLEFF; TANKLEFF; TANKLEFF ASSOCIATES; UNIVERSITY HOSPITAL) (Gottlieb; John Williams; Martin; Patrick Henry; Robert Gottlieb; SEYMOUR TANKLEFF; Shari Rother; Tankleff; Vernard Adams; Williams)

Edition: NASSAU AND SUFFOLK

Word Count: 786

STEVEN A. METCALF II, ESQ., Managing Attorney
NANETTE IDA METCALF, ESQ., Managing Attorney**
MARTIN TANKLEFF, ESQ., Associate Attorney
CHRISTOPHER DARDEN, ESQ., *Special Counsel**
MARC HOWARD, ESQ., *Special Counsel*
JOSEPH D. MCBRIDE, ESQ., *of Counsel*

EXHIBIT K

Metcalf & Metcalf, P.C.
99 Park Avenue, 25th Floor
New York, NY 10016
646.253.0514 (*Phone*)
646.219.2012 (*Fax*)

2021 WL 2778559
Only the Westlaw citation is currently available.
United States District Court, District of Columbia.

UNITED STATES OF AMERICA
v.
MICHAEL JOSEPH FOY, Defendant.

Criminal No. 21-cr-00108 (TSC)
|
Filed 07/02/2021

MEMORANDUM OPINION

TANYA S. CHUTKAN United States District Judge

***1** Michael Joseph Foy has been charged with eight misdemeanor and felony offenses arising from his participation in the riots at the U.S. Capitol on January 6, 2021. ECF No. 6, Indictment. Following a detention hearing before Magistrate Judge Patricia Morris in the U.S. District Court for the Eastern District of Michigan, Foy was ordered detained pending trial. After his arraignment in this court, Foy moved for review of the detention order. On March 15, 2021, after a hearing, this court denied Foy's motion and ordered that he remain detained pending trial.

Foy filed a second motion for release, ECF No. 22, Def. Mot., and the court held a hearing on the renewed motion on June 2, 2021. For the reasons set forth below, and upon careful consideration of the motion, the government's opposition, the defendant's reply, the government's June 9, 2021 surreply, the arguments set forth during the June 2, 2021 hearing, the applicable law, and the entire record herein, the court will GRANT the motion for release and will order Foy to be released to home confinement with GPS monitoring and other conditions of supervision.

I. BACKGROUND

Foy, a former United States Marine with no prior criminal record, has been indicted on eight counts: civil disorder, in violation of 18 U.S.C. § 231(a)(3); obstruction of an official proceeding and aiding and abetting, in violation of 18 U.S.C. § 1512(c)(2); assaulting, resisting, or impeding certain officers using a dangerous weapon, in violation of 18 U.S.C. §§ 111(a)(1) and (b); entering and remaining in a restricted building or grounds with a deadly or dangerous weapon, in violation of 18 U.S.C. §§ 1752(a)(1) and (b)(1)(A); entering and remaining in a restricted building or grounds, in violation of 18 U.S.C. § 1752(a)(1); disorderly and disruptive conduct in a restricted building or grounds, in violation of 18 U.S.C. § 1752(a)(2); engaging in physical violence in a restricted building or grounds, in violation of 18 U.S.C. § 1752(a)(4); and an act of physical violence in the capitol grounds or buildings, in violation of 40 U.S.C. § 5104(e)(2)(F).

The parties do not contest that Foy was at the U.S. Capitol on the afternoon of January 6, 2021 when protesters stormed the building and attacked law enforcement officers, disrupting the joint session of the United States Congress that had convened to certify the vote count of the 2020 Presidential Election Electoral College. ECF No. 2-3, Stmt. of Facts, at 1. Despite the efforts of the U.S. Capitol Police and Metropolitan Police, shortly after 2:00 p.m. individuals in the crowd forced their way into the Capitol building. *Id.* At approximately 2:20 p.m., members of both houses of Congress and then-Vice President Mike Pence were evacuated from the House and Senate chambers and the joint session of Congress was suspended. *Id*.

A wide array of footage obtained by law enforcement shows an individual identified as Foy throwing a projectile and aggressively and repeatedly swinging a hockey stick towards law enforcement officers positioned outside of the center doorway of the Lower West Terrace of the U.S. Capitol. *See* Gov't Exs. 1, 2, 4, 5 to Opp. to First Bond Review Mot. The stick in the footage matches one later found in Foy's Michigan apartment. ECF No. 30, Gov't Opp. at 2 n.1. Shortly after the attack on the police officer, video footage shows this individual motioning his arms, seemingly urging other protesters forward, and ultimately climbing through a window into the U.S. Capitol, hockey stick in hand. *See* Gov't Ex. 3 to Opp. First Bond Review Mot. Opp.

II. LEGAL STANDARD

***2** In our society, "liberty is the norm" and "detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987). The Bail Reform Act, 18 U.S.C. § 3141 *et seq.*, thus provides that a defendant must be released pending trial unless it is determined that no condition or combination of conditions exist which will reasonably assure his appearance as required or the safety of the community. 18 U.S.C. § 3142(c). "In common parlance, the relevant inquiry is whether the defendant is a 'flight risk' or a 'danger to the community.' " *United States v. Munchel*, 991 F.3d 1273, 1279 (D.C. Cir. 2021) (quoting *United States v. Vasquez-Benitez*, 919 F.3d 546, 550 (D.C. Cir. 2019)).

When the basis for pretrial detention is the defendant's danger to the community, the government is required to demonstrate the appropriateness of detention pursuant to subsection (e) by clear and convincing evidence. 18 U.S.C. § 3142(f). Short of that, a judicial officer is generally required to release the defendant "subject to the least restrictive condition or combination of conditions" to effect these goals. *Id.* The factors that must be considered in assessing the defendant's future dangerousness, as set forth in § 3142(g) are:

> (1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence ...;
>
> (2) the weight of the evidence against the person;
>
> (3) the history and characteristics of the person ...; and
>
> (4) the nature and seriousness of the danger to any person or the community that would be posed by his release.

18 U.S.C. § 3142(g); *see also* *Munchel*, 991 F.3d at 1279–80; *United States v. Smith*, 79 F.3d 1208, 1209 (D.C. Cir. 1996).

Notwithstanding this general rule, certain conditions and charged offenses trigger a rebuttable presumption that no condition or combination of conditions will reasonably assure the safety of any person or the community. 18 U.S.C. § 3142 (e)(2)–(3) (providing that a rebuttable presumption arises pursuant to subsection (e)(2) if the defendant committed a "crime of violence" while on release pending trial for another offense and not more than five years after the date of conviction or the release of the person from imprisonment for that offense, or pursuant to subsection (e)(3) if there is probable cause to believe the defendant committed one of a subset of offenses listed in that section). This presumption "operate[s] at a minimum to impose a burden of production on the defendant to offer some credible evidence contrary to the statutory presumption." *United States v. Taylor*, 289 F. Supp. 3d 55, 63 (D.D.C. 2018) (citing *United States v. Alatishe*, 768 F.2d 364, 371 (D.C. Cir. 1985)). Moreover, where the presumption applies, even if a defendant rebuts the presumption, it "remains a factor to be considered" among the other § 3142(g) factors to be weighed in determining whether pretrial detention is warranted. *Taylor*, 289 F. Supp. 3d at 63 (citing *United States v. Mercedes*, 254 F.3d 433, 436 (2d Cir. 2001)); *see also* *United States v. Ali*, 793 F. Supp. 2d 386 (D.D.C. 2011).

III. DISCUSSION

A. Applicability of the Rebuttable Presumption

In this case, the government contends—and Foy initially conceded, *see* ECF No. 10, First Bond Review Mot., at 9—that the court is to "presume[ ] that no condition or combination of conditions will reasonably assure" his appearance as required and the safety of the community because Foy has been charged with a crime of violence. Gov't Opp. at 11–14; *see also* 18 U.S.C. §§ 3142(f)(1), (e)(1)–(2). If this presumption applies, Foy would be required to "offer some credible evidence" that he will not endanger the community or flee if released. *Id.* at 32. However, in his Reply in support of this motion, Foy withdrew his prior concession and argued that the rebuttable presumption does not apply in this case. ECF No. 31 at 3–6. Based on the plain text of the statute and available case law, the court agrees.

***3** The statute sets forth two circumstances in which the rebuttable presumption applies. Subsection 3142(e)(3) provides that the rebuttable presumption arises when there is

probable cause to believe that the defendant committed one of a subset of offenses enumerated therein. *See* 18 U.S.C. § 3142(e)(3). Foy has not been charged with one of these enumerated crimes. Thus, for the presumption to apply, it must do so under subsection 3142(e)(2), which states:

> [The rebuttable presumption arises when a] judicial officer finds that—(A) the person has been convicted of a Federal offense that is described in subsection (f)(1) of this section, or of a State or local offense that would have been an offense described in subsection (f)(1) of this section if a circumstance giving rise to Federal jurisdiction had existed; (B) the offense described [...] was committed while the person was on release pending trial for a Federal, State, or local offense; *and* (C) a period of not more than five years has elapsed since the date of conviction, or the release of the person from imprisonment, for the offense described [...], whichever is later.

18 U.S.C. § 3142(e)(2) (emphasis added).

The plain text of the statute supports Foy's argument. The text uses the word "and" rather than "or" and therefore the statute is conjunctive not disjunctive. In other words, each of the listed elements must be present for the presumption to arise. While there is minimal case law on this issue, what there is supports Foy's position. *See, e.g.*,[1] *United States v. Carter*, 2021 WL 687858 (S.D. Ohio 2021) ("The rebuttable presumption under § 3142(e)(2) arises only when each of three conditions is met .... Absent any of these elements, the rebuttable presumption does not apply."); *United States v. Barner*, 743 F.Supp.2d 225 at 228–29 (W.D.N.Y 2010) ("§ 3142(e)(2) contains three subparagraphs ... *all* of which must be satisfied in order for the presumption to arise."). Although Foy is currently charged with a wide array of crimes stemming from his alleged violent, armed assault on a police officer during the events at the United States Capitol, Foy has no prior convictions. Therefore, the rebuttable presumption does not apply under § 3142(e)(2).

B. Analysis of the § 3142(g) Factors

As the rebuttable presumption does not apply here, the court must determine, on the evidence and the record before it, whether the Defendant should nevertheless be held pending trial pursuant to 18 U.S.C. § 3142. Title 18 U.S.C. § 3142(e)(1) authorizes the court to detain a defendant if, upon consideration of the factors set forth at § 3142(g), the court finds that no condition or combination of conditions will reasonably assure the appearance of the defendant and the safety of any other person or the community.

In applying these factors, the court first observes that charges against Foy are unquestionably serious and deeply troubling. *See* 18 U.S.C. § 3142(g)(1) (directing judicial officers to consider "the nature and circumstances of the offense charged"). Foy is charged with multiple felonies not for his mere presence at the U.S. Capitol on January 6, 2021, but for his alleged participation in violent confrontations with uniformed officers protecting the entrance to the building during proceedings critical to our nation's democracy. Counts two and three of the Indictment, which charge Foy with obstruction of an official proceeding and assaulting, resisting, or impeding certain officers using a dangerous weapon, respectively, carry statutory maximum penalties of twenty years in prison. *See* 18 U.S.C. §§ 1512(c), 111(b). Moreover, unlike many other participants in the events of January 6, Foy is alleged to have both engaged in a physical attack on law enforcement officers and to have breached the Capitol building itself. Stmt. of Facts at 6. As Chief Judge Howell recently observed, "[t]he actions of this violent mob, particularly those members who breached police lines and gained entry to the Capitol, are reprehensible as offenses against morality, civic virtue, and the rule of law." *United States v. Chrestman*, No. 21-mj-218, 2021 WL 765662, at *13 (D.D.C. Feb. 26, 2021).[2] Judge Randolph Moss likewise noted that "[t]his was a singular and chilling event in U.S. history, raising legitimate concern about the security—not only of the Capitol building—but of our democracy itself."

United States v. Cua, No. 21-107 (RDM), 2021 WL 918255, at *3 (D.D.C. Mar. 10, 2021). And as the D.C. Circuit stated, "[i]t cannot be gainsaid that the violent breach of the [U.S.] Capitol on January 6 was a grave danger to our democracy, and that those who participated could rightly be subject to detention to safeguard the community." *See* *Munchel*, 991 F.3d at 1284–85.

