

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division – Felony Branch**

UNITED STATES OF AMERICA

v.

MICHAEL BASILLAS,

Defendant.

Case No. 2017-CF2-001334

Judge Kimberley Knowles

**MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR A MISTRIAL
BASED ON THE GOVERNMENT’S VIOLATION OF *BRADY* AND RULE 16**

Defendant Michael Basillas, by and through legal counsel, hereby requests that this Court dismiss the April 3, 2017 Superseding Indictment or, in the alternative, declare a mistrial given the Government’s failure to disclose evidence in violation of the United States Constitution and Fed. R. Crim. Proc. 16. *See Brady v. Maryland*, 373 U.S. 83, 90 (1963). The Government has abused its power by burying exculpatory evidence in the mountain of video exhibits produced to the defendants in this case and, thereby, violated its constitutional obligation to disclose to the defense, prior to trial, information in the Government’s possession that is favorable and material. *See id.*

BACKGROUND

Michael Basillas is charged with several offenses stemming from a protest through downtown Washington, D.C. on January 20, 2017. Among other charges, Michael Basillas has been charged with conspiracy to riot under 22 D.C. Code, Section 1322(b). Although the April 3, 2017 Superseding Indictment contains a litany of alleged overt acts, the Government’s best evidence that an agreement existed between two or more people to damage, destroy, or deface

property prior to January 20, 2017 amounts to a planning meeting that occurred on January 8, 2017 (“January 8th Meeting”). The Metropolitan Police Department (“MPD”) placed an undercover officer at the January 8th Meeting; however, the officer’s notes of the meeting consisted of two paragraphs. The notes are devoid of any mention of an Anti-Capitalist/Anti-Fascist March, violence, or destruction of property. Project Veritas—a right-wing organization known for editing and manipulating videos—planted at least two operatives into the January 8th Meeting and surreptitiously made several video recordings. MPD then contacted Project Veritas and provided video footage of this meeting.

Beginning with the November 2017 trial (“November Trial”), defense counsel has repeatedly challenged the authenticity of this video and questioned the Government about whether edits were made to it. And, beginning with the November 2017 trial, the Government has staunchly defended the integrity of this video and featured it prominently in its case-in-chief.

During the April 7, 2018 trial readiness hearing of another trial group before Chief Judge Morin, the Government sought to admit numerous statements, including the videos of the January 8th Meeting, against all defendants pursuant to *Jenkins v. United States*, 80 A.3d 978, 990 (D.C. 2013) (citing *Butler v. United States*, 481 A.2d 431, 439-41 (D.C.1984)). In support of the alleged conspiracy, the Government pointed to discussions during the January 8th Meeting and Judge Leibovitz’s finding during the November Trial that a conspiracy existed. Defense counsel objected orally and in writing, and argued at length that the January 8th Meeting consisted of discussions regarding benign topics such as protestors’ safety and protection, facilitating marching, and general ideas regarding the Inauguration. Nonetheless, the Court adopted the November Trial ruling, found that a conspiracy existed, and admitted the January 8th Meeting video.

Michael Basillas also challenged the conspiracy finding. For efficiency purposes, undersigned counsel offered and Judge Morin accepted the arguments made during the April hearing for the other trial group.¹ In Basillas' Objection to the Admission of Co-Conspirator Statements, counsel argued that the January 8th Meeting did not constitute the formation of a conspiracy and noted the vague statements, lack of actual planning, and absence of an agreement.

On May 15, 2018—seven days ago—the Government delivered its opening argument to the jury. Consistent with its strategy since November, the Government relied heavily on the January 8th Meeting to establish that the defendants engaged in a conspiracy to riot based. The Government described the video in detail to the jury:²

At the planning meetings, you're going to hear the discussions about this very event. We'll provide the route. You choose what direct action you're going to take. We create the environment. You bring it about. Wear all black. Make sure you bring other clothes to change into when we re absorb in the family friendly festival of resistance. Oh, and no breaking windows at the family friendly festival of resistance, not there.

You're going to hear discussions about making sure we go through gentrified neighborhoods. That we don't break the windows³ or harm people in a drug rehab place. We don't want to make their lives worse. You're going to see the communications.

After describing the significance of the video in detail, the Government tied the January 8th Meeting directly to Trial Defendants, telling the jury: “You're going to hear about the planning. And you're going to look at the evidence in this case.”⁴

On May 21, 2018, the Government called Officer Adelmeyer, the undercover officer present during the January 8th Meeting. The Government did not elicit testimony regarding numerous Project Veritas operatives, nor questions or concerns regarding the authenticity of the

¹ See Basillas Objections to the Admission of Co-Conspirator Statements (April 18, 2018).

² See **Exhibit 1**, May 16 Trial Transcript (Realtime Uncertified) at 34.

³ There is no mention of breaking windows in conjunction with a rehabilitation in the January 8th Meeting.

⁴ *Id.*

video. And, when defense counsel attempted to cross examine Officer Adelmeyer regarding Project Veritas, the Government strenuously objected. The Government did, however, show the Project Veritas video to the jury, provide the jury with a transcript while the video was played, and elicit extensive testimony from Officer Adelmeyer regarding the January 8th Meeting.

On May 22, 2018, following the conclusion of Officer Adelmeyer's testimony, the Trial Defendants learned—from counsel in another trial group—of a fourth video taken on January 8, 2017, filmed in the same building as the January 8th Meeting shortly after that meeting. That fourth video consists of two parts: a discussion between a Project Veritas operative and a member of the Industrial Workers of the World Union (“IWW”) (“Part 1”); and, a telephone conversation between two purported Project Veritas operatives (“Part 2”).

Both parts of this fourth video undermine the Government's principle argument that a conspiracy existed prior to January 20, 2017. In Part 1, a member of the IWW who was just at the January 8th Meeting describes the best case and worst case scenarios for the inauguration day protest.

Project Veritas Operative: What's the best case scenario that you would want to see happen on January 20, and what's, uh, something you're concerned about?

Matthew Hessler: Well, the best case scenario? (Laughs). I mean there's a lot...I guess...

Project Veritas Operative: I guess...ideal world? Yeah.

Matthew Hessler: I guess, you know, to be reasonable, the number one thing that we would hope would happen, is we go out there, and we have all of our actions, and they go off as planned, and everybody is safe. And then Donald Trump has to have his, you know, initiation behind closed doors.

Project Veritas Operative: So that's the ultimate goal?

Matthew Hessler: I think that is the ultimate goal, yeah. I mean, people are gonna raise a big stink. Everyone is angry. You know, we don't expect that, per se, but that would be great.

Project Veritas Operative: What's something that you...uh...what's the term... nightmare scenario?

