

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

UNITED STATES OF AMERICA	:	Criminal Case Nos. 2017 CF2 7212
	:	2017 CF2 1235
v.	:	2017 CF2 7216
	:	2017 CF2 1378
MATTHEW HESSLER,	:	2017 CF2 1355
CHRISTOPHER LITCHFIELD,	:	
DYLAN PETROHILOS,	:	Chief Judge Morin
CALY RETHERFORD, and	:	
CAROLINE UNGER	:	Trial: 04/17/2018

**GOVERNMENT’S NOTICE OF INTENT TO WITHDRAW
EXPERT NOTICE AND MOTION TO CONTINUE THE TRIAL**

The United States, by and through its attorney, the United States Attorney for the District of Columbia, respectfully submits this notice that it is withdrawing the March 2, 2018 Notice of Intent to Admit Expert Testimony of “Julie McMahon”, and respectfully moves this Court for a continuance of the April 17, 2018 trial date to allow the government an opportunity to secure and to provide proper Rule 16 notice for an expert. In support of this motion to continue, the government states as follows:

1. On March 2, 2018, the government filed a Notice of Intent to Admit Expert Testimony of an FBI agent who had, among other training and experience, infiltrated anarchist extremist groups several years ago and had participated in the use of the black bloc tactic as part of her undercover work. The government also filed a Motion in Limine to allow the FBI agent to testify publicly at trial under an alias, in light of certain specific concerns. The government did provide to defense counsel the true name and CV of the expert, under a non-disclosure agreement pending a ruling from the Court on the motion in limine.

2. On April 6, 2018, this Court ruled that the government's proposed expert witness was not permitted to testify publicly under an alias. In addition, the Court denied the government's request to issue a protective order that prevented the dissemination of the FBI agent's true name and other identifying information from her CV to third parties, concluding that such a protective order would limit the defense's ability to investigate the FBI agent in preparation for her testimony at trial.
3. On April 9, 2018, the Court provided to the parties guidance regarding the permissible scope of expert testimony. Specifically, the Court ruled that a government expert could provide "educational" testimony – that is, could testify about the black bloc tactic and the meaning of certain terminology. However, the Court ruled that the expert could not review video evidence of the riot or other physical evidence in this case and render an opinion about whether this evidence was consistent or inconsistent with the use of the black bloc tactic.
4. On the evening of April 9, 2018, the government received a letter from all defense counsel in the April 17, 2018 trial. That letter is attached as Exhibit A. The letter proposed an "offer" to the government – that is, if the government will withdraw its notice of intent to introduce the expert testimony of "Julie McMahon", the defense will not disseminate her true name and CV to the defendant or any third parties, and the defense will destroy the materials the government had previously provided to the defense under the non-disclosure agreement.
5. After receipt of the defense's letter, undersigned counsel performed some internet research regarding its notice of intent to admit the testimony of this FBI agent. A number of articles were written about this issue. Some of the comments posted in

connection with these articles included the following statements in response to discussions about her identity:

- a. “She’s definitely gonna end up doxed” - Comment posted on March 6, 2018 at 8:12pm to the Splinter News article “The Feds, Still Chasing Inauguration Protesters, Bring Undercover ‘Infiltrator’ to the Stand” (dated March 6, 2018);
 - b. “Hopefully info is release to make sure this person isn’t harming anyone else.” – Comment posted on March 8, 2018 at 8:37am to the Anarchist News article “Prosecutors Say a Woman Who Went Undercover with an ‘Anarchist Extremist Group’ Will Testify at Inauguration Protest Trials” (dated March 7, 2018); and
 - c. “The speculation period won’t be very long because in April we’ll see this piece of shit in court and all doubts will be put to rest about who it was.” – Comment posted on March 8, 2018 at 7:25am to the Anarchist News article “Prosecutors Say a Woman Who Went Undercover with an ‘Anarchist Extremist Group’ Will Testify at Inauguration Protest Trials” (dated March 7, 2018).¹
6. In light of the Court’s ruling that the defense is permitted to disseminate the FBI agent’s true name and other information to third parties (combined with the specific concerns and pattern of harassing conduct as outlined in the government’s motion in limine), and in light of the Court’s guidance limiting the scope of any expert testimony regarding the black bloc tactic and terminology, the government hereby withdraws its notice of

¹ To be clear, the government recognizes and respects the First Amendment right to write and publish articles, and respects the First Amendment right of individuals to comment on those articles. The government also respects the criminal justice process and the rights of defendants to confront their accusers. This process routinely requires witnesses to face significant personal consequences when they testify at trial. The recent development of and use of “doxing” as a means to harass individuals who testify at trial raises the consequences for those witnesses. It is an additional factor that the undersigned assistant routinely weighs and considers in deciding how to resolve all types of criminal cases in this jurisdiction, from misdemeanors to serious violent crimes.