***4** Nor is there any shortage of evidence supporting the charges against Foy. *See* 18 U.S.C. § 3142(g)(2) (directing judicial officers to consider "the weight of the evidence against the person"). The court has reviewed an array of video and photographic exhibits from multiple sources and vantage points in which Foy can be seen using his hockey stick to strike officers during a confrontation at the Lower West Terrace tunnel entrance to the Capitol Building on January 6, 2021, and subsequently climbing with his hockey stick through a broken window into the Capitol.

However, Foy's "history and characteristics" tip the scales —just barely—in favor of his release. *See* 18 U.S.C. § 3142(g)(3). Foy, who has no prior criminal record, was honorably discharged from the United States Marine Corps in June of 2020, after approximately five years of service,[3] and had been living with family members in their Michigan home throughout the pandemic. *Id.*

And the D.C. Circuit has made clear that detention is not appropriate for all defendants who participated in the January 6 riots. *Munchel*, 991 F.3d at 1283. For detention to be appropriate in such cases on the basis of a defendant's "dangerousness," the "court must *identify an articulable threat* posed by the defendant to an individual or the community. The threat need not be of physical violence, and may extend to 'non-physical harms such as corrupting a union'.... But it must be clearly identified." *Id.* (emphasis added) (quoting *United States v. King*, 849 F.2d 485, 487 n.2 (11th Cir. 1988)).

Unlike other January 6 cases, there is no evidence that Foy planned in advance to attend the rally or coordinated with other participants. *Compare* *United States v. Dresch*, No. 21-CR-0071 (ABJ), 2021 WL 2453166, at *1 (D.D.C. May 27, 2021) (defendant made a series of posts to social media prior to January 6th, including statements that he was "prepared for chemical attacks and what not," and "NO EXCUSES! NO RETREAT! NO SURRENDER! TAKE THE STREETS! TAKE BACK OUR COUNTRY! 1/6/2021=7/4/1776"), and *United States v. Sabol*, No. 21-CR-35-1 (EGS), 2021 WL 1405945, at *10 (D.D.C. Apr. 14, 2021) (defendant "engaged in prior planning that suggests his assaultive conduct and civil disorder did not merely arise 'in the context of a hysterical throng' " and "brought tactical gear, including a helmet, steel-toe boots, zip ties, a radio and an ear piece"), *with* First Bond Review Mot. at 3 ("Mr. Foy initially had not plans [sic] to attend the protest in Washington D.C. But in the early morning hours of January 6th, he decided to drive from his home in Michigan to the District.") Nor did he promote or celebrate the events of the day or his own actions after the fact. *See, e.g.*, *Dresch*, No. 21-CR-0071 (ABJ), at *3 (defendant posted extensively to social media following the events of January 6, at one point stating that "it was grand ... best day ever ... I think it was a good show of force ... look what we can do peacefully, wait til [sic] we decide to get pissed" and later concluding "look if they can't hold the capitol with thousands of cops, how can they tell us what to do 1000 miles away"); *United States v. Whitton*, No. CR 21-35-5 (EGS), 2021 WL 1546931, at *8 (D.D.C. Apr. 20, 2021) (defendant bragged in a text message to an acquaintance that he "fed [Officer B.M.] to the people"); *Sabol*, No. 21-CR-35-1 (EGS), at *10 (defendant "maintained, even days after the riot when he believed he was wanted by the FBI, that he had been "fighting tyranny in the D.C. Capitol").

***5** In considering "the nature and seriousness of the danger to any person or the community that would be posed by [Foy]'s release," 18 U.S.C. § 3142(g)(4), the court is mindful of the D.C. Circuit's caution that a future threat must be "clearly identified" for pretrial detention to be justified, particularly given that "the specific circumstances of January 6 have passed." *Munchel*, 991 F.3d at 1283–84. "Consideration of this factor encompasses much of the analysis set forth above, but it is broader in scope," requiring an "open-ended assessment of the 'seriousness' of the risk to public safety." *Cua*, 2021 WL 918255, at *5 (quoting *Taylor*, 289 F. Supp. 3d at 70). "Because this factor substantially overlaps with the ultimate question whether any conditions of release 'will reasonably assure ... the safety of any other

person and the community,' 18 U.S.C. § 3142(e), it bears heavily on the Court's analysis." *Id.* (alteration in original).

The court does not doubt that Foy's actions posed a grave danger to the officers present at the Capitol building on January 6, the lawmakers performing their duties inside, and to the security of our democracy itself. And yet, the gravity and unsettling nature of Foy's actions must be considered in the context of his long history of law-abiding behavior, his military service, and the absence of any remarks promoting or celebrating the events of January 6 or indicating a willingness or desire to engage in ongoing violence. *Cf.* *United States v. Klein*, No. CR 21-236 (JDB), 2021 WL 1377128, at *11 (D.D.C. Apr. 12, 2021) ("[D]espite his very troubling conduct on January 6, the Court finds on balance that Klein's history and characteristics point slightly toward release.").

After much deliberation and close consideration of the parties' arguments, therefore, the court cannot at this time find "that no conditions or combination of conditions exist which will reasonably assure his appearance as required or the safety of the community." *See* 18 U.S.C. § 3142(e). In light of the shocking and violent nature of Foy's actions, however, the court does find that the close supervision provided by home confinement is needed to ensure the ongoing safety of the community and of our democratically-elected government.

IV. CONCLUSION

For the foregoing reasons, the court will GRANT Foy's Motion to Release from Custody, ECF No. 22, and will release him into home confinement with GPS monitoring under the courtesy supervisions by the Pretrial Services Agency of the Eastern District of Michigan. A corresponding order is forthcoming.

All Citations

Slip Copy, 2021 WL 2778559

Footnotes

1 Although the cited cases are not binding on this court, the court finds their analysis to be persuasive.

2 In *Chrestman*, Chief Judge Howell outlined six factors to be considered in assessing the "nature and circumstances" of offenses related to the events of January 6, 2021 at the United States Capitol, including whether a defendant: (1) "has been charged with felony or misdemeanor offenses"; (2) "engaged in prior planning before arriving at the Capitol, for example, by obtaining weapons or tactical gear"; (3) carried or used "a dangerous weapon, whether a firearm, a large pipe, a wooden club, an axe handle, or other offensive-use implement"; (4) "coordinat[ed] with other participants before, during, or after the riot"; or (5) "assumed either a formal or a de facto leadership role in the assault by encouraging other rioters' misconduct"; as well as (6) the nature of "the defendant's words and movements during the riot," including whether he "damaged federal property," "threatened or confronted federal officials or law enforcement, or otherwise promoted or celebrated efforts to disrupt the certification of the electoral vote count during the riot." *Chrestman*, No. 21-mj-218, at *7–9. These considerations have guided the court's analysis of the "nature and circumstances" of Foy's charged offenses in this case.

3 As noted during the hearing on this motion, Foy's military service cuts both ways in the court's analysis. Although his history of respect for and compliance with authority indicates an increased likelihood that he will comply with release conditions this court sets, Foy, unlike many other January 6 defendants, took an oath to "support and defend the constitution of the United States"—an oath he appears to have broken on January 6, 2021.

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STEVEN A. METCALF II, ESQ., Managing Attorney
NANETTE IDA METCALF, ESQ., Managing Attorney**
MARTIN TANKLEFF, ESQ., Associate Attorney
CHRISTOPHER DARDEN, ESQ., *Special Counsel**
MARC HOWARD, ESQ., *Special Counsel*
JOSEPH D. MCBRIDE, ESQ., *of Counsel*

EXHIBIT L

Metcalf & Metcalf, P.C.
99 Park Avenue, 25th Floor
New York, NY 10016
646.253.0514 (*Phone*)
646.219.2012 (*Fax*)

MARJORIE TAYLOR GREENE
14TH DISTRICT, GEORGIA

1023 LONGWORTH HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-5211

Congress of the United States
House of Representatives
Washington, DC 20515–1014

Christopher Wray
Director
Federal Bureau of Investigation
935 Pennsylvania Ave., NW
Washington, DC, 20535

Yogananda D. Pittman,
Acting Chief
United States Capitol Police
119 D Street, NE
Washington, DC, 20510

June 24, 2021

Director Wray and Acting Chief Pittman,

It is abundantly clear that there is a two-track justice system in the United States: denial of due process rights for Trump supporters who were at the Capitol on January 6 and "catch and release" treatment for Black Lives Matter (BLM) and Anti-Fascist (ANTIFA) domestic terrorists.

Consider that charges were dropped in at least 90 percent of cases where BLM and ANTIFA domestic terrorists were arrested over the last year. In Atlanta, charges were dropped in 37 cases of rioters arrested.[1] In Detroit, a judge dropped charges in 39 cases of rioters and looters. Altogether, 93 percent of cases have been dropped in Detroit.[2] In Orange County, California, assault charges were dropped for a leader of a BLM riot even though the prosecutor backed the police for making the arrest. In cities like Dallas and Philadelphia, up to 95 percent of citations were dropped or not prosecuted. In Houston, about 93 percent of citations were dropped. In Los Angeles, 93 percent of riot citations were not even filed by prosecutors.

Meanwhile, the accused protestors from January 6 are being abused behind bars and denied their constitutional rights.[3] Michael Sherwin, an attorney for the District of Columbia, bragged that law enforcement had "rounded up" 400 people who participated in the breach of the Capitol on January 6, admitting that the goal was to "charge as many people as possible."[4]

---

[1] WSBTV.com News Staff, "Charges dismissed in 37 cases involving people participating in peaceful Black Lives Matter protests," WSBTV, January 8, 2021, https://www.wsbtv.com/news/local/atlanta/charges-dismissed-37-cases-involving-people-participating-peaceful-black-lives-matter-protests/GR4EXI2TZ5EJTLA64TBBOGENEE/.
[2] Eli Newman, "Judge Dismisses Cases Against 28 Detroit Black Lives Matter Protesters," wdet.org, January 14, 2021, https://wdet.org/posts/2021/01/14/90511-judge-dismisses-cases-against-28-detroit-black-lives-matter-protesters/.
[3] Julie Kelly, "Shawshank for January 6 Detainees," American Greatness, May 17, 2021, https://amgreatness.com/2021/05/17/shawshank-for-january-6-detainees/.
[4] Tucker Carlson, "Tucker Carlson: Why are Jan. 6 protestors still in jail while murderers still walk free?" Fox News Opinion, April 6, 2021, https://www.foxnews.com/opinion/tucker-carlson-jan-6-protesters-jailed-murderers-walk-free.

Biased officials who are eager to charge "as many people as possible" with little to no regard for their actual offenses reveal how corrupt the U.S. justice system has become. Even the mainstream media has reported on the Biden Administration taking investigators who typically work on cases involving drug trafficking and child pornography and reassigning them to calling relatives and even ex-girlfriends of the January 6 accused to find them guilty.[5]

There is substantial evidence that the accused of January 6 face inhumane detention conditions. One defendant faces seven years in prison for walking through the open doors of the Capitol, taking photos in the hallway, and leaving without doing any harm. Another accused citizen sent a message to his father saying he had been in solitary confinement for one hundred days without having been convicted of any crime.

Mainstream media outlets have also reported DC jail guards cruelly beating Trump supporters.[6] One man was beaten so badly that he has a skull fracture and is now blind in one eye.[7] Moreover, an attorney for one defendant stated that suspects are held in solitary confinement in cells the "size of a walk-in closet" for up to 24 hours a day and treated like "domestic terrorists" by jail guards.[8] Another attorney shared that one woman who was arrested at the Capitol is "housed alone and shackled when she is outside of her cells – only allowed for five hours a week."[9]

The treatment at these facilities is so bad that both Republicans and Democrats have called for change. Senator Elizabeth Warren told reporters that "Solitary confinement is a form of punishment that is cruel and psychologically damaging." Senator Richard Durbin has urged progressives to "amplify their criminal justice reform calls even on behalf of Donald Trump supporters."[10]

As you know, the Constitution protects every American citizen's God-given right to due process, access to counsel, a fair and speedy trial judged by a jury of their peers, and not to be subjected

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[5] Dinah Voyles Pulver, "Two months and nearly 300 Capitol riot arrests later, FBI is hunting hundreds more," USA TODAY, March 8, 2021, https://www.usatoday.com/story/news/2021/03/08/capitol-riot-insurrection-arrests-near-300-fbi-hunts-hundreds-more/6871403002/.