Matthew Hessler: Nightmare scenario...Nightmare scenario would be, everybody ends up in jail without enough jail support, but I think we have that covered. You know, we don't want anyone to get hurt. We don't want anybody to, who is maybe not...I don't know...people who aren't privileged or who maybe are at a disadvantage or feel a little e bit vulnerable...we want them to be safe. That's like our most important thing. So if they are not, that is a nightmare scenario.”⁵

In Part 2, a Project Veritas operative tells another apparent operative that he believes the organizers of the IWW—members of which the Government alleges conspired to riot—do not appear to “know anything about the upper echelon stuff.”⁶ When read in conjunction, these statements directly contradict the Government's theory that the January 8th Meeting participants agreed to damage, destroy, or deface property prior to January 20, 2017.

On May 23, 2018, Chief Judge Morin ruled for the June 4, 2018 trial group that the Government violated Fed. R. Crim. Proc. 16 and its obligations under *Brady v. Maryland*, 373 U.S. 83, 90 (1963). Undersigned counsel has not yet been able to obtain a transcript of the May 23rd proceedings before Chief Judge Morin. However, we understand that the Government represented that an (unnamed) detective edited the video before it was produced to the defendants. We believe this detective is the detective currently testifying in the trial of Michael Basillas, the last witness the Government will call in its case-in-chief.

We also understand that the Government was given a week to investigate the circumstances surrounding the Rule 16 and *Brady* violations for the June 4, 2018 trial group. And, that even if the Government is able to remediate its discovery failures, the Court will likely prohibit the Government from introducing the January 8th Meeting video at the June 4, 2018 trial.

⁵ The source file is titled FNQI0873_20130511210716.MOV, beginning at 9:04.

⁶ The source file is titled FNQI0873_20130511210716.MOV, beginning at 12:38.

ARGUMENT

The Court should dismiss the indictment, or in the alternative, order a mistrial because: (1) had the Government provided the fourth video in a timely manner, the Government would not have been able to establish that it was more likely than not that a conspiracy to riot existed and (2) because Michael Basillas does not have the time—on the eve of the final day of the Government’s case—to adequately investigate and utilize the withheld evidence. The Government not only omitted evidence that would demonstrate to the Court and jury that there was no conspiracy among the defendants, but that the Government—or its agent—may have tampered with the evidence by altering the video produced.

Our adversarial system is premised on the belief that “[s]ociety wins not only when the guilty are convicted but when criminal trials are fair.” *Brady*, 373 U.S. at 87, 83 S.Ct. 1194. Prosecutors have a dual role a trial, including an obligation “to assist the defense in making its case.” *United States v. Bagley*, 473 U.S. 667, 675 n. 6, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). In fact, prosecutors are representative of the sovereign, whose “interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done.” *Berger v. United States*, 295 U.S. 78, 88 (1935). “We expect this constitutional duty to be taken both literally and seriously; ‘[a] rule ... declaring [that the] prosecution may hide, defendant must seek, is not tenable in a system constitutionally bound to accord defendants due process.’” *Miller v. United States*, 14 A.3d 1094, 1108 (D.C.2011) (citing *Banks v. Dretke*, 540 U.S. 668, 696 (2004)). Given the Government’s conduct and the jury’s repeated exposure to the January 8th Meeting and other statements deemed admissible as a result of the pre-January 20th conspiracy finding, a mistrial is the sole remedy to preserve Trial Defendants’ constitutional rights.

A. The Withheld *Brady* Evidence Directly Impacts Judge Morin’s Finding That There Was a Conspiracy to Riot By January 20, 2017

On April 18, 2018, Michael Basillas filed a motion objecting to the admission of alleged co-conspirator statements the Government planned to introduce against him. The first prong of our argument in this regard was that there was no such conspiracy. The Government, in trying to meet its pre-trial burden of establishing that it is more likely than not that a conspiracy existed, relied heavily on the statements at the January 8th Meeting. Indeed, since that meeting was captured on video, that meeting is inarguably the Government’s best evidence that a conspiracy existed by January 20, 2017.

Had Michael Basillas known of the fourth video when making and arguing our motion to preclude admission of the co-conspirator statements, we surely would have used the statements on that video that belie the idea that participants at the January 8th Meeting planned to riot. Having not had the opportunity to use that exculpatory information in that hearing, Chief Judge Morin ruled against Michael Basillas and several co-conspirator statements have been entered against Michael Basillas throughout this trial.

B. The Government’s Omission and Alteration of the Facts is a Direct Violation of *Brady* and Fed. R. Crim. Proc. 16(e)(i)

The Government failed to identify *Brady* evidence that is material to the Defendant’s guilt or punishment “at the earliest feasible opportunity.” *See Vaughn v. United States*, 93 A.3d 1237, 1257 (D.C. 2014); *see also Leka v. Portuondo*, 257 F.3d 89, 100 (2d Cir. 2001) (reversing conviction where Government did not identify material exculpatory information until the weeks before trial); *Miller v. United States*, 14 A.3d 1094, 1116-17 (D.C. 2011) (holding “exculpatory evidence must be disclosed in time for the defense to be able to use it effectively, not only in the presentation of its case, but also in its trial preparation”). The defense must have time to

contemplate the implications of the evidence, and make investigative, strategic, and tactical decisions for its defense. *See Biles v. United States*, 101 A.3d 1012, 1021 (D.C. 2014); *Zanders v. United States*, 999 A.2d 149, 164 (D.C. 2010) (finding that the defense must be given “a fair opportunity to pursue leads before they turn cold or potential witnesses become disinclined to cooperate with the witness.”). In *U.S. v. Pollack*, 534 F.2d 964, 973 (D.C. Cir. 1976), the Court of Appeals noted that “[d]isclosure by the government must be made at such a time to allow the defense to use the favorable material effectively in the preparation and presentation of its case, even if satisfaction of this criteria requires pretrial disclosure.”

While we credit Ms. Kerkhoff’s representations that she had not seen the second half of the video until May 22, 2018, we understand that AUSA Basset represented to Judge Morin that the Government was aware of the statement and Ms. Kerkhoff inadvertently forgot about it. And, it seems clear that the U.S. Attorneys Office has been well aware of Part 1 of the fourth video for months if not longer. Regardless of who knew about Part 2 when, the Government cannot be excused from identifying both Parts 1 and 2 as *Brady* material, and providing that evidence to Michael Basillas at a time when it could be practically used at trial. A violation occurs when the prosecution withholds “evidence favorable to an accused . . . irrespective of the good faith or bad faith of the prosecution.” *Brady*, 373 U.S. at 87.

Voluminous discovery does not relieve the Government of its *Brady* obligations. In *United States v. Hsia*, the government provided the defendant with access to 600,000 documents and claimed the defendant should have found the exculpatory needle in the documentary haystack. 24 F. Supp. 2d 14, 29–30 (D.D.C. 1998). The Court held that to the extent the government knows of any documents or information that constitute *Brady* material, it must identify that material to the defendant. *Id.* The Government has the “affirmative duty” and “if the sword of Damocles is

hanging over the head of one of the two parties, it is hanging over the head of the [government].”
Id.