intent to admit the expert testimony of “Julie McMahon.”² Subject to a *Motorla* hearing and a showing that the expert is qualified, the Court’s ruling on April 9, 2018 makes clear that an individual with undercover experience is not required to render the expert “educational” opinions that the Court stated would be permitted in this case. As a result, the government believes that the specific safety risks to the FBI agent, and the professional and personal consequences that she will face – (that is, the likelihood of extensive personal harassment and the inability to ever work in an undercover capacity again) – outweigh the need for her specific undercover experience and training to render the “educational” opinions in this case.

7. The government is actively seeking to secure an individual with the necessary qualifications to present at a *Motorola* hearing and testify at trial in the limited areas outlined by the Court, and who will not face such significant personal and professional consequences by testifying at this trial. Based on the specific pattern of conduct in this case, the government anticipates that any such individual will face some level of harassment as a result of his/her affiliation with the prosecution of this case; but, the risks and consequences to an individual who no longer operates in an undercover capacity (or no longer intends to operate in an undercover capacity) are less significant than those faced by “Julie McMahon.”
8. The undersigned assistants have actively worked to identify and secure a qualified expert for many months. Indeed, the undersigned assistants had two different qualified individuals lined up prior to the November 2017 trial, both of whom had operated in

² The government submitted a letter to all defense counsel at 4pm on April 10, 2018, notifying counsel of its intent to withdraw the expert, and accepting the “offer” made by defense counsel to not disseminate the agent’s true name or CV to third parties. A copy of this letter is attached as Exhibit B.

an undercover capacity. Due to the same risks and consequences faced by “Julie McMahon”, the undersigned assistants were not able to call those witnesses and, on the eve of the November 2017 trial, advised the Court and counsel that they would proceed to trial without an expert. During the November 2017 trial, fourteen citizens of the District of Columbia sacrificed a substantial amount of time and energy to sit on the jury in that case and to hear all the evidence. At the conclusion of the trial, multiple jurors told the undersigned assistants that they believed that an expert witness would have been helpful to aid the jury’s understanding of the black bloc tactic and certain terminology as it related to certain categories of conduct committed by defendants charged in this case.³

9. In this particular trial group, the role each defendant played falls within the categories of conduct outlined by the prior jury for which they believed an expert would aid in their deliberations. The undersigned assistants cannot, in good conscience, ask another fourteen citizens to sacrifice a substantial amount of time and energy to sit on this jury without presenting the evidence of an “educational” expert on the black bloc tactic and terminology used. For this reason, the government is no longer prepared to proceed to trial on April 17, 2018, and is requesting a continuance of the trial date to allow it to secure an “educational” expert.⁴

10. The government has not previously requested a continuance of any trial date for any defendant indicted in the superseding indictment. The government has announced its

³ Judge Leibovitz permitted the undersigned assistants and defense counsel to speak with jurors who wanted to talk to counsel at the conclusion of the trial.

⁴ For the same reasons articulated in this motion, the government will be filing a comparable notice of intent to withdraw the expert notice and motion to continue the trial date for the defendants scheduled for trial on April 23, 2018. The government does not intend to file a motion to continue the trial date for either of the May trial dates (May 14, 2018 or May 29, 2018), as we do not believe an educational expert is essential to understand the conduct of the defendants in those two trial groups.

readiness to proceed to trial on multiple occasions. Undersigned counsel believes it has demonstrated, throughout the life of this case, considerable efforts to get these cases ready for trial, and to assist each defense counsel in preparing for trial. Each defendant in this trial group is on personal recognizance with no reporting requirements or other conditions of release. This is the first trial date for each defendant in this trial group. The government believes that a continuance is appropriate.

Respectfully submitted,

JESSIE K. LIU
UNITED STATES ATTORNEY

By: /s/ Jennifer A. Kerkhoff
Jennifer A. Kerkhoff
Rizwan Qureshi
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served on all registered counsel for each of the above-captioned defendants via email on this 11th of April 2018.