[6] Christopher Eberhart, "Exclusive: 'It's like Guantanamo Bay': Inside the Washington D.C. jail where capitol rioters are 'treated like domestic terrorists,' assaulted, taunted and locked up in 'closet-sized' cells up to 24 hours a day," Daily Mail.com, June 1, 2021, https://www.dailymail.co.uk/news/article-9602127/Inside-Washington-jail-accused-Capitol-rioters-treated-domestic-terrorists.html.

[7] Tucker Carlson, "Tucker Carlson: Why are Jan. 6 protestors still in jail while murderers still walk free?" Fox News Opinion, April 6, 2021, https://www.foxnews.com/opinion/tucker-carlson-jan-6-protesters-jailed-murderers-walk-free.

[8] Christopher Eberhart, "Exclusive: 'It's like Guantanamo Bay': Inside the Washington D.C. jail where capitol rioters are 'treated like domestic terrorists,' assaulted, taunted and locked up in 'closet-sized' cells up to 24 hours a day," Daily Mail.com, June 1, 2021, https://www.dailymail.co.uk/news/article-9602127/Inside-Washington-jail-accused-Capitol-rioters-treated-domestic-terrorists.html.

[9] Mariah Timms, "Capitol riot suspect Lisa Eisenhart unfairly kept in solitary over security classification, attorneys say," Nashville Tennessean, March 10, 2021, https://www.tennessean.com/story/news/crime/2021/03/10/capitol-riot-suspect-lisa-eisenhart-unfairly-solitary-confinement-defense/6927885002/.

[10] Kyle Cheney, Andrew Desiderio, and Josh Gerstein, "Jan. 6 defendants win unlikely Dem champions as they face harsh detainment," Politico, April 19, 2021, https://www.politico.com/news/2021/04/19/capitol-riot-defendants-warren-483125.

to cruel and unusual punishment.[11] Moreover, certain prisoners placed in custody may petition for a writ of habeas corpus.[12]

If reports surrounding the treatment of these prisoners are true, it is an enormous stain on the credibility of our justice system and a blow to the rule of law in the United States. It is indeed a dark day in America when thousands of domestic terrorists burn down cities, loot businesses, and destroy federal property for an entire year and remain at large while peaceful citizens who walked into the Capitol on January 6 are treated worse than foreign terrorists.

We demand the Federal Bureau of Investigation (FBI), Bureau of Prisons (BOP), United States Capitol Police (USCP), and Mayor of the District of Columbia provide the following information, including:

- What intelligence was available prior to January 6 regarding the influx of persons into the District of Columbia and their intentions?
- What requests were made for additional law enforcement and National Guard troops in preparation for the January 6 rally on the Ellipse, and at the United States Capitol? If so, by whom? If the requests for additional law enforcement was denied, by whom?
- Releasing the entirety of the video footage from the US Capitol Complex on January 6, 2021.[13]
- The role USCP officers may have played in the death of protestors at the Capitol, including Ashli Babbitt, Kevin Greeson, Benjamin Phillips, and Roseanne Boyland.
- Revealing the name of the USCP officer who discharged a firearm leading to the death of Ashli Babbitt, including whether the officer was given authorization to use deadly force and by whom. Further, what actions have the USCP taken in response to this officer's use of deadly force, including training, administrative leave, or suspension? Is this officer still an on-duty officer at the United States Capitol or any congressional office buildings?
- What federal law enforcement and intelligence agencies were involved in the planning and execution of the events on January 6? Were any members of federal law enforcement, including, but not limited to, the Federal Bureau of Investigation (FBI), participants or attendants at the Ellipse rally or events at the Capitol on January 6?
- Disclosing the form and details of surveillance conducted both before and after the events of January 6 on the accused, Members of Congress, and their respective staff.
- Records describing how defendants from January 6 are being treated in custody, including:
    - visitation hours
    - access to religious texts and reasonable religious service accommodations
    - access to exercise
    - portion of time in lockdown, solitary confinement,
    - nutritional content—including number of daily meals—compared with the general prison population
    - access to communication with family and attorneys

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[11] US CONSTITUTION, Amendments V, VI, and VIII.
[12] 28 U.S.C. 2242.
[13] "Righting History: The Journalistic Battle of January 6th Rages On", June 4, 2021, https://rumble.com/vi0ye9-righting-history-the-journalistic-battle-of-january-6th.html.

- whether the prosecution made potentially exculpatory evidence available to the appropriate defense counsels of the accused

We urgently request that you supply answers to these questions by July 30, 2021.

Sincerely—

Marjorie Taylor Greene
Member of Congress

cc:
Muriel Bowser
Mayor
District of Columbia
1350 Pennsylvania Ave., NW
Washington, DC, 20004

Michael Carvajal
Director
Federal Bureau of Prisons
320 First St., NW
Washington, DC, 20534

STEVEN A. METCALF II, ESQ., Managing Attorney
NANETTE IDA METCALF, ESQ., Managing Attorney**
MARTIN TANKLEFF, ESQ., Associate Attorney
CHRISTOPHER DARDEN, ESQ., *Special Counsel**
MARC HOWARD, ESQ., *Special Counsel*
JOSEPH D. MCBRIDE, ESQ., *of Counsel*

EXHIBIT M

Metcalf & Metcalf, P.C.
99 Park Avenue, 25th Floor
New York, NY 10016
646.253.0514 (*Phone*)
646.219.2012 (*Fax*)

Most Portland rioters have charges DISMISSED by US Attorney: 58 suspects of the 97 arrested have cases scrapped, while 32 more are left pending

- **Charges have been dismissed against 58 of 97 people arrested during the unrest last year that lasted for more than 100 days between May and October**
- **A further 32 cases are still pending but 'will also likely be dismissed'**
- **Several hundred others who were facing charges brought by the district attorney also had them dropped**
- **The majority were facing 'lesser charges' such as rioting and disorderly conduct**

By JAMES GORDON FOR DAILYMAIL.COM
PUBLISHED: 02:29 EDT, 4 May 2021 | **UPDATED:** 03:56 EDT, 4 May 2021

The majority of the people facing federal charges over last summer's protests in **Portland**, **Oregon** will not be prosecuted or spend any time at all behind bars, it haas been revealed.

Although 97 people were arrested and had charges filed against them in connection to protests that took place between May and October of last year, 58 cases have either been dismissed completely or will be scrapped under deferred resolution agreements.

A further 32 cases are also pending with many also likely to be dismissed, **Fox News** reports.

Read More

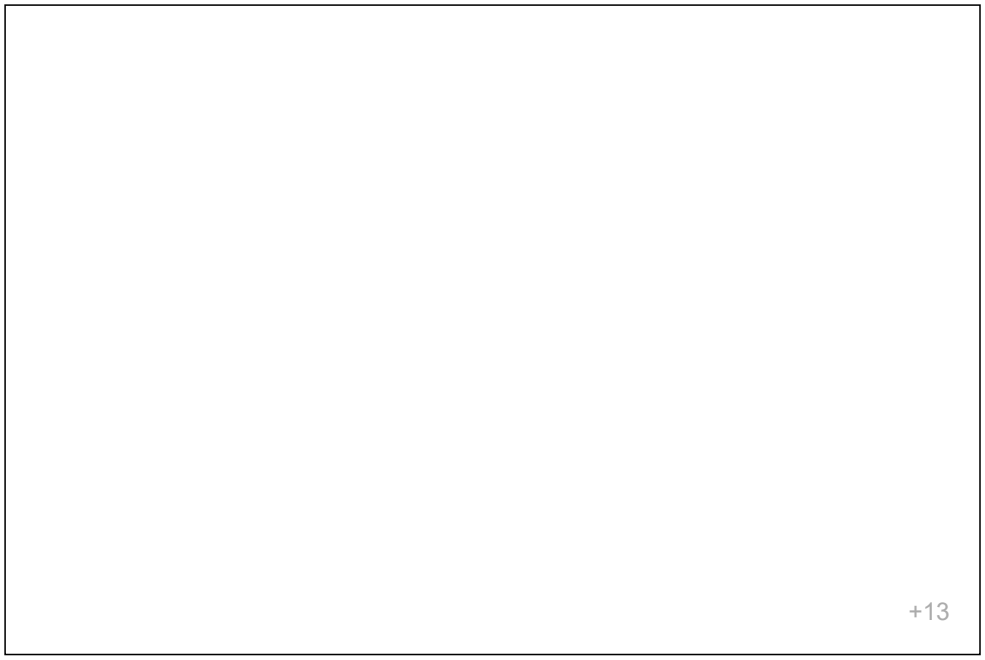
Just seven people have entered guilty pleas, and just one is heading to prison having been caught red-handed setting fire to the city's Justice Center.

Edward Schinzing was caught on video setting fire to the building. He had his shirt off and, helpfully for police, had his name tattooed on his back.

Among those who have had charges dismissed are David Bouchard and Charles Comfort, who were both accused of attacking law enforcement officers.

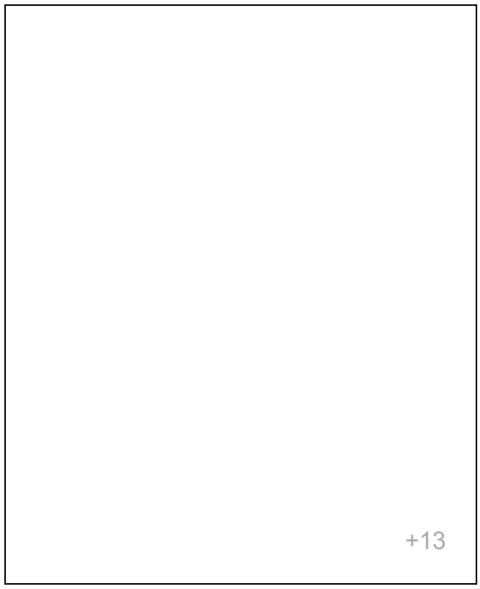
+13

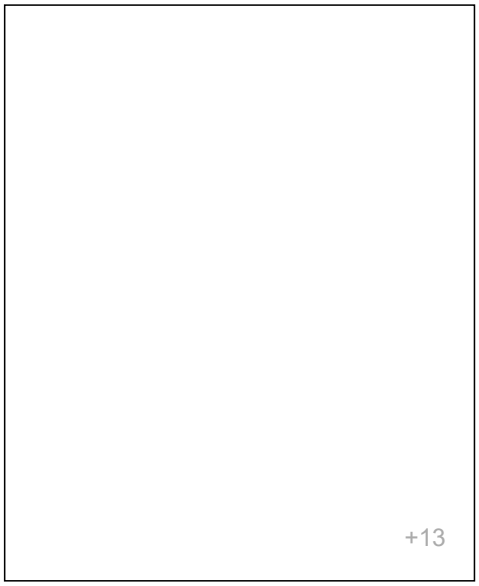
Charges have been dismissed against 58 of the 97 people arrested during the unrest last year that lasted for more than 100 days between May and October



Black Lives Matter protesters gather at the Mark O. Hatfield United States Courthouse in Portland, Oregon last year

Edward Schinzing, 33, had his name tattooed on his back while video captured him setting fire to the Justice Center building. The facility houses the Multnomah County jail and the Portland Police Bureau headquarters