Here, the Government attempted a similar tactic as in the *Hsia* case and produced a total of 4,595 files (2,143 files on USAfx and 2,452 body worn camera files) but failed to identify an exculpatory video that was part of a meeting on which the Government bases its case-in-chief. “[T]he individual prosecutor has a duty to learn of any favorable evidence known . . . the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.” *Kyles v. Whitley*, 514 U.S. 419, 437–38 (1995).

Here, the Government appears to have been in possession of the fourth video for over a year, yet failed to identify either statement as *Brady* and only disclosed Part 2 once notified by defense counsel. The Government’s *Brady* violations are particularly egregious given the lingering authenticity concerns surrounding the planning meeting videos. For months, defense counsel in multiple trial groups have raised concerns about edits and alterations in the video. Over each defense objection, the prosecution has repeatedly misstated the facts. During the November 2017 trial before Judge Leibovitz, defense counsel objected to the video’s authenticity. The discussion spans nearly 30 pages of the November 28 transcript.⁷ Defense counsel raised various authenticity concerns, including Officer Adelmeyer’s lack of presence during the whole meeting, lack of continuity between video segments, and Project Veritas’ possible political motivation to adulterate the video. Defense counsel specifically noted that they had “reason to believe that the video is not the full, complete meeting, and there have been some redactions to the video.”⁸ In response, the Government represented that the video “was provided in what appears to be

⁷ **Exhibit 2**, United States v. Macchio, Tr. at 59-84 (November 28, 2017).

⁸ **Exhibit 2**, Macchio Tr. at 73:23-25 (November 28, 2017).

complete, unredacted form.”⁹ The Government acknowledged that there was one redaction concerning the identity of the cameraperson. And, the Government represented that this was the sole redaction.¹⁰ The Government further represented that they gave defense counsel “the full entirety” of the videos from January 8th.¹¹

Defense counsel for the June trial group again raised authenticity concerns during pre-trial readiness hearings in April 2017 before Chief Judge Morin.¹² Defense counsel filed a motion to compel disclosure of the videos from Project Veritas for inspection of the underling files. Defense counsel noted that the files were not disclosed in their original form and sought to inspect the videos for undisclosed edits and missing frames. During the motions hearing, the Government represented that Project Veritas provided “unedited video” to the MPD, which the Government then posted in discovery. The Government maintained that the “only editing that was done by [the U.S. Attorney’s Office] was at the very beginning of the video” concerning the identity of the cameraperson.¹³

In this current proceeding, Trial Defendants again disputed the authenticity of the videos. On May 21, counsel for Mr. Cadman objected to the evidence based on the best evidence rule as well as Project Veritas’ possible motivations to adulterate video.¹⁴ The Government represented that the primary edit it made to the videos was to combine three clips together in creating its trial exhibit. The Government further represented that defense had access to the full video. The Government noted that it redacted the identity of the undercover officer and the cameraperson. The Government did not disclose any further edits or redactions.

⁹ **Exhibit 2**, Macchio Tr. at 74:22-23 (November 28, 2017).

¹⁰ **Exhibit 2**, Macchio Tr. at 75:14-19 (November 28, 2017) (“[W]hat we redacted is what I identified to them that we redacted....”)

¹¹ **Exhibit 2**, Macchio Tr. at 80:2-6 (November 28, 2017)

¹² **Exhibit 3**, United States v. Litchfield, Tr. at 8:23-25, 9:1 (April 6, 2018).

¹³ **Exhibit 3**, Litchfield Tr. at 9:17-25 (April 6, 2018).

¹⁴ **Exhibit 4**, United States v. Basillas, Tr. at 129:3-6 (May 21, 2018)

As Judge Morin asserted today in Court, the Government's failure to disclose merely one piece of evidence—not two statements as we have here—violate Rule 16 and Brady. Moreover, the June 4 trial team will be given an opportunity to explore the source of the issue and use whatever favorable material they may glean at trial. Michael Basillas, however, has learned of this video *during* trial, *after* the Government has prominently and repeatedly featured the January 8th Meeting in its case-in-chief. The admission of the co-conspirator statements against Trial Defendants are extremely prejudicial and impact all of the charges defendants face. Had the Government complied with its *Brady* obligations, the co-conspirator motion may well have been decided differently by Judge Morin and Trial Counsel would not find itself in its current position.

C. Dismissal is Warranted Given the Prejudice Faced by Michael Basillas

While the typical remedy for a *Brady* violation is a new trial, the Court should allow for dismissal when there is egregious misconduct and in order to prevent further prejudice to the defense. Dismissal is warranted where the Government acted in “reckless disregard” of its constitutional obligations. *United States v. Chapman*, 524 F.3d 1073, 1085 (9th Cir. 2008) (upholding dismissal of indictment where Government failed to disclose 650 pages of exculpatory material). In *United States v. Wang*, the court dismissed an indictment where the Government did not disclose *Brady* material until the eve of trial and at least six months after the Government came into possession of the information. *United States v. Wang*, No. 98 CR 199, 1999 WL 138930, at *37, 54-55 (S.D.N.Y. Mar. 15, 1999).

Here, we understand that the Government was in possession of the videos for over one year. And, far from the eve of trial, the Government is disclosing days before it rests. The delay and continued refusal to disclose complete information is inexcusable and requires that the only appropriate sanction to alleviate the prejudice is dismissal. Indeed, many courts have dismissed

or reversed convictions where the defendant suffered prejudice or where there was *Brady* evidence withheld. *See, e.g., Schoenauer v. United States*, 2010 WL 5514366, at *14 (S.D. Iowa 2010) (dismissing several counts with prejudice); *United States v. Fitzgerald*, 615 F. Supp. 2d 1156, 1160 (S.D. Cal 2009) (dismissing with prejudice pre-retrial).

3. **In the Alternative to Dismissal, This Court Should Order a Mistrial**

The Court is entrusted to administer a remedy, or a sanction, that is “just under the circumstances.” *Odom v. United States*, 930 A.2d 157, 158-159 (D.C. 2007); *Terry Johnson v. United States*, No. 13-CF-614 at 20-21 (D.C. App. April 14, 2016) (determining that the trial court erred in its reasoning when it declined to impose a sanction after the government “had violated its disclosure obligations under *Brady*”). Trial Counsel has not had the opportunity to investigate the statements, speak to any witnesses, or present the evidence in its filings, hearings, and at trial. We have, to be frank, barely had time to consider how to react to the new evidence given when it was discovered.