/s/ Jennifer A. Kerkhoff
Jennifer A. Kerkhoff
Assistant United States Attorney

EXHIBIT A



ANDREW
CLARKE LAW PLLC

April 9, 2018

VIA ELECTRONIC MAIL

Jennifer Kerkhoff
Assistant United States Attorney
555 4th Street Northwest
Washington, District of Columbia 20530
Jennifer.Kerkhoff@usdoj.gov

Re: Offer to Destroy Expert Witness Discovery;
United States of America v. Dylan Petrohilos; Case No. 2017 CF2 7216

Dear Ms. Kerkhoff,

My name is Andrew O. Clarke, Esquire, and as you are aware, I represent the defendant in the above referenced matter. On March 28, 2018, you sent an e-mail to Undersigned Counsel and other co-defendants in this trial group, with the identity and Curriculum Vitae (CV) of an FBI Agent you intend to elicit expert testimony from at the April 17, 2018 trial in this matter (“Agent”).

On April 6, 2018, Judge Robert Morin denied your request for the protective order in this matter which would have prohibited us from disclosing the Agent’s name and CV. It is our understanding that defense counsel is no longer subject to the proposed protective order and can disseminate the CV and identity of the Agent to our clients and third parties.

Nonetheless, Undersigned Counsel and Counsel for Defendants, Matthew Hessler (2017 CF2 7212), Christopher Litchfield (2017 CF2 1235), Clay Rutherford (2017 CF2 1378), and Caroline Unger (2017 CF2 1355) (collectively “We”) have yet to disclose, to anyone, the name and CV of the Agent. If the government no longer intends to call the Agent, We will agree to delete and

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1712 Eye Street, Northwest, Suite 915,
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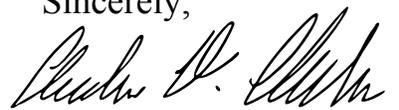
Facsimile: (202)747-5827

destroy the CV provided to us and will not disclose her name to our clients or any third-party investigators.

Please let us know the government's intentions concerning the Agent by Tuesday April 10, 2018 at 5 pm so We can timely prepare for trial.

Let us know immediately if you have any questions about the foregoing.

Sincerely,



Andrew O. Clarke

Cc:

Cary Clennon, Esquire Clennonlegal@hotmail.com
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Rizwan Qureshi, Esquire Rizwan.Qureshi2@usdoj.gov

Exhibit B



U.S. Department of Justice

Jessie K. Liu
United States Attorney

District of Columbia

*Judiciary Center
555 Fourth St., N.W.
Washington, D.C. 20530*

April 10, 2018

By Electronic Mail

Andrew Clarke, Esq. (Counsel for defendant Dylan Petrohilos)
Mark Sweet, Esq. (Counsel for defendant Christopher Litchfield)
Michelle Bradshaw, Esq. (Counsel for defendant Christopher Litchfield)
Cary Clennon, Esq. (Counsel for defendant Matthew Hessler)
Charles Murdter, Esq. (Counsel for defendant Caroline Unger)
Sharon Weathers, Esq. (Counsel for defendant Sharon Weathers)

Re: Expert Witness – Notice of Withdraw

Counsel:

I am in receipt of your April 9, 2018 letter titled “Offer to Destroy Expert Witness Discovery”, in which you state that it is your understanding that you are able to “disseminate the CV and identity of the Agent to our clients and third parties.” You further note that you have not yet disclosed the name and CV of the Agent to anyone. You then propose that, if the government advises you by 5pm on April 10, 2018 that it no longer intends to call the agent, “We will agree to delete and destroy the CV provided to us and will not disclose her name to our clients or any third party investigators.”

As an initial matter, your proposed offer (conditioned upon the government withdrawing its expert notice) “to delete and destroy the CV provided to us” and “not disclose her name to our clients or any third party investigators” seems more narrow than your initial statement in paragraph two of your letter that you believe you are able to “disseminate the CV and identity of the Agent to our clients ***and third parties***” (with no narrowing of “third parties” to be limited to just investigators). I am assuming this last sentence is a typographical error and that your proposed offer is that you “will agree to delete and destroy the CV provided to us and will not disclose her name to our clients or any third party.”

With the understanding that ALL counsel are agreeing to delete and destroy the CV of the agent that was provided to you (and will not disclose the information contained in the CV), and that ALL counsel will not disclose the agent’s name to any client or any third party, the government hereby accepts your “offer.” The government will be filing today a notice

withdrawing its intent to present the expert testimony of the FBI agent “Julie McMahon” during the April 17, 2018 rioting trial.

If my understanding of your “offer” is inaccurate, please contact me immediately. I am also requesting written confirmation from each counsel that the CV is destroyed and that each counsel agrees that he/she will not disclose the information contained in the CV or the agent’s name to other person (including their client or a third party). Please note that this letter is being sent to all counsel before the 5pm deadline you set in your April 9, 2018 letter.

Sincerely,

Jennifer A. Kerkhoff
Assistant United States Attorney