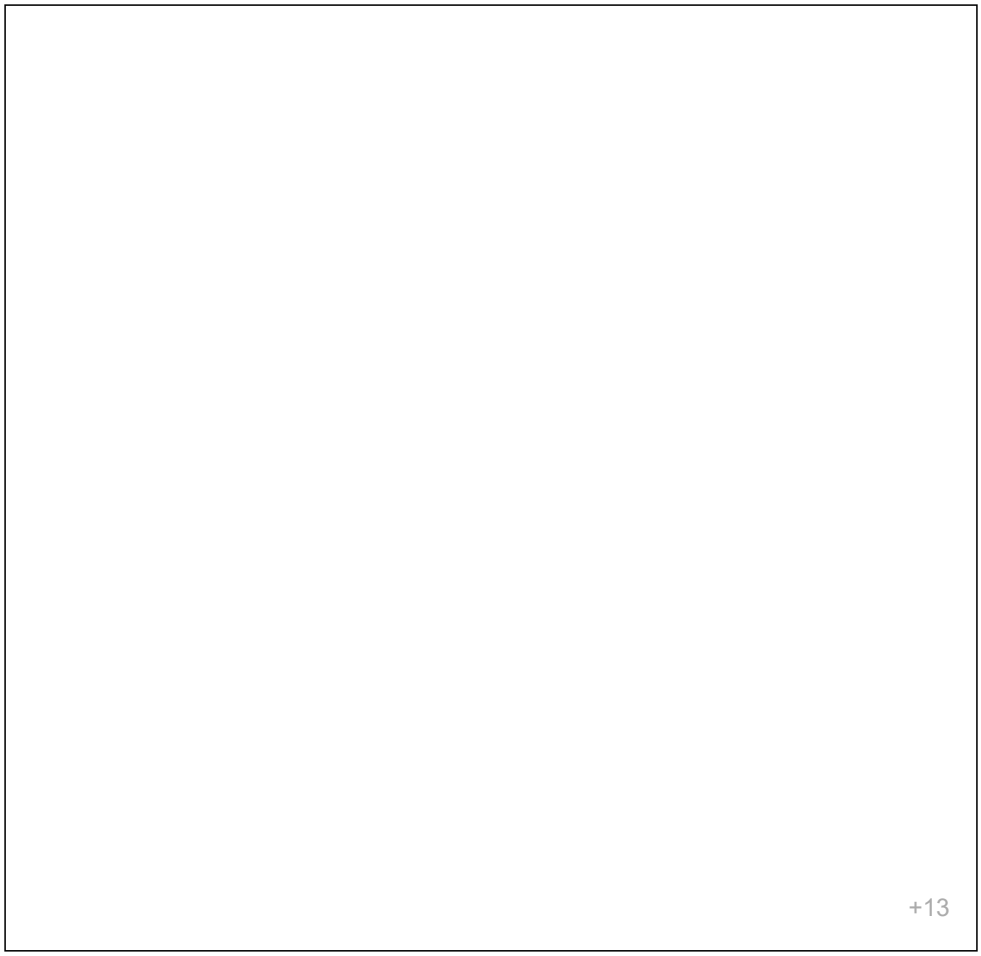
Authorities were able to identify him through a comparison of his booking photo (left) and photos from the scene (right) in which a distinctive tattoo of his last name across his upper back was visible

The decision not to prosecute many of the accused rioters federally echoes the decision made last year by Portland's newly elected district attorney who stipulated under a new policy, his office would not prosecute people who have been arrested since late May on non-violent misdemeanor charges.

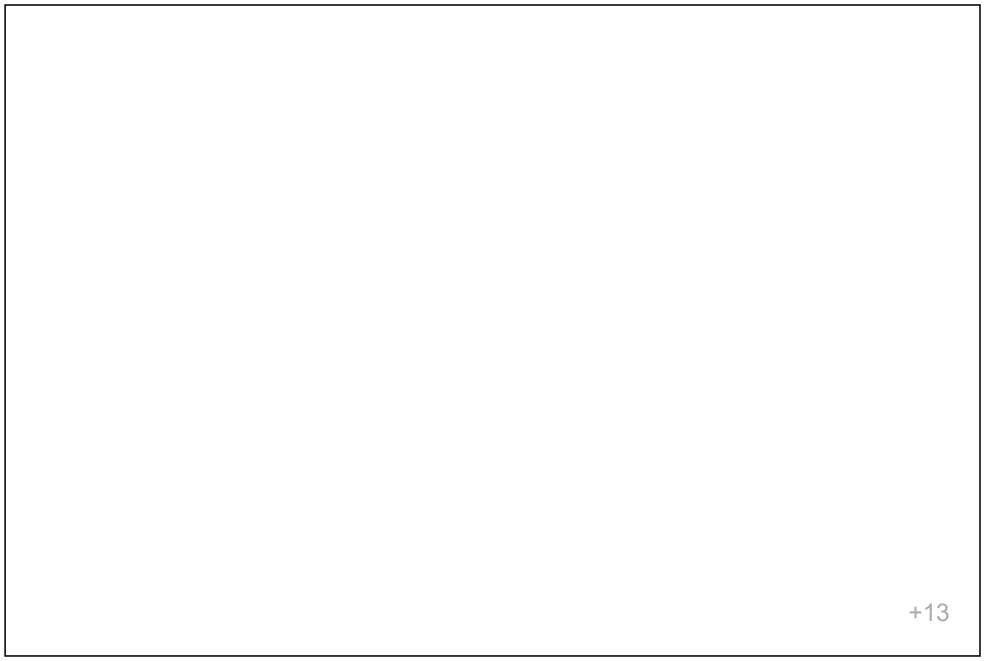
The policy recognizes the outrage and frustration over a history of racial injustice that led to more than 100 nights of sustained, often violent protest in Portland as well as the more practical realities of the court system, which is running more than several months behind in processing cases because of COVID-19.

'The protesters are angry ... and deeply frustrated with what they perceive to be structural inequities in our basic social fabric. And this frustration can escalate to levels that violate the law,' Multnomah County District Attorney Mike Schmidt said.

- 'My crush with him is O-V-E-R' Chelsea Handler reveals how her feelings for New York governor Andrew Cuomo fizzled after sexual harassment allegations emerged
- Avril Lavigne shows rocker side in vintage Slayer T-shirt during coffee run with Mod Sun in Malibu
- Florence Pugh's boyfriend Zach Braff, 46, commissions a portrait of the actress, 25, as her Black Widow character in honour of the film's release
- Kim Kardashian is granted FIVE-YEAR restraining order from man who sent her a diamond engagement ring and morning-after pills and went to her gated community
- Heidi Klum reveals tip she gave daughter Leni, 17, on joining family business and becoming a model: 'It's okay to say no'
- This is 40! Teddi Mellencamp rings in milestone birthday with her former RHOBH costars Kyle Richards, Lisa Rinna, and Dorit Kemsley
- Brian Austin Green wraps his arm around girlfriend Sharna Burgess while bringing his kids to support her Dance The World event in Orlando



Edward Thomas Schinzing, 33, was among a group of protesters who broke into the Justice Center on May 29, 2020 (pictured) before vandalizing the space and setting fires



People gather to protest in front of the Mark O. Hatfield federal courthouse in downtown Portland in July 2020

'Leave my broke-a** alone': Jamie Lynn Spears begs for peace from social media trolls after it was revealed she's NOT on sister Britney Spears' payroll

Julia Stiles remembers the 'funny, weird moment' when a limo picked her up straight from her college dorm to go to the MTV Movie Awards

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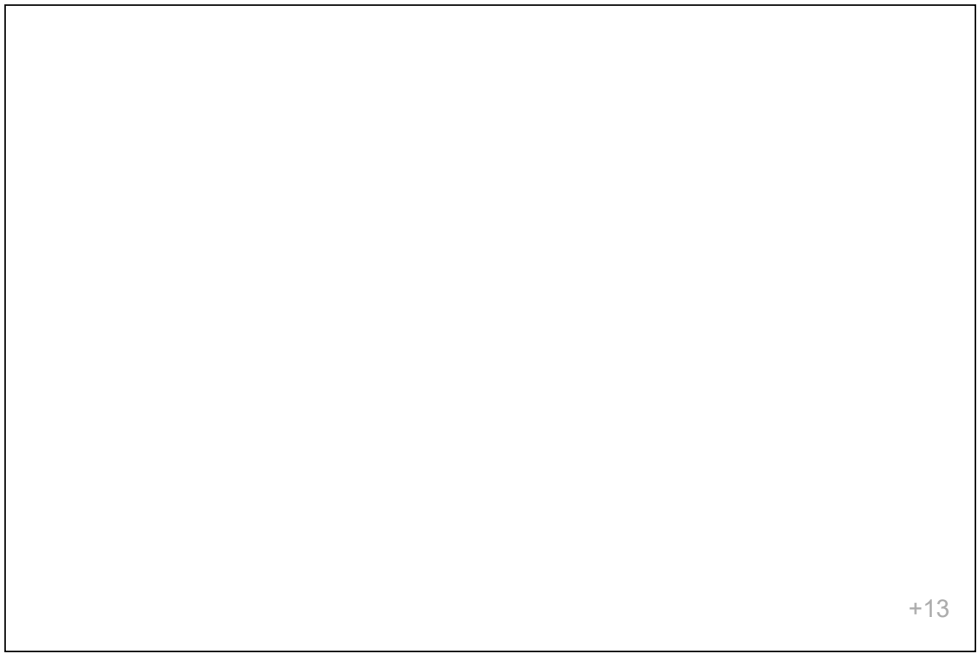
Christina Haack rocks a bikini and boasts about the 'most romantic' date



There were more than 100 nights of rioting last summer which saw protesters tear gassed and fired upon with rubber bullets by the city's police force

'This policy acknowledges that centuries of disparate treatment of our black and brown communities have left deep wounds and that the healing process will not be easy or quick.'

Portland Police Chief Chuck Lovell said people who commit violent acts or intentionally damage property will still be held accountable.

'Committing a crime is different from demonstrating,' Lovell said in a statement. 'The arrests we make often come after hours of damage to private property, disruption of public transit and traffic on public streets, thefts from small businesses, arson, burglary, attacks on members of the community, and attacks against police officers.'

A protestor flips off federal police atop the perimeter barricade of the Mark O. Hatfield federal courthouse, pictured last July

during trip to Mexico with new boyfriend Joshua Hall... after her ex Ant Anstead kisses Renée Zellweger

Anna Wintour's daughter Bee Shaffer, 33, is PREGNANT with her first child - after third anniversary with husband Francesco

Million Dollar Listing's Ryan Serhant gives grand tour of his newly renovated 8,000-square-foot townhome in Brooklyn

American Pickers co-host Mike Wolfe's wife Jodi files for divorce from the reality star after almost ten years of marriage

Seen and heard! Netflix releases drama-filled trailer for Love Is Blind: After the Altar as the cast reunites two years after the wild dating experiment

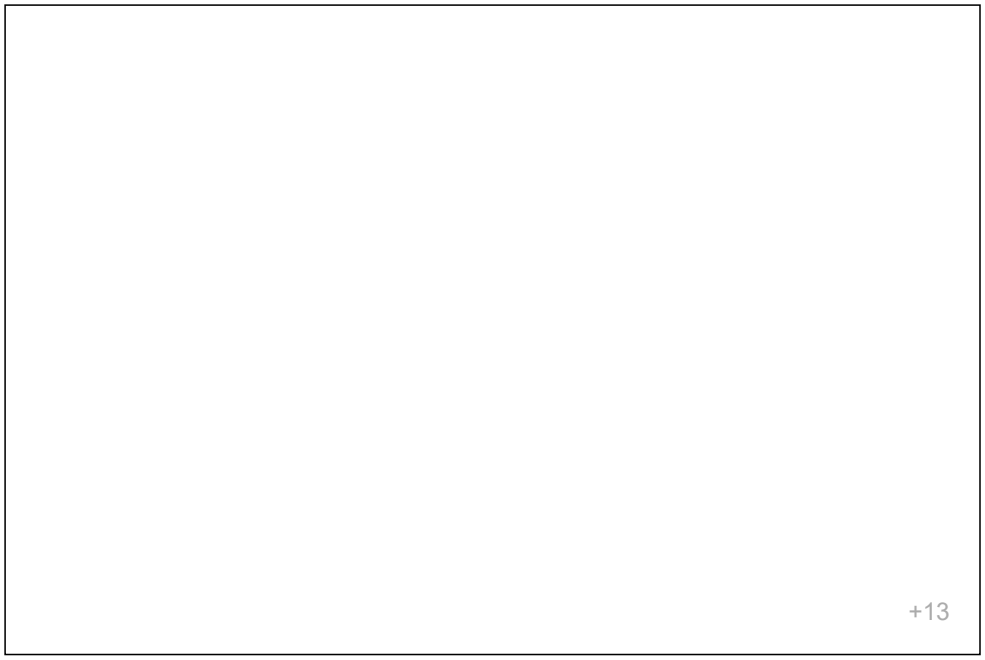
Cannes gets off to a wacky start: BRIAN VINER reviews Annette at the famous film festival

Too precious! Bindi Irwin dotes on her three-month-old daughter Grace Warrior and poses up with their pet pooch Piggy in a sweet photograph

Matt Damon attends celebratory dinner after Stillwater premiere with co-star Abigail Breslin and cast after 'tearing up' during five minute standing ovation at Cannes

La dolce vita! Paulina Porizkova, 56, wows in a white suit as she struts her stuff on the Fendi runway in Rome and snaps backstage selfies

Rumer Willis showcases her toned form in retro-



Portland was the epicenter of protests in 2020 with at least 200 nights of demonstrations, 30 nights of rioting and around 1,000 arrests. (File photo from July)

Protestors face off with federal police amidst tear gas outside the Mark O. Hatfield federal courthouse (File photo from July)

Chad Wolf, the acting Secretary of Homeland Security under President Trump, slammed the decision to dismiss charges against alleged rioters.