The standard remedy for a *Brady* violation is a mistrial. *See United States v. Wilson*, 720 F. Supp. 2d 51, 63 n.4 (D.D.C. 2010). A new trial is warranted “if the omitted evidence creates a reasonable doubt” as to the appellant’s guilt, “which otherwise would not exist.” *Mangrum v. United States*, 418 A.2d 1071, 1077 (D.C. 1980) (internal citations omitted).

We note that an instruction to the jury that it may not consider the co-conspirator statements against defendants is untenable because those statements have already been admitted and the jury will not be able to simply disregard the Government’s repeated attempts to tie those statements to the defendants.

CONCLUSION

Wherefore, for the foregoing reasons and any other reasons considered by the Court, counsel respectfully requests that this Motion be granted.

Dated: May 23, 2018

Respectfully Submitted

/s/William B. Jacobson

William B. Jacobson (D.C. Bar No. 450374)

ORRICK, HERRINGTON & SUTCLIFFE LLP

1152 15th Street, NW

Washington, DC 20005-1706

Telephone: (202) 339-8610

wjacobson@orrick.com

Counsel for Michael Basillas

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of Defendant's Motion to were, on May 23, 2018, electronically filed and served on counsel for the government and upon counsel for the co-defendants in this case.

/s/William B. Jacobson
William B. Jacobson (D.C. Bar No. 450374)
Counsel for Michael Basillas

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division – Felony Branch**

UNITED STATES OF AMERICA

v.

**MICHAEL BASILLAS,
Defendant.**

Case No. 2017-CF2-001334

Judge Kimberley Knowles

PROPOSED ORDER

Upon due consideration of Defendant Michael Basillas’ Motion to Dismiss, Or in the Alternative, For a Mistrial Based on the Government’s Violation of Brady and Rule 16, on this _____th day of _____ 2018, it is hereby ORDERED that Defendant’s Motion is GRANTED.

Judge Kimberley Knowles

EXHIBIT 1

1 of a certified transcript, resulting in differences in
2 content, page and line numbers, punctuation, and
3 formatting.

4 This realtime unedited draft contains no
5 appearance page, index or certification.

6 THE COURTROOM CLERK: Your Honor calling from
7 jury trial calendar: United States versus Michael
8 Basillas, case 2017 CF2 1334; codefendant United States
9 versus Seth Cadman, case 2017 CF2 1172; codefendant United
10 States versus Casey Webber, case 2017 CF2 1156;
11 codefendant with United States versus Anthony Felice, case
12 2017 CF2 1163.

13 MS. KERKHOFF: Good morning, Your Honor.
14 Jennifer Kerkhoff for the United States.

15 MR. QURESHI: Good morning, Your Honor. Rizwan
16 Qureshi for the United States.

17 MR. JACOBSON: Good morning, Your Honor. Billy
18 Jacobson for Michael Basillas, who's present behind me,
19 along with Nathaniel Ingraham, Caitlin Garrigan-Nass.

20 MR. SCHRAGER: Good morning, Your Honor. Seth
21 Schrage on behalf of Michael Basillas.

22 MR. RIST: Good morning, Your Honor. Matthew
23 Rist on behalf of Anthony Felice, who's present sitting
24 behind me.

25 MS. DOWNS: And April Downs on behalf of Mr.

1 details and images that are going to convince you that's
2 Anthony Felice. And Anthony Felice wasn't just part of
3 this group as it moved. Anthony Felice was participating
4 in the violence, and you'll see see Anthony Felice
5 lighting off Roman candles, flares during the riot itself.

6 Then we get to Casey Webber.

7 Defendant Webber, also all in black. Also
8 masked up. And you'll see him in the riot moving with the
9 group. And you'll see, as he tries to step around the
10 police line at the end, the mask has started to come off.

11 Here's what you won't see from defendant Webber: The
12 government's not going to present evidence that he
13 personally broke a window. Did not personally broke a
14 window. He moved with the group. He stayed with the
15 group. But defendant Webber, you will see and hear in
16 this trial, defendant Webber has other evidence against
17 him. You see, this group that moves for those 16 blocks,
18 for those 33 minutes all dressed in this all black with
19 the masks with what -- this purpose, this violence and
20 destruction, this wasn't spontaneous. This wasn't a
21 collection of people who happened to be in the same place.
22 This riot, it was planned. You're going to have evidence
23 of planning meetings and Mr. Webber, you'll have evidence
24 from phones, receiving information about the plans.

25 There's a family friendly event and then there's this, the

1 anti-capitalist block. Black bloc. Not the family
2 friendly.

3 At the planning meetings, you're going to hear
4 the discussions about this very event. We'll provide the
5 route. You choose what direct action you're going to
6 take. We create the environment. You bring it about.
7 Wear all black. Make sure you bring other clothes to
8 change into when we re absorb in the family friendly
9 festival of resistance. Oh, and no breaking windows at
10 the family friendly festival of resistance, not there.
11 You're going to hear discussions about making sure we go
12 through gentrified neighborhoods. That we don't break the
13 windows or harm people in a drug rehab place. We don't
14 want to make their lives worse. You're going to see the
15 communications. You're going to hear about the planning.
16 And you're going to look at the evidence in this case.

17 When you watch the video that shows the route,
18 that shows the movement, the instructions, the collective
19 action, you will see this wasn't spontaneous emotion.
20 This was purposeful. This was a plan to let people get
21 out their anger. Boy, the power of a group. You're going
22 to see the power of a group. You're going to see in this
23 video how powerful a group can be when it chooses to
24 engage in violence and destruction, when it masks up and
25 thinks it has anonymity. The power of the group. You'll

1 see the kind of courage a mask in a group can give some
2 people, the kind of courage that you will watch here that
3 allows them to look directly at officers and launch bricks
4 at them, chairs at them, break windows in front of them.
5 Why? You'll see the the power of the group. And Mr.
6 Webber, Mr. Webber prior to January 20, he was receiving
7 these messages. So when he showed up on January 20, to be
8 part of this group, it was with knowledge, intent, and
9 purpose.

10 The power of hundreds of people moving together
11 allowing breakers to come back in and re absorb. The
12 power that made officer Ashley Anderson feel utterly
13 helpless.

14 Now, these are important facts for you to
15 consider as you look at the charges. The charge in this
16 case is that the defendants engaged in a riot. That they
17 purged and insight had a riot and that there was an
18 agreement to engage in a riot. And when you watch these
19 videos, what I'll see is collected, coordinated action and
20 destructions of property. And what the judge will tell
21 you at the end of this trial about the law, the judge will
22 instruct you, is that for destruction of property, if you
23 enter into an agreement with somebody, we're going to
24 engage in violence and destruction, you don't personally
25 have to have wielded a hammer to be responsible for the

EXHIBIT 2

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA.

CRIMINAL DIVISION

- - - - - x

UNITED STATES OF AMERICA,

Plaintiff

vs.

Criminal Action Nos.

MICHELLE MACCHIO,	2017 CF2 1183
JENNIFER ARMENTO,	2017 CF2 1193
CHRISTINA SIMMONS,	2017 CF2 1210
ALEXEI WOOD,	2017 CF2 1221
OLIVER HARRIS and	2017 CF2 1254
BRITTNE LAWSON,	2017 CF2 1256

Defendants.

- - - - - x

Washington, D.C.
November 28, 2017

The above-entitled matter came on for jury trial before the HONORABLE LYNN LEIBOVITZ, Associate Judge, in Courtroom 203, commencing at approximately 9:56 a.m.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL REPORTER, ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS TESTIMONY AND PROCEEDINGS OF THE CASE AS RECORDED.

APPEARANCES:

On behalf of the Government:
Jennifer Kerkhoff, Esquire
Rizwan Qureshi, Esquire
Assistant United States Attorneys

On behalf of Defendant Lawson:

Sara Kropf, Esquire
Daniel Portnov, Esquire
Washington, D.C.

1 MS. HEINE: Yes. Yes, your Honor.

2 THE COURT: So here's what I'm going to do. We're
3 going to need to take a break anyway. So rather than keep
4 you all in the jury box, we're going to take a 25-minute
5 break.

6 In other words, it's ten after 11:00. I'm going to
7 break until 11:35. That's just so the court reporter can
8 actually get her break once we've finished our legal
9 discussion.

10 And I'll see you back at 11:35.

11 (Whereupon, the jury exited the courtroom at
12 11:11 a.m. and the following proceedings were had:)

13 THE COURT: Sir, I'll excuse you until 25 of. Don't
14 discuss your testimony with anyone.

15 THE WITNESS: Of course. Thank you, ma'am.

16 (Witness excused.)

17 THE COURT: So, counsel, just everybody please have
18 a seat.

19 So Exhibit 125 is one of three or all of three of
20 the portions that we discussed pretrial?

21 MS. KERKHOFF: It's all three, your Honor. They
22 were -- simply for size purpose, they had been segmented.
23 They are combined because it's a running recording.

24 THE COURT: Do you have a transcript of that?

25 MS. KERKHOFF: Yes, I do. And I previously provided

1 it to counsel.

2 THE COURT: Can I just have one?

3 MS. KERKHOFF: (Tenders document to the Court.)

4 THE COURT: And so the transcript, I assume, is
5 125-A, so we're all talking about the same thing. And it
6 says "Planning Meeting," January 8th, 2017.

7 And, Ms. Kerkhoff, I've ruled on three separate
8 segments. Actually, I think I still had one part of the last
9 one that I wanted to -- no. That's a different thing.
10 That's Mr. Wood's video.

11 For this one, I admitted all three segments as
12 co-conspirator statements, statements in furtherance of the
13 conspiracy.

14 So what is the objection at this time, Ms. Heine?

15 MS. HEINE: So just to put on the record all of our
16 prior objections.

17 THE COURT: It's in the record.

18 MS. HEINE: Okay.

19 THE COURT: There's been a very nice woman here
20 taking down everything you've said in this whole proceeding.
21 So it's certainly in the record that you objected to that.

22 MS. HEINE: Yes.

23 THE COURT: There's no question.

24 MS. HEINE: Moving on from that --

25 THE COURT: Yes.

1 MS. HEINE: -- we don't think the foundation has
2 been laid for the entire video to be played, assuming the
3 video captures the entire relevant portion of this meeting,
4 because the officer just testified that he was only present
5 for a portion of the anti-capitalist/anti-fascist meeting.

6 I don't know what portion that was. If the video
7 covers more than his portion, there's a lack of foundation.

8 THE COURT: So, Ms. Kerkhoff, what's the answer to
9 that?

10 MS. KERKHOFF: The answer is the officer is going
11 between things. He is present on portions of the video and
12 was present for a large percentage of this.

13 The Government's response to that is 901(b)(1) and
14 901(b)(4) do not require -- particularly 901(b)(4), do not
15 require that the individual be present for every moment that
16 is being captured as long as they have a foundation to say it
17 fairly and accurately depicts it.

18 I can establish whether -- that this is the location
19 of the basement, this is what Mr. Petrohilos looked like.
20 That's -- we can show him on the video -- that he has a
21 sufficient foundation under 901(b) to say this is fairly and
22 accurately capturing that.

23 I'm not aware of any edits or anything.

24 To the extent they want to argue that there are
25 edits or it's been manipulated, that goes to weight, not

1 admissibility. They can bring that out.

2 THE COURT: And so, Ms. Kerkhoff, I'm forgetting why
3 it was divided into three parts. Was it one continuous
4 meeting?

5 MS. KERKHOFF: This is one continuous meeting. It's
6 a matter of the size in which it would record. It is one
7 continuous meeting. The individual stays seated. It goes
8 from one part to the next. They're talking about the same
9 thing.

10 It's apparent in the video itself this is the same
11 meeting, everyone's in the same position, that there is
12 nothing on the video itself and there is no evidence to
13 indicate that anything was edited or clipped based on even
14 the content.

15 THE COURT: So can you proffer to me where the video
16 comes from? You don't have to name names. But is it a
17 civilian?

18 MS. KERKHOFF: Yes. A third party provided it.

19 THE COURT: And a third party provides it to law
20 enforcement and is not here to authenticate it?

21 MS. KERKHOFF: Not under the -- this is a recording.
22 Correct. A third party provided it.

23 THE COURT: And so what would the officer's
24 testimony be about what portions of Exhibit 125-A, which is
25 now the amalgamation of the three portions I already

1 considered, he was present for?

2 In other words, can he say he recalls anything in
3 particular, whether he was definitely present for some, not
4 for others? What's his testimony going to be?

5 MS. KERKHOFF: He will testify that he does recall
6 much of the portions of this, where they discussed jail
7 solidarity, where they were discussing -- I believe the
8 anti-capitalist bloc and what to wear. He was moving
9 throughout the focus groups. They weren't --

10 THE COURT: So what's he going to be -- he's going
11 to say he specifically heard this?

12 MS. KERKHOFF: If your Honor wants to ask him, you
13 can ask him. I haven't said, Mark the transcript and tell me
14 what you can see.

15 He has watched it multiple times and said, "That is
16 a recording of that meeting that I was present at, and that
17 was that meeting. That's where I was. That's what Dylan
18 Petrohilos was doing. That is the meeting I attended on
19 January 8th."

20 THE COURT: And so, when you got -- when law
21 enforcement got this video, was it turned over on a device of
22 some kind?