'It's offensive to all the men and women who risked their lives in Portland for 90 to 120 days or even longer in some cases, being attacked night after night after night,' he told **Fox News.**

'The prosecutors in that the U.S. Attorney's Office, the number of prosecutors, that support, even the courthouse system, isn't really set up to handle those sorts of numbers,' said Former federal prosecutor Alex Little.

Lisa Hay, the federal public defender in Oregon, has a slightly different take on the high number of cases being dismissed.

style green bikini during vacation in Greece... after rocking racy brown string two-piece

BAZ BAMIGBOYE: The Serpent swaps murder for drug gangs
Tahar Rahim has found a way to make crime pay

Kristin Cavallari looks stunning in a gold bikini before modeling a backless dress... after revealing she never 'looks at calories' on food labels

Shonda Rhimes extends her massive deal with Netflix to include feature films along with gaming and VR content plus live events

Justin Chambers to play Godfather-era Marlon Brando for Paramount+'s The Offer... as he makes his return to acting after leaving Grey's Anatomy

Tiffany Haddish reveals she had her first orgasm to Nicolas Cage during his 1997 movie Face/Off: 'It was my first Big O'

Joe Exotic's estranged husband Dillon Passage reveals new relationship with boyfriend named John: He 'has been my rock'

Tilda Swinton, 60, and her daughter Honor, 23, ooze elegance as they attend The Souvenir Part II premiere at Cannes Film Festival

Kristin Bell and Kirby Howell-Baptiste run a multimillion dollar COUPON scamming ring in the new trailer for the movie Queenpins

Netflix rolls out release date for Red Notice ... its most expensive film EVER with a budget of '$200MILLION' starring The Rock, Gal Gadot and Ryan Reynolds

'I think the federal government went overboard in some of the ways they addressed these protests,' said Lisa Hay, a federal public defender in Oregon. 'What we're seeing now is many of the cases that were brought because of the federal government's overreach are now being dismissed.'

Protesters set Police Union building on fire in Portland

Watch the full video

0:00 / 2:11

Portland endured more than 100 nights of rioting during last summer's protest over racial inequality and police brutality

Last summer's protests dominated the news in Portland for months following the death of George Floyd, a black man who died after a white Minneapolis police officer held a knee to his neck for nearly nine minutes.

Protesters were angry after the Portland police used tear gas repeatedly in the early days of the protests.

Demonstrations have at times attracted up to 10,000 people for peaceful marches and rallies around the city. But some protesters have turned to violence that's been

RHOC alum Shannon Beador sues Facebook and Instagram over claims third parties used her likeness to shill diet supplements on the platforms

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Owen Wilson says he 'loves' Richard E. Grant after goofing around with him on the Atlanta set of Loki

Marrying Millions star Bill Hutchinson, 63, arrested for 'sexually assaulting 17-year-old girl' in Texas

Kourtney Kardashian's daughter Penelope rocks out after the star's beau Travis Barker gives the child a custom drum set for her ninth birthday

Hilaria Baldwin refers to herself as 'multi cultured' as she reflects on 'painful' Spanish heritage scandal: 'People will try to find reason to invalidate you'

Marilyn Manson turns himself in to police for 2019 spitting incident... after a fourth woman sues rocker over sexual assault allegations

TikTok star takes her own life aged just 19 after attracting a legion of fans by sharing her life as a fourth-generation farmer

Jill wears her Vogue cover dress for tour of vaccine site with Senator Raphael Warnock in Georgia seat up for grabs in 2022

Camila Cabello showcases curves in a crop top and leggings on hike... after celebrating second anniversary with Shawn Mendes

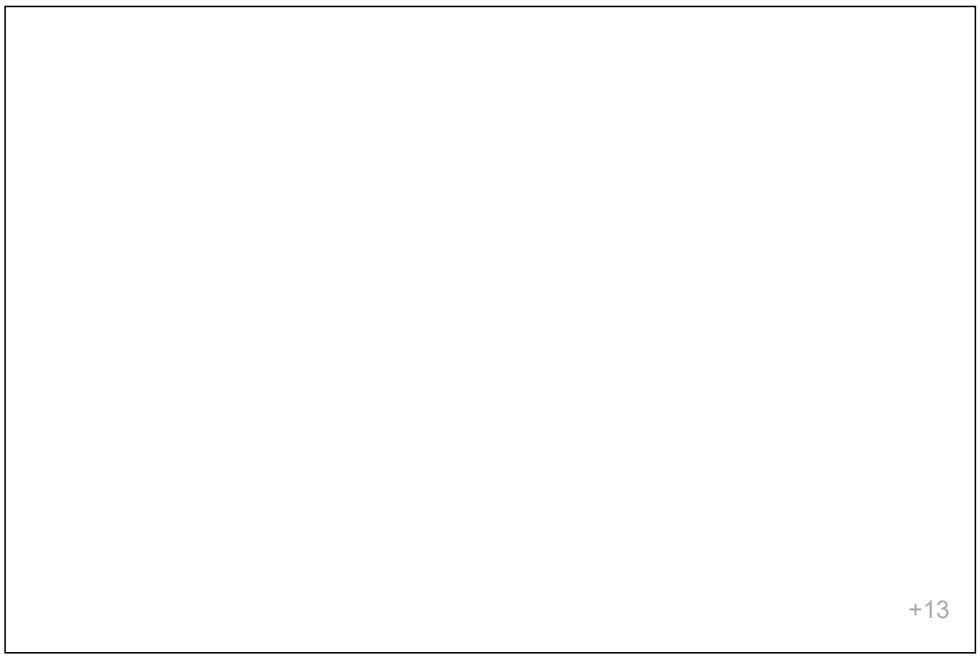
Lindsay Lohan, 35, shares a video from her days as a child model when she wore a swimsuit on Live With Regis And Kathie Lee at

increasingly directed at the courthouse and other federal property with 27 riots declared in the space of four months.

Some protesters threw bricks, rocks and other projectiles at officers, with police responding by firing tear gas and rubber bullets to disperse crowds.

At the time, the Trump administration sent federal agents to quell the unrest but the deployment had the opposite effect, reinvigorating protesters who found a new rallying point in opposing the federal presence.

Mayor Ted Wheeler recently decried what he described as a segment of violent agitators who detract from the message of police accountability and should be subject to more severe punishment.



A demonstrator waves a U.S. flag in front of federal agents after tear gas is deployed during a riot in Portland in July

Portland protestors loot businesses and light huge fires to stores

Watch the full video

0:00 / 0:50

- the age of eight
- Erika Jayne, 49, denies accusations divorce from Tom Girardi, 82, is a 'sham to hide assets' as split plays out on Real Housewives of Beverly Hills

- Heather Morris' tribute to costar Naya: The actress gets a tattoo of one of Rivera's final tweets on the one year anniversary of her tragic passing
- Helen Mirren, 75, exudes elegance in a crisp white suit as she leaves her hotel following an evening at Cannes Film Festival
- NBA star James Harden is stopped and frisked by police in Paris... as his rapper friend Lil Baby is seen being placed in handcuffs
- Bachelor In Paradise cast unveiled! Ivan Hall, Natasha Parker, and Abigail Heringer leading the fan favorites looking for love in Mexico
- Kaia Gerber shares a bath with another woman after unleashing her killer instincts while making her acting debut on American Horror Stories
- Kylie Jenner uses a waist trainer to 'get back into these abs' in workout video ... after revealing her sweet nickname for daughter Stormi
- Khloe Kardashian puts on a busty display at the gym... after ex Tristan Thompson left a flirty comment on one of her Instagram posts
- Strong is beautiful! Team GB synchronised swimmers pose underwater in lingerie to hit back at critics who mock their 'muscular'

Civil rights leaders including Al Sharpton tell Biden and Kamala activists will be 'getting back into the streets' for voting rights after Republicans blocked bill in Senate

Civil rights leaders said they informed President Joe Biden and Vice President Kamala Harris activists would be 'getting back into the streets' as voting rights legislation has stalled on Capitol Hill.

News

U.S.

Almost Half of Federal Cases Against Portland Rioters Have Been Dismissed

Many charged in connection with violence surrounding last year's racial-justice protests have completed community service and won't be tried

Tear gas filled the air at a Black Lives Matter protest at a courthouse in Portland, Ore., last summer.

PHOTO: MARCIO JOSE SANCHEZ/ASSOCIATED PRESS

By Aruna Viswanatha and Sadie Gurman

Updated April 15, 2021 12:41 pm ET

Federal prosecutors in Portland, Ore., have moved to dismiss almost half the cases they charged in connection with violence accompanying last year's protests over racial injustice, as authorities grapple with how to tamp down politically motivated unrest that has arisen since then.

Of 96 cases the U.S. attorney's office in Portland filed last year charging protesters with federal crimes, including assaulting federal officers, civil disorder, and failing to obey, prosecutors have dropped 47 of them, government documents show. Ten people have pleaded guilty to related charges and two were ordered detained pending trial. None have gone to trial.

The penalties levied so far against any federal defendants, most of whom were arrested in clashes around federal buildings in Portland including the courthouse, have largely consisted

of community service, such as working in a food bank or encouraging people to vote.

More than half of the around 30 so-called deferred resolution deals, in which prosecutors ask the court to drop cases once defendants complete volunteer work, were initiated last fall under the Trump administration, interviews and a review of cases shows. Prosecutors have

NEWS • PRESS RELEASES

D.A. Vance Declines to Prosecute Protest Arrests

JUNE 5, 2020

REPORT POLICE VIOLENCE AND MISCONDUCT

Manhattan District Attorney Cy Vance, Jr. today announced the D.A.'s Office's policy regarding arrests on charges of Unlawful Assembly and Disorderly Conduct during ongoing demonstrations against the use of excessive force and killing of George Floyd. Previously, the D.A.'s Office's policy was to offer individuals charged with these low-level offenses an Adjournment in Contemplation of Dismissal, meaning their cases would be dismissed within six months. Under the new policy, the D.A.'s Office declines to prosecute these arrests in the interest of justice. The Office will also continue to evaluate and decline to prosecute other protest-related charges where appropriate.

"The prosecution of protestors charged with these low-level offenses undermines critical bonds between law enforcement and the communities we serve. Days after the killing of George Floyd, our nation and our city are at a crossroads in our continuing endeavor to confront racism and systemic injustice wherever it exists. Our office has a moral imperative to enact public policies which assure all New Yorkers that in our justice system and our society, black lives matter and police violence is a crime. We commend the thousands of our fellow New Yorkers who have peacefully assembled to demand these achievable aims, and our door is open to any New Yorker who wishes to be heard."

The D.A.'s Office's policy is designed to minimize unnecessary

interactions with the criminal justice system, reduce racial disparities and collateral consequences in low-level offense prosecutions, and enable the Office and court system to preserve resources for the prosecution of serious crimes. If evidence emerges that any individuals personally participated in violence against police officers, destruction, or looting, such individuals will be charged with appropriate crimes.

Manhattan District Attorney's Office

MAIN OFFICE
One Hogan Place
New York, NY 10013
212.335.9000

WASHINGTON HEIGHTS OFFICE
530 West 166th Street, Suite 600A
New York, NY 10032
212.335.3320

HARLEM OFFICE
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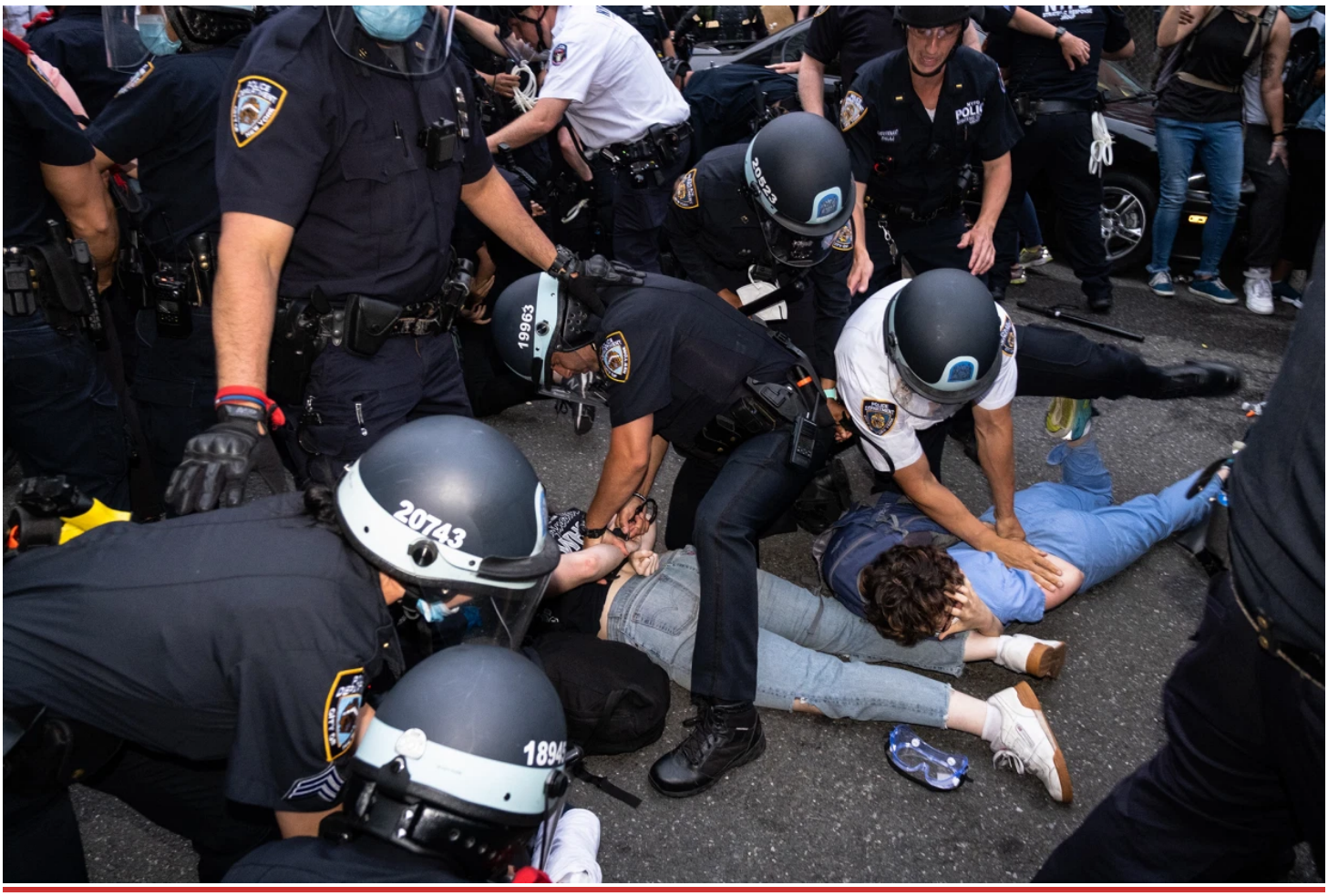
NEWS

Charges against hundreds of NYC rioters, looters have been dropped

By Lee Brown and Julia Marsh

June 20, 2021 | 8:14am | Updated



Business owners speak out against the charges dropped against protesters.
Stephen Yang

Hundreds of alleged looters and rioters busted last year in protests over George Floyd's murder by police have had their charges dropped, according to NYPD data — figures ripped as "disgusting" by a local business owner.

In The Bronx — which saw fires in the street and mass looting in June 2020 — more than 60 percent of arrestees have had charges dropped, according to the investigation by NBC New York.

Seventy-three of the 118 people arrested in the borough had their cases shelved altogether, another 19 were convicted on lesser counts like trespassing, which carries no jail time, the report said.

Eighteen cases remain open, with NBC not accounting for the other eight arrests.

"Those numbers, to be honest with you, is disgusting," Jessica Betancourt, who owns a Bronx eyeglass store that was looted and is vice president of a local merchants association, told NBC. "I was in total shock that everything is being brushed off to the side.

“They could do it again because they know they won’t get the right punishment,” she added of the rioters who again left the Bronx burning.

73 out of the 118 arrested in the Bronx and 222 of those arrested in Manhattan have had their charges dropped.
ALBA VIGARAY/EPA-EFE/Shutterstock

In Manhattan — where looters ran rampant across Soho and Midtown— 222 of those arrested had their cases completely dropped, while 73 got lesser counts.

Of the 485 people busted in the borough, 128 have open criminal court cases, while 40 juvenile defendants had their cases moved to family court, NBC found.

Another 40 cases with juvenile defendants were sent to family court.

A NYPD SUV on fire during protests in 2020.
Stephen Yang

Sources in the DA's offices insisted that in many of the cases, the evidence was not strong enough to secure a conviction. The offices are also swamped with a backlog of cases created by the courts' prolonged closure during the COVID-19 pandemic.

Patrice O'Shaughnessy, a spokeswoman for the Bronx DA's Office, provided differing information than the NBC report.

She said there were 90 total arrests on felony and misdemeanor charges stemming from riots on June 1 and 2 last year — and 28 were outright dismissals, accounting for about 31 percent.

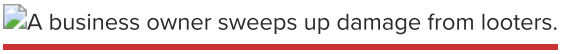
Fourteen cases were resolved with what's known as an "adjournment in contemplation of dismissal" — meaning, charges get tossed if the defendant stays out of trouble for six months or completes community service.

The remainder of the cases were either resolved with a guilty plea or conditional discharge, or are still pending, according to O'Shaughnessy.

"We went forward with cases for which we had evidence and a complaining witness," she said. "Some cases were dismissed but we held people accountable because we do not tolerate violence against Bronx business owners."

Former NYPD Chief of Patrol Wilbur Chapman said that the district attorneys' offices and the courts had "allowed people who committed crimes to go scot-free."

"If they are so overworked that they can't handle the mission that they're hired for, then maybe they should find another line of work," Chapman told NBC.


A business owner sweeps up damage from looters.

A Bronx business owner called the dropped looting charged “disgusting.”
Richard Harbus

And NYPD Deputy Inspector Andrew Arias asserted that painstaking work went into each case.

“We had to analyze each case individually and see if, in fact, we could prove the right person had committed the crime,” Arias said.

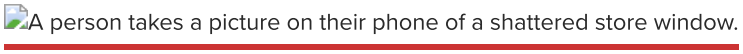
Meanwhile, two of the top candidates in the Democratic mayoral primary panned the move Sunday.

Macy’s Herald Square boarded up ahead of expected riots in June 2020.
Christopher Sadowski

“Everyone needs to be safe in their communities and store owners need to know that their property is going to be protected,” said Kathryn Garcia in a statement. “When I’m mayor, I will work to ensure the NYPD partners with the District Attorney’s office to make sure that they have the resources and support they need to seek accountability and justice.”

Added Andrew Yang, “While the vast majority of those protesting last year did so peacefully, those who broke the law, broke windows, destroyed small businesses and acted violently and recklessly must be held accountable.”

Eric Adams, a former NYPD captain who has positioned himself as the field’s law-and-order candidate, did not respond to a question about the report at a Sunday campaign event.



Former NYPD Chief of Patrol Wilbur Chapman said the courts had “allowed people who committed crimes to go scot-free.”
Richard Harbus

The campaign of Maya Wiley — whose platform supports defunding the NYPD — didn’t respond to a request for comment.

Bronx DA Darcell Clark declined repeated requests for an interview with NBC, as did Manhattan DA Cyrus Vance Jr., with the latter’s office busy investigating former President Donald Trump’s businesses, the outlet said.

The station noted an internal memo in which Vance says that there are more than 3,500 unindicted felony cases waiting to move forward that have been on hold due to the pandemic.

Before dropping a case, Vance told his prosecutors to review defendants’ criminal histories, whether police could really place the suspect at the scene, and whether the individual caused “any damage to the store.”

“For many of these commercial burglaries, you will be asked to reduce the initial felony charge to a misdemeanor and to dispose of the case … with an eye towards rehabilitation,” Vance told his office, according to NBC.

Court spokesman Lucian Chalfen told NBC that the decisions to dismiss cases were primarily made by the district attorneys.

“An application must be made by the district attorney or as they have done with hundreds of DATs [desk appearance tickets], decline to prosecute them,” Chalfen said.

Additional reporting by Sean Conlin

FILED UNDER **COURTS**, **CY VANCE**, **GEORGE FLOYD**, **LOOTING**, **NEW YORK CITY**, **RIOTS**, **THE BRONX**, **6/20/21**

RECOMMENDED 1/5

CRIME AND COURTS

Chief investigative reporter Jonathan Dienst on crime, corruption and terrorism.

I-TEAM

Most Riot, Looting Cases From Last Year Dropped by NYC DAs

By **Jonathan Dienst** and **Courtney Copenhagen** • Published June 18, 2021 • Updated on June 18, 2021 at 6:25 pm

One year ago, parts of New York City felt out of control as crowds of looters were seen smashing storefront after storefront.

The mayhem continued night after night from late May into June. At one point, there was even a so-called “looting dance party” on the streets of SoHo.

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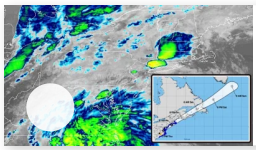
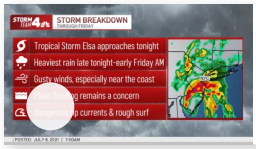
The mobs seemingly pillaged at will. Many were caught on tape, some with their faces visible. Others even posted on social their own videos of their actions those nights.

News



JUL 5

Hailing T-Storms Pummel NYC Area, Flooding Streets and Subways; Deadly Elsa Triggers Tropical Warnings



14 HOURS AGO

Live Radar: Track Elsa's Latest Timing and Impacts for Tri-State

“We got the Rolex store,” some in the crowd can be heard screaming in one video.

Police were far outnumbered and seemingly unprepared.

Hundreds of arrests were made during the looting and riots. Many of those arrests took place in Manhattan and along some commercial streets in the Bronx where the problems were widespread.

Surveillance videos show looters breaking into many locally owned Bronx stores, stores that were left ransacked.

the worst of the looting in early June.

Since then, the NYPD says the Bronx district attorney and the courts have dismissed most of those cases – 73 in all. Eighteen cases remain open and there have been 19 convictions for mostly lesser counts like trespassing, counts which carry no jail time.

Jessica Betancourt owns an eyeglass shop that was looted and destroyed along Burnside Avenue in the Bronx last June.

“Those numbers, to be honest with you, is disgusting,” Betancourt said when told of the few cases being prosecuted.

Betancourt is also vice president of a local merchants association. She says local business leaders are upset few are being held accountable for the destruction they caused.

“I was in total shock that everything is being brushed off to the side.”

In addition to the NYPD and court data News 4 New York reviewed, the Bronx District Attorney's Office provided data from the night of June 1-2, which included a total of 90 felony and misdemeanor arrests. Of those, 28 were outright dismissals. Fourteen were adjourned contemplating dismissal (ACD) which means if they do not get arrested within six months or do community service or other condition the case gets dismissed. The rest of the cases are either pending, or the accused pleaded guilty or received a conditional discharge.

“We went forward with cases for which we had evidence and a complaining witness. Some cases were dismissed but we held people accountable because we do not tolerate violence against Bronx business owners," the Bronx District Attorney's Office said in a statement.