23 MS. KERKHOFF: On a --

24 THE COURT: In other words, did somebody say,
25 "Here's my phone. Watch it on my phone"? Was it submitted

1 on a flash drive? Was it --

2 MS. KERKHOFF: A flash drive.

3 THE COURT: Submitted on a flash drive.

4 MS. KERKHOFF: Yeah.

5 THE COURT: And do you know how it was recorded?

6 MS. KERKHOFF: Yes. With a button cam.

7 THE COURT: A button cam.

8 And have your folks done anything to see whether
9 it's been redacted, altered or otherwise messed with?

10 MS. KERKHOFF: The review of it -- and everything
11 was reviewed -- indicates there appears to be no edits,
12 particularly when it appears to be a continuous stream. This
13 is not a compilation; it's a continuous stream from that
14 event.

15 THE COURT: And so you actually have somebody in
16 house who reviewed the tape that was given and concluded that
17 it was a continuous, unbroken stream or was it somebody at
18 MPD?

19 MS. KERKHOFF: Both an MPD detective and I reviewed
20 it. And, again, it flowed from one sentence into the same
21 sentence next.

22 The recordings themselves are continuous and the
23 segments flow from one into the next.

24 THE COURT: So this is an -- this isn't a
25 technical --

1 MS. KERKHOFF: Right.

2 THE COURT: -- examination that was done. This is a
3 detective who would say, "I reviewed the whole thing and it's
4 a continuous segment."

5 And is this item of the entire video you'd play a
6 continuous, uninterrupted segment?

7 MS. KERKHOFF: No. It's the three segments.

8 THE COURT: So it breaks.

9 MS. KERKHOFF: It breaks because of how it was
10 captured based on memory size. It captures and records.

11 THE COURT: Is each one an uninterrupted segment?

12 MS. KERKHOFF: Yes.

13 THE COURT: And I guess I may need to ask you to ask
14 your detective, your undercover, what specifically he's able
15 to authenticate here.

16 Because if all you can say is, "Yeah. I was in the
17 room and this is what it all looked like and this is the
18 general subject matter they were talking about," that's one
19 thing.

20 If he can say he recalls being present for specific
21 portions, I'd like to know that.

22 MS. KERKHOFF: Would you like me to have him back on
23 the stand and ask that outside or just ask --

24 THE COURT: Not particularly. I'd be happy to have
25 everyone listen to his answers to that question. I'm not --

1 no. I'm not asking to have to hear the voir dire.

2 MS. KERKHOFF: That's fine.

3 THE COURT: I just want to know for proffer purposes
4 what the -- what his ability to authenticate this is.

5 MS. KERKHOFF: Yes. Again, I will ask those
6 questions. I'll provide those to the Court. The Government
7 submits that 901(b)(4) as well as 901(b)(1) do not require
8 his presence for every second.

9 THE COURT: And your point is it goes to weight, not
10 admissibility?

11 MS. KERKHOFF: Correct. That's what the case says,
12 I believe.

13 THE COURT: What case?

14 MS. KERKHOFF: They were in the pleading that I
15 submitted Sunday night into Monday morning regarding defense
16 counsel's objections to authenticity of any video where the
17 individual's not in the position of videographer.

18 THE COURT: Just tell me what that was called.

19 MS. KERKHOFF: It was objections to --

20 THE COURT: No. Your pleading.

21 MS. KERKHOFF: My pleading? It was --

22 THE COURT: Sunday night?

23 MS. KERKHOFF: It was about 2:00 a.m. on Monday
24 morning. So Sunday night into Monday morning. It's titled
25 "Opposition to Motion to Strike."

1 THE COURT: Is that Exhibit 113?

2 MS. KERKHOFF: And 119.

3 THE COURT: Okay.

4 MS. KERKHOFF: And I would just note that's the
5 S-a-f-a-v-i-a-n case, *Safavian*.

6 THE COURT: Just hold on.

7 Okay. So that is clueing me in there.

8 The Government's opposition. Right here in front of
9 me. I've been waiting to understand what the discussion was
10 going to be about 113 and 119. Okay. Thank you.

11 So here's when I'm going to do. I'm going to let
12 you get the answers to those questions. We're going to take
13 our break. I will see you at 25 of. And you can tell me
14 what the answers are.

15 MS. KERKHOFF: Thank you, your Honor.

16 (Thereupon a recess was taken, after which the
17 following proceedings were had:)

18 THE COURT: Good afternoon.

19 MS. KERKHOFF: Good afternoon.

20 THE COURT: Or good morning.

21 Let's not re-call the whole case.

22 THE DEPUTY CLERK: Okay.

23 THE COURT: Good morning again.

24 All counsel and Defendants are here.

25 So can I ask just the Government a couple questions,

1 Ms. Heine, if that's all right with you?

2 MS. HEINE: Yes.

3 THE COURT: Thank you.

4 First of all, any response, I guess, to the
5 questions to Officer Adelmeyer about what he can say about
6 what he was present for?

7 MS. KERKHOFF: Yes.

8 Officer Adelmeyer was present for the beginning of
9 the meeting. So, effectively, through Pages 1 through 3.
10 Then there was a discussion about coffee and food.

11 He then moved 20 feet away, could still observe the
12 group and still talking, and listened to another focus group.

13 He could still hear and see the same individual
14 speaking as depicted on the video.

15 He returned back those 20 feet at Page -- around, he
16 said, Page 14, discussion of bail. So at the bottom of
17 Page 14 and stayed till the remainder.

18 So he's at the beginning. He's observing the
19 conversation, but not hearing all words during the middle,
20 and he returns starting at Page 14.

21 What he has said is that what's on the video, the
22 words he heard, are depicted; and that what's shown on the
23 video, is what he could physically see.

24 THE COURT: And tell me again. I know this is three
25 separate segments, in other words, recorded in segments.

1 But is there a break between each segment where
2 other parts of the meeting go on and there's additional
3 content or does this purport to be the entire meeting?

4 MS. KERKHOFF: Purports to be the entire meeting.
5 And you can even see that the sentence is continuing from
6 Segment 1 into Segment 2.

7 THE COURT: And I see there's a break at -- where do
8 they break? Where is it supposed to break? Because I recall
9 seeing this in two different parts. So where does Part 1
10 end?

11 MS. KERKHOFF: Your Honor, I'll have to get my other
12 transcript out for that one.

13 What I can represent --

14 THE COURT: Just pull that up.

15 MS. KERKHOFF: Yes.

16 So Part 1 stops or breaks at Page -- on Page 9, at
17 the bottom, Part 1 --

18 THE COURT: In other words, after Line 25?

19 MS. KERKHOFF: I'm sorry. I'm trying to coordinate
20 three transcripts here.

21 Page 8. The -- Line 1 ends at Line 21 in the middle
22 of the sentence. It says: "Cool."

23 And Line 19, going to 21: "I guess in terms of,
24 like, what other people are like."

25 And then he goes to saying the organizing committee,

1 but making sure they're excited about participating in this
2 march.