In Manhattan, many major retailers and local shops were broken into in late May and into June. Amid the pandemic, mobs and organized criminals were taking advantage of huge protests rocking the city after the Minneapolis police killing of George Floyd.

In Manhattan, the NYPD data shows there were 485 arrests. Of those cases, 222 were later dropped and 73 seeing convictions for lesser counts like trespassing, which carries no jail time. Another 40

Law enforcement expert and former NYPD Chief of Patrol Wilbur Chapman voiced anger at the district attorneys' dropping of so many looting and burglary cases.

“If they are so overworked that they can’t handle the mission that they're hired for, then maybe they should find another line of work,” Chapman said.

Sources in the district attorneys' offices tell NBC New York that evidence, in some cases, was simply not strong enough for proof beyond a reasonable doubt. And with the courts closed amid the pandemic, there was a huge backlog of cases was unwieldy for both the courts and prosecutors.

The NYPD did set up a task force after the riots to examine videos and photos to separate out suspected rioters from peaceful protesters. That work shares similarities with what the FBI is doing in making hundreds of arrests after the riot at the U.S. Capitol.

But unlike federal prosecutors who are moving forward with prosecutions of the Capitol Hill rioters, New York City prosecutors are disposing of most burglary-related cases.

The NYPD says there was tedious follow-up investigations led in part by Deputy Inspector Andrew Arias, where evidence included photos and recovered stolen property.

"We had to analyze each case individually and see if, in fact, we could prove the right person had committed the crime," Arias said.

Former Chief Chapman says while the NYPD did some follow-up, he said the data shows the district attorneys and the courts have not.

“It allowed people who committed crimes to go scot free,” Chapman said.

Bronx District Attorney Darcel Clark declined repeated requests for an interview, as did Manhattan District Attorney Cy Vance, whose office has been busy with a team of prosecutors investigating separate allegations of tax fraud surrounding President Trump’s businesses – allegations Trump denies.

3,500 unindicted felony cases in the pipeline waiting to move forward in the courts. His memo says all those cases were on hold because of the pandemic.

Before dropping a case, Vance told his prosecutors to review defendants' criminal histories, whether police could really place the suspect at the scene, and whether the individual caused "any damage to the store."

Vance told his office, "For many of these commercial burglaries, you will be asked to reduce the initial felony charge to a misdemeanor and to dispose of the case ... with an eye towards rehabilitation."

He also stressed the "continued goal to achieve consistency and equitable treatment in these cases."

A court spokesman says decisions to dismiss cases were primarily made by the district attorneys. "An application must be made by the district attorney or as they have done with hundreds of DATs, decline to prosecute them," said Lucian Chalfen.

In the Bronx, some businesses that had insurance are back. But the scars from the riots of a year ago remain.

"They could do it again because they know they won't get the right punishment," Betancourt said.

New York City mayoral candidate Kathryn Garcia touched upon the subject of looting during one of her stops during her campaign Sunday, saying: "Everyone needs to be safe in their communities and store owners need to know that their property is going to be protected," adding that if elected, she would "work to ensure the NYPD partners with the District Attorney's office to make sure that they have the resources and support they need to seek accountability and justice."

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STEVEN A. METCALF II, ESQ., Managing Attorney
NANETTE IDA METCALF, ESQ., Managing Attorney**
MARTIN TANKLEFF, ESQ., Associate Attorney
CHRISTOPHER DARDEN, ESQ., *Special Counsel**
MARC HOWARD, ESQ., *Special Counsel*
JOSEPH D. MCBRIDE, ESQ., *of Counsel*

EXHIBIT N

Metcalf & Metcalf, P.C.
99 Park Avenue, 25th Floor
New York, NY 10016
646.253.0514 (*Phone*)
646.219.2012 (*Fax*)

2021 WL 2816245
Only the Westlaw citation is currently available.
United States Court of Appeals,
District of Columbia Circuit.

UNITED STATES of America, Appellee
v.
Timothy Louis HALE-CUSANELLI, Appellant

No. 21-3029
|
Decided July 7, 2021

On Appeal of a Pretrial Detention Order (No. 1:21-cr-00037-1)

Attorneys and Law Firms

Jonathan Zucker, appointed by the court, was on the appellant's Memorandum of Law and Fact.

Ann M. Carroll, Chrisellen R. Kolb, and Nicholas P. Coleman, Assistant U.S. Attorneys, were on appellee's Memorandum of Law and Fact.

Before: Tatel, Wilkins, and Rao, Circuit Judges.

Opinion

Wilkins, Circuit Judge:

***1** Timothy Hale-Cusanelli, who was arrested in connection with the incident at the United States Capitol on January 6, 2021, appeals from orders of the District Court ordering him detained pending trial, and denying reconsideration of that ruling in light of *United States v. Munchel*, 991 F.3d 1273 (D.C. Cir. 2021). Hale-Cusanelli challenges the District Court's conclusion that no condition or combination of conditions of release will reasonably assure the safety of any other person and the community. We affirm.

I.

On January 6, 2021, Hale-Cusanelli, who was then enlisted in the Army Reserves and worked as a Navy contractor in New Jersey, traveled to Washington, D.C., to attend the "Stop the Steal" rally. He wore a suit and tie and did not bring with him any form of weapon. Def.'s Mot. for Modification of Bond to Place the Def. on Conditional Release Pending Trial ("Def.'s Mot. for Conditional Release") at 3, 10–11, *United States v. Hale-Cusanelli*, No. 1:21-cr-37, ECF No. 13 (D.D.C. Mar. 2, 2021). Hale-Cusanelli eventually made his way to the United States Capitol, where he entered through doors that had already been kicked open. Opp'n to Def.'s Mot. for Conditional Release at 2, *Hale-Cusanelli*, No. 1:21-cr-37, ECF No. 18 (D.D.C. Mar. 12, 2021). He apparently left the Capitol after learning that someone had been shot.

Hale-Cusanelli later admitted to a Confidential Human Source ("CHS") that he had participated in the events at the Capitol on January 6. *Id.* The CHS reported Hale-Cusanelli to the Naval Criminal Investigation Service ("NCIS") and then, in cooperation with NCIS, recorded a conversation with Hale-Cusanelli. [1] *Id.*; Mot. for Emergency Stay & for Review of Release Order at 4, *Hale-Cusanelli*, No. 1:21-cr-37, ECF No. 3 (D.D.C. Jan. 19, 2021). In that conversation, Hale-Cusanelli admitted to using voice and hand signals to urge other members of the mob at the Capitol to "advance." Mot. for Emergency Stay & for Review of Release Order at 4, *Hale-Cusanelli*, No. 1:21-cr-37, ECF No. 3 (D.D.C. Jan. 19, 2021). He further admitted to picking up a flagpole that someone else had thrown "like a javelin" at a police officer, and referring to it as a "murder weapon." *Id.* Hale-Cusanelli is not accused of using or threatening to use the flagpole as a weapon. *See id.* Later, Hale-Cusanelli admitted to NCIS and FBI agents that he had used his military training and a face covering to protect himself after he was exposed to pepper spray. *Id.* at 4–5.

In the recorded conversation with the CHS, Hale-Cusanelli described "the adrenaline, the rush, the purpose" he felt on January 6, which he compared to "civil war." Opp'n to Def.'s Mot. for Conditional Release at 19, ECF No. 18 (D.D.C. Mar. 12, 2021). The government described part of the conversation as follows:

> [Hale-Cusanelli] stated that it was "only a matter of time" before a civil war broke out "along partisan lines," but that "they" don't want to fire the first shot because all of the guns and resources are in Republican hands, and Republicans make up 70% of the military. [Hale-Cusanelli] then said that, in the event of civil war, "it's not going to be New York and California winning the day, it's going to be the good

> old boys f[ro]m the Midwest, Texas, and Arkansas." [Hale-Cusanelli] told CHS that he "really wishes" there would be a civil war. When CHS interrupted and said "but a lot of people would die," [Hale-Cusanelli] replied "Thomas Jefferson said the tree of liberty should be refreshed with the blood of patriots and tyrants."

***2** *Id.* at 20.

On January 15, 2021, Hale-Cusanelli was arrested on a criminal complaint in Colts Neck, New Jersey. A magistrate judge in the District of New Jersey ordered him released with conditions but temporarily stayed that ruling. On January 19, Chief Judge Howell stayed the New Jersey court's release order pending review by the District Court here. On January 29, Hale-Cusanelli was indicted on seven counts involving trespass and disorderly conduct in connection with the events on January 6. Indictment at 1–4, *Hale-Cusanelli*, No. 1:21-cr-37, ECF No. 9 (D.D.C. Jan. 29, 2021). The indictment does not allege that Hale-Cusanelli assaulted anyone, damaged any property, or organized any of the events on January 6. *See id.*

Hale-Cusanelli is 31 years old and, prior to his arrest, resided in Colts Neck, New Jersey, where he worked at Naval Weapons Station Earle as a private security officer. Def.'s Mot. for Conditional Release at 2. At the time of his arrest, he had been enlisted in the Army Reserves for approximately 11 years. *Id.*

After his arrest, NCIS interviewed 44 of Hale-Cusanelli's coworkers, and 34 of them described him "as having extremist or radical views pertaining to the Jewish people, minorities, and women." Opp'n to Def.'s Mot. for Conditional Release at 6–7. Those coworkers reported that Hale-Cusanelli had made various abhorrent statements, including that babies born with disabilities should be shot, that "Hitler should have finished the job," and that "Jews, women, and blacks were on the bottom of the totem pole." *Id.* at 7. Hale-Cusanelli's coworkers also described him as "unstable," observed that he had reported to work wearing a "Hitler mustache," and noted that he had discussed leaving his employment "in a blaze of glory" shortly before January 6. *Id.* at 7–8.

Prior to January 6, Hale-Cusanelli used a YouTube channel to upload a series of videos under the name the "Based Hermes Show." Hale-Cusanelli characterized these videos as "a platform to talk about local New Jersey politics." Def.'s Mot. for Conditional Release at 14. He deleted the videos after January 6, but the government was able to recover some clips from his phone. Opp'n to Def.'s Mot. for Conditional Release at 17. In the recovered clips, Hale-Cusanelli expressed racist and anti-Semitic sentiments. *Id.* at 17–19. Also recovered from Hale-Cusanelli's phone were a number of memes expressing similar views. *Id.* at 13–16.

Hale-Cusanelli's criminal history is limited. In 2010, he was arrested with three other codefendants after one of them used a homemade PVC launcher (*i.e.*, a potato gun) to fire frozen corn cobs at a home in Howell Township, New Jersey. Suppl. to Def.'s Memorandum of Law & Fact ("Suppl.") at 50–64, *Hale-Cusanelli*, No. 21-3029 (D.C. Cir. May 27, 2021). On the potato gun were the words "WIDOWMAKER" and "WHITE IS RIGHT," as well as a drawing of the Confederate flag. *Id.* at 59. Hale-Cusanelli additionally had a "punch dagger"—*i.e.*, a short-bladed dagger designed so that the blade protrudes from the front of an individual's fist—in his possession at the time. *Id.* Each member of the group was charged with conspiracy to commit criminal mischief and possession of a weapon. *Id.* Hale-Cusanelli ultimately pleaded guilty to disorderly conduct. *Id.* at 14.

***3** A police report describing the potato-gun incident provided further details, but Hale-Cusanelli did not bring these details to the District Court's attention. According to the police report, one of the arrested officers concluded that "[i]t does not appear that there was any bias-related intent involved with this particular offense." *Id.* at 59. The officer stated that he was not aware of any black individuals residing at the home, and that one of Hale-Cusanelli's codefendants admitted he had targeted the home because of a prior dispute with one of its residents over bicycles. *Id.*

According to the government, two harassment complaints were filed against Hale-Cusanelli in February and March 2020. *Id.* at 9–10. The complaints were both filed by Jewish individuals who accused him of posting online their names and addresses. *Id.* at 10. No further details are available in the record.

II.

On March 23, the District Court held a hearing to review the New Jersey magistrate judge's release order. After hearing from the parties, the District Court addressed the four 18 U.S.C. § 3142(g) factors and orally ruled that Hale-Cusanelli was dangerous within the meaning of the Bail Reform Act —*i.e.*, that "no condition or combination of conditions will reasonably assure ... the safety of any other person and the community." 18 U.S.C. § 3142(e)(1).

First, the District Court concluded that the "nature and circumstances of the offense" factor weighed "just slightly" in favor of release because Hale-Cusanelli was not charged with any offenses involving violence or destruction of property. Suppl. at 24–25. The District Court nonetheless expressed concern about Hale-Cusanelli's admission that he had urged others "to essentially storm the Capitol Building and enter it despite police presence, tear gas, fences and what have you." *Id.* at 25.

Second, the District Court concluded that the weight of the evidence against Hale-Cusanelli was "overwhelming" and that this factor therefore weighed in favor of detention. *Id*.

Third, the District Court addressed Hale-Cusanelli's history and characteristics. The court observed that "[t]his [was] the most difficult prong in this case." *Id*. at 26. The court noted Hale-Cusanelli's lack of criminal history, his employment history, and the fact that he was a military veteran with a security clearance, all of which "sp[oke] in his favor." *Id*. However, the court expressed concern about his "well-documented history of racist and violent language" and the fact that he "has been generally engaged in hateful conduct, if not necessarily violent conduct toward a number of people with whom he's had contact." *Id*. The court observed that "we don't typically penalize people for what they say or think." *Id*. at 27. It "also d[id] take note" of the potato-gun incident, which it concluded was "some evidence of [Hale-Cusanelli] actually acting out on this, that this is not just language but actually action." *Id*.

Fourth, the District Court concluded that the danger Hale-Cusanelli posed to the community weighed in favor of detention given "all of the violent language ... previously mentioned." *Id*. at 27–28. The court found "highly troubling" Hale-Cusanelli's statements to the CHS regarding "looking forward to a civil war" and "the tree of liberty need[ing] to be watered with the blood of patriots from time to time." *Id*. at 28. The court agreed "with the government's concern regarding potential escalation of violence at this point given all that has occurred." *Id*. The court also expressed concern for the safety of the CHS, noting that Hale-Cusanelli knew the CHS's identity, that he had previously made comments "about committing violence against those who he feels are pitted against him," and that he "has been willing to put these thoughts into action in the past." *Id*.

***4** The District Court observed that "this is a close case in terms of the government meeting its burden under the Bail Reform Act," but the court ultimately concluded that "no condition or combinations of conditions will assure the safety of the community" were he released pending trial, and it ordered that Hale-Cusanelli be detained. *Id*. at 28–29; *see also* Detention Order, *Hale-Cusanelli*, No. 1:21-cr-37, ECF No. 20 (D.D.C. Mar. 23, 2021).

On April 2, Hale-Cusanelli moved for reconsideration of the detention order in light of this Court's decision in *Munchel*, 991 F.3d 1273. Def.'s Mot. For Recon., *Hale-Cusanelli*, No. 1:21-cr-37, ECF No. 21 (D.D.C. Apr. 2, 2021). In a supplement, Hale-Cusanelli informed the District Court that the CHS's employment in New Jersey had ended, that the CHS had since moved "well in excess of 1500 miles" from where Hale-Cusanelli would be living, and that Hale-Cusanelli did not know (and could not easily find out) where the CHS is now living and working. Suppl. to Def.'s Mot. For Recon. at 2 & n.2, *Hale-Cusanelli*, No. 1:21-cr-37, ECF No. 25 (D.D.C. Apr. 14, 2021).

On April 28, the District Court held a hearing on the motion for reconsideration and orally denied the motion. The court distinguished *Munchel*, observing that the District Court's dangerousness determination in that case had relied primarily on the nature and circumstances of the charged offenses, whereas the court had concluded in this case that this factor actually "tilted toward release." Suppl. at 37. The court observed that, were it "just looking at what [Hale-Cusanelli] did on January 6th, he would be a free man right now." *Id*. at 38. Instead, the District Court observed that its dangerousness determination here was based on Hale-Cusanelli's animus toward certain groups of people, his having acted on that animus in the past, and the possibility that he would do so again in the future. *Id*. The court also rejected Hale-

Cusanelli's suggestion that he was no longer a threat to the CHS because the CHS had moved, observing that Hale-Cusanelli "may well know where [CHS] has moved," and the CHS "may well have moved back." *Id*. at 39.

Hale-Cusanelli appeals the District Court's March 23 detention order and April 28 order denying reconsideration. He asserts that the decision to detain him based on the danger he poses to the community was error.

III.

We review release and detention orders pursuant to the Bail Reform Act, 18 U.S.C. § 3142 *et seq.*, for clear error. *Munchel*, 991 F.3d at 1282. "The clear error standard applies not only to the factual predicates underlying the district court's decision, but 'also to its overall assessment, based on those predicate facts, as to the risk of flight or danger presented by defendant's release.' " *United States v. Mattis*, 963 F.3d 285, 291 (2d Cir. 2020) (quoting *United States v. Abuhamra*, 389 F.3d 309, 317 (2d Cir. 2004)). This standard of review is highly deferential. We will find clear error only when "although there is evidence to support [a finding or a ruling], the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Munchel*, 991 F.3d at 1282 (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948)). However, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *United States v. Brockenborrugh*, 575 F.3d 726, 741 (D.C. Cir. 2009) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 574, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985)). If the District Court finds that "no condition or combination of conditions will reasonably assure ... the safety of any other person and the community," the District Court "shall order" detention before trial. 18 U.S.C. § 3142(e)(1).

***5** Hale-Cusanelli primarily asserts that the District Court clearly erred in assessing his history and characteristics and the nature and seriousness of the danger he poses. *See* 18 U.S.C. § 3142(g). Regarding his history and characteristics, Hale-Cusanelli argues that the District Court clearly erred in concluding that the potato-gun incident was "some evidence" that he had violently acted on his racist ideology. Specifically, Hale-Cusanelli points to portions of a police report that show that he had not fired the potato gun and that the codefendant who had fired the gun chose the house because of a prior dispute with one of its residents over bicycles, not out of any racial animus. Hale-Cusanelli failed to raise this argument below. Hale-Cusanelli also argues that the District Court erred by relying on his "civil war" comments to the CHS, because other parts of the conversation allegedly show that he did not really want violence to occur. He also failed to make this argument below. (In his defense, Hale-Cusanelli asserts that he did not receive the recording of the conversation from the prosecution until after the District Court ruled.)

It is not readily apparent that it was a "plain, clear, or obvious error," *see* *United States v. Sheffield*, 832 F.3d 296, 311 (D.C. Cir. 2016), for the District Court to observe that the potato-gun incident was at least "some evidence" of Appellant having acted violently based on his racist ideology. Hale-Cusanelli points to the police report, which gave two reasons for its conclusion that "[i]t does not appear that that there was any bias[ ] involved" with the potato gun incident. Suppl. at 59. The first was that the victim was not African American, but that is not dispositive given Appellant's prejudices against others—especially Jews—and the officer apparently made no effort to determine whether the victims were Jewish. The second reason was that the actual shooter claimed he targeted the victim due to a dispute with his son related to stolen bicycles, and while the officer credited that explanation, the District Court was not required to agree. The potato gun, moreover, bore the words "WHITE IS RIGHT," as well as a Confederate flag. *Id.* As the district court noted, "we don't typically penalize people for what they say or think." Suppl. at 27. But given Appellant's deeply held and longstanding racist and anti-Semitic views, the District Court could reasonably view it as more than a coincidence that Appellant was implicated in a violent incident involving a weapon with a white supremacist message on it.

Nor is it apparent that it was plain error for the District Court to rely upon Appellant's "civil war" statements to find that he was a danger to the community. Appellant contends that the District Court was not aware that he said "[w]hen I say I want civil war, it's not like I want to see people dead in

the street" and that "civil war, not that I actually want that, I think that civil war is probably the simplest—not that the simplest solutions are always the best solutions—but I think it probably is the simplest solution, the most likely outcome, inevitably." Appellant's Mem. at 19 n.13. Even so, the District Court would have to weigh those statements against others where Appellant acknowledged that guns would be used in a civil war and that people would die, to which Appellant replied "Thomas Jefferson said the tree of liberty should be refreshed with the blood of patriots and tyrants." Opp'n to Def.'s Mot. for Conditional Release at 20. It is not obviously wrong to conclude that these statements, taken as a whole, demonstrate a potential danger to the community. This is particularly so when viewed with other statements Appellant made just prior to January 6, such as proclaiming a "final countdown" and an intention to leave his employment in a "blaze of glory." *Id.* at 7–8.

Appellant suggests, based on *Munchel*, that because he did not commit violence on January 6, he should not be found to pose a danger to the community. Appellant misreads *Munchel*. We did not hold in *Munchel* that only those persons who participated in violence on January 6 could properly be considered as posing a future danger to the community justifying pretrial detention. If that had been the case, we would have reversed the detention order (as proposed by the dissent) instead of remanding the case for reconsideration. *Compare* *Munchel*, 991 F.3d at 1283–84, *with* *id.* at 1285 (Katsas, J., concurring in part and dissenting in part) ("[W]hereas my colleagues remand for a do-over, I would reverse outright."). To the contrary, we explained in *Munchel* that a person could be deemed a danger to the community sufficient to justify detention even without posing a threat of committing violence in the future. *Id.* at 1283 (describing the threat of corrupting a union as one such danger contemplated by Congress). In the nearly forty years since the enactment of the Bail Reform Act, countless defendants have been detained even where the charged offense did not involve violence, based on drug charges, *see* 18 U.S.C. § 3142(f)(1)(C), being a repeat offender, *see* *id.* § 3142(f)(1)(D), a serious risk of obstruction of justice, *see* *id.* § 3142(f)(2)(B), or a serious risk of threats to prospective witnesses or jurors, *id*. The point of *Munchel* was that everyone who entered the Capitol on January 6 did not necessarily pose the same risk of danger and the preventive detention statute should apply to the January 6 defendants the same as it applies to everyone else, not that the January 6 defendants should get the special treatment of an automatic exemption from detention if they did not commit violence on that particular day.

***6** Here, the District Court made a forward-looking determination about the serious risk of obstruction of justice and threats to witnesses as the basis for detention. The District Court found a risk to the CHS based on Appellant's prior statements about "committing violence against those who he feels are pitted against him." Suppl. at 28. The District Court also expressed concern for a "potential escalation of violence" by Appellant given his statements about how great he felt about the January 6 incident, his desire for a "civil war" to settle political differences, and his lengthy history of statements condoning violence against persons of other races and religions. *Id.* Significantly, we also know that Appellant admitted to the CHS that he directed people to advance on January 6 and assumed a leadership role during the incident. The District Court reconsidered its ruling based on *Munchel* and pointed out that it "primarily relied on" Appellant's extensive history of statements condoning violence against those of other races and religions to find that he was a danger to the community. *Id.* at 38. And while the District Court mentioned that the potato-gun incident showed Appellant taking action based upon racial animus "[t]o a certain extent," the court was also aware of Appellant's numerous incendiary statements (such as his intent to leave his job "in a blaze of glory"), as well as the harassment complaints against Appellant for publicizing the names and addresses of Jewish individuals. *Id.*; *see also* Opp'n to Def.'s Mot. for Conditional Release at 7–8. Ultimately, the court explained that "his conduct in this case made me concerned that he was perhaps looking to act on these violent tendencies and violent comments in the past." Suppl. at 38. So even were we to conclude that the District Court erred by finding that the potato-gun incident was motivated by racial animus, it was not the sole basis of the ruling that Appellant posed a risk of escalating hate-motivated violence in the future. Furthermore, the District Court did not appear to rely upon the potato-gun incident at all in its ruling that Appellant posed a risk to witnesses, which is an independently sufficient basis for detention. Finally, even if the potato-gun was not motivated

by racial bias, it is not completely exculpatory—it is still an incident where Appellant participated in violence as an act of retaliation, which is precisely the type of concern we should have when it comes to the risk to the CHS.

The District Court acknowledged that this was a close case, but it ruled that based on the totality of the circumstances, the government had met its burden. Reasonable minds might disagree on that determination, but our standard of review is for clear error, not to substitute our judgment for that of the District Court. We affirm.

All Citations

--- F.4th ----, 2021 WL 2816245

Footnotes

1 The record does not contain a transcript of the recorded conversation. Consequently, all quotations in this memorandum are as presented by the parties.