3 THE COURT: So according to the planning meeting,
4 Video 1, the transcript that you gave us back in pretrial
5 matters --

6 MS. KERKHOFF: Yes.

7 THE COURT: -- Segment 1 ends where Dylan says:
8 "Cool. Is there, um, I guess, in terms of, like, what are
9 others -- things that people like to do?"

10 And so that appears to be Line 21 on Page 8 of
11 125-A.

12 And you're saying that it continues into the next
13 sentence. So it must be continuous?

14 MS. KERKHOFF: That it does -- yes. It appears
15 continuous into the next sentence.

16 THE COURT: And so then for planning meeting,
17 Video 2, the thing you gave us in pretrial matters, that one
18 ended with Dylan saying: "Yeah. Yes. That is just another
19 closed circle that will -- yes."

20 And that would be on Page 19, Line 24.

21 MS. KERKHOFF: Correct.

22 THE COURT: And that -- your position is that
23 continues on into the next line at Line 25?

24 MS. KERKHOFF: Yes.

25 THE COURT: Okay. And so will your witness be able

1 to testify that he has reviewed the video and there appear to
2 be no breaks or redactions?

3 MS. KERKHOFF: Yes.

4 THE COURT: Anything else I should be aware of for
5 this discussion?

6 MS. KERKHOFF: No.

7 The only thing -- no. That's fine.

8 THE COURT: Ms. Heine?

9 MS. HEINE: Your Honor, I do believe there are small
10 breaks. I don't know -- there's seconds missing. There's a
11 timer at the bottom of the video and there are seconds. It
12 jumps from one second to a few seconds later.

13 There are redactions because, at some point, the
14 timer disappears, I think when it goes towards the third
15 video, although now they're all put into one video in the
16 exhibit.

17 You know, this was also provided to the Government
18 by a third-party civilian. The Government hasn't identified
19 who that is.

20 We believe it was provided by --

21 MS. KERKHOFF: Objection. Who provided it is
22 irrelevant.

23 MS. HEINE: That's --

24 THE COURT: Well, without naming names, can you
25 characterize it, please?

1 MS. HEINE: Provided by an organization that
2 purports to be an ultraconservative investigative journalist
3 organization that infiltrates groups and tries to bring them
4 down.

5 THE COURT: And so you believe, meaning you have
6 evidence you could present, that you can proffer?

7 MS. HEINE: Yes. On their webpage, they --

8 THE COURT: So do you have evidence that you can put
9 in or that you'd proffer about the meeting itself and whether
10 there were breaks -- the things you're describing and what I
11 would see, if I watched that video, represent actual breaks
12 in the video?

13 MS. HEINE: No, your Honor.

14 I have no idea what happened at the meeting other
15 than evidence that's been presented by Ms. Kerkhoff.

16 THE COURT: All right. And so do you have a
17 response to what Ms. Heine is saying about counters skipping
18 seconds?

19 MS. KERKHOFF: The timestamp is wrong on the video.
20 I think it is from -- it says 20:13. In terms of the counter
21 in seconds and the counter disappearing, what I know and can
22 tell and what the undercover officer knows and can tell us is
23 he was present for the portion before the counter disappears
24 and after. He says that is still a fair recording of what
25 happened.

1 So I don't know why the counter was the way it was,
2 although the timestamp is wrong. We can tell it's wrong.

3 THE COURT: You say because it says 20:13?

4 MS. KERKHOFF: I think it says May 11, 2013, or
5 something to that effect.

6 THE COURT: So you're saying the portions where
7 there happened to be a disappearance of the counter, the
8 witness was present for and could authenticate those
9 portions?

10 MS. KERKHOFF: The last portion, yes. He was
11 present for that because that occurs -- that occurs towards
12 the end. He was present for the last ten pages. Yes.

13 THE COURT: All right. Ms. Heine, further argument?

14 MS. HEINE: The *Butler* case that was cited in our
15 motion filed this weekend to strike portions of
16 Exhibit 113 -- it says that, when there is a tape-recording
17 which is particularly susceptible to manipulation and
18 adulteration, that authentication has to be by clear and
19 convincing evidence.

20 You know, this isn't a matter of the mere weight of
21 the video. If he was not present for large chunks of it, we
22 don't know what he heard.

23 We know that -- we have reason to believe that the
24 video is not the full, complete meeting, and there have been
25 some redactions to the video.

1 We have reason to believe it was filmed by someone
2 with a motive to bring this group down and, therefore, motive
3 to possibly adulterate the video.

4 THE COURT: And reason to believe, though no
5 evidence you could actually proffer or present?

6 MS. HEINE: I can proffer that this organization's
7 website claims responsibility for having infiltrated and
8 filmed surreptitiously this group, including this meeting.

9 THE COURT: And so, to the extent that -- I don't
10 know if this is the organization that filmed the meeting.
11 But if it's an organization that is claiming a bias against,
12 I guess, the persons present at the meeting and, by
13 inference, the people here -- have you disclosed the identity
14 of the tapers?

15 MS. KERKHOFF: I have not disclosed the identity of
16 the tapers. I don't believe anybody ever asked me.

17 But, no, I have not. As a basis, they're not a
18 witness.

19 The officer can testify to what he can testify to.

20 What I can inform the Court is that we requested --
21 or MPD requested that, if material were to be provided to us,
22 it had to be provided in complete, unredacted form. And it
23 was provided in what appears to be complete, unredacted form.

24 Ms. Heine is talking about split seconds from one
25 video to the next.

1 The video appears constant. The conversation
2 appears --

3 THE COURT: I'm asking just about the identity of
4 the provider of the tape to the extent that -- do you know
5 the identity of the provider of the tape, I mean, if it's an
6 organization?

7 MS. KERKHOFF: It's an organization. Yes.

8 THE COURT: And to the extent that it's an
9 organization and, therefore, not susceptible to the kinds of
10 security issues that persons would be susceptible to, have
11 you disclosed the nature of the organization to them? And,
12 if not, why can't you?

13 MS. KERKHOFF: I believe counsel knows.

14 The organization is Project Veritas. There are
15 individuals, though, who are identified. And what was
16 redacted is what I identified to them that we redacted, which
17 is the individual putting on the button cam in the mirror to
18 show their face and then walking into the meeting as a
19 continuous stream.

20 I told them we redacted that portion to show that
21 individual's face, because an organization didn't provide the
22 tape in terms of, you know, where the -- the button wearing.
23 A person did. So that person.

24 THE COURT: And so you're agreeing there is, I
25 guess, a portion at the beginning that is not shown?

1 MS. KERKHOFF: We redacted it.

2 THE COURT: And that's something that's known to the
3 defense?

4 MS. KERKHOFF: I disclosed that. Yes.

5 THE COURT: Okay. So you obviously can cross on
6 that.

7 To the extent that there is an organization that did
8 the taping of this, why can't you cross on that?

9 MS. HEINE: I would love to.

10 THE COURT: All right. Would there be an objection
11 to that?

12 MS. KERKHOFF: Just to the extent that -- to which
13 he can. I mean, I think at some point he'll admit it. It's
14 an organization. I think it goes to this officer's
15 knowledge. He can -- they can ask him. But I don't think
16 this is about a belief system.

17 THE COURT: But the officer would be willing --
18 would be capable of answering, in other words, from personal
19 knowledge or from knowledge of the case that the recording
20 was provided by a representative of or a person associated
21 with Project Veritas, the entity that --

22 MS. KERKHOFF: Correct.

23 THE COURT: -- was -- however you want to
24 characterize it?

25 MS. KERKHOFF: Yeah. I think he -- he would know it

1 from later information. He did not know it was being
2 recorded. He did not have that information at the time.

3 THE COURT: But he can answer those questions now?
4 In other words, the defense can put before the jury --

5 MS. KERKHOFF: Sure.

6 THE COURT: -- the, I guess, motive with which the
7 person who recorded this recorded it?

8 MS. KERKHOFF: Yes. But I don't think they can
9 impeach the officer with that. They could try to impeach the
10 video, but not the officer.

11 THE COURT: I think they can challenge the
12 authenticity of it and the weight to be given the video as to
13 the authenticity of that.

14 MS. KERKHOFF: Correct. If they choose to do that.
15 Yes.

16 THE COURT: So, I mean, further argument?

17 MS. HEINE: Not on this issue. I have another issue
18 to raise that's relevant to this witness.

19 THE COURT: All right. Anybody else arguing about
20 the admissibility of the Video 125?

21 MS. WELETZ: Yes, your Honor. Attorney Carrie
22 Weletz on behalf of Ms. Armento.

23 I believe that the Government has said that this
24 officer can authenticate the beginning and the end of the
25 video.

1 I still think that there's no clear and convincing
2 evidence that he can authenticate the middle. He has not
3 heard these words. Just because he was watching people speak
4 doesn't mean he knows what was said during this big chunk of
5 time in the middle.

6 Technology is amazing. Editing can be done to
7 seamlessly present a video to someone with a naked eye. You
8 can't tell that it's been done.

9 The Government could have taken the step of sending
10 this to their tech people to see if it had been done, if
11 there had been any edits or if it was a raw video. That was
12 not done.

13 So I do not think that that middle part of the video
14 where Officer Adelmeyer wasn't present has been authenticated
15 properly under the rules.

16 THE COURT: Anyone else? Anyone else?

17 MR. McCOOL: Your Honor, can we just join --

18 THE COURT: You want to join in the argument?

19 MR. McCOOL: That's all I have to say. Yes. Thank
20 you.

21 MR. COHEN: Just from the time not being on part of
22 the video, it appears like the 35-minute mark on that --
23 there is a redaction of, like, the bottom 15 percent of the
24 video. It's blacked out. Someone did something to the video
25 and manipulated it.

1 THE COURT: Is that something you're going to be
2 playing?

3 MS. KERKHOFF: The --

4 THE COURT: Is that a part of the portion you're
5 going to be playing?

6 MS. KERKHOFF: 35? I think it stops at 36 minutes.
7 So there was a redaction that we made, which I told counsel
8 about, on the original video which redacts the officer as he
9 appeared.

10 But the video that we posted as the exhibit,
11 consistent with the transcript that we're playing, does not
12 have -- we stopped it before it got to that point. We did
13 redact the officer's visible presence.

14 THE COURT: So, Mr. Cohen, is that what you're
15 talking about?

16 MR. COHEN: If that's what the Government's -- I
17 can't tell. I don't know for sure. I know the Government
18 had disclosed that, but I'm not sure if that's what -- why
19 the -- that part is redacted. If that's the Government's
20 representation, I will take it.

21 THE COURT: You're talking about the very, very last
22 part of the tape?

23 MR. COHEN: Well, it's longer than 36 minutes. Yes.
24 But, yes, it starts at the 35-minute mark. The bottom
25 15 percent is blacked out.

1 THE COURT: Is that what we're talking about?

2 MS. KERKHOFF: We're not playing that portion. No.
3 We gave them the full entirety of those videos from that day.

4 We're playing the portion of the meeting. So he's
5 talking about what was produced in discovery versus what I
6 have designated and given them as an exhibit.

7 MR. COHEN: I am sorry. I say the blackout part
8 starts at 35 minutes. The Government says they're going to
9 run the video through 36 minutes, which would mean there's
10 video where the part is blacked out. I want to make sure I'm
11 not missing something there.

12 THE COURT: Either way, what I understand the
13 Government to be saying is the witness was physically present
14 for and will authenticate everything from Page 14 on as
15 something he actually heard the content of.

16 And he can answer questions about an apparent
17 redaction in the last minute, if there is one.

18 MS. KERKHOFF: Your Honor, what I can see is that
19 it's how the video was converted to an MP4. The bottom
20 screen moves that way because, at 35 minutes, it's how the
21 video was captured into an MP4.

22 There doesn't appear to be anything else taken out
23 other than how the screen shot capture occurred when we
24 converted this to a playable format.

25 THE COURT: And so your witness can testify about

1 that?

2 MS. KERKHOFF: I don't think he can testify how it
3 was converted. The audio was run --

4 THE COURT: He can testify about having seen the
5 original video and how this is different?

6 MS. KERKHOFF: This is the video he watched. To
7 play it, we had to put it -- convert it into an MP4 doing a
8 screen shot capture. It doesn't alter what was present; it
9 just alters the screen shot.

10 THE COURT: So what I'm seeing of what you're
11 playing shows -- does it show the thing that Mr. Cohen is
12 talking about?

13 MS. KERKHOFF: He's talking about this black
14 portion.

15 THE COURT: So there's a band across the bottom.

16 MS. KERKHOFF: Correct.

17 MR. COHEN: I don't know --

18 THE COURT: It's on the TV when it's not converted
19 correctly.

20 Mr. Cohen, it shows the meeting. There's a band
21 across the bottom. Feel free to cross-examine about it.

22 MR. COHEN: Yes, your Honor.

23 THE COURT: So the band, for the record, is about a
24 three-quarter-inch band across the bottom.

25 I'm going to rule now, Ms. Heine.

1 MS. HEINE: I -- okay.

2 THE COURT: Is there something new?

3 MS. HEINE: Yes.

4 I just want to put on the record that we did a while
5 ago ask Ms. Kerkhoff for the identity of who filmed this.
6 She declined to provide it. I wanted to make sure the record
7 is clear on that.

8 THE COURT: So the Government has proffered that
9 Officer Adelmeyer was present for the entirety of the
10 meeting, in other words, physically present, listening
11 carefully enough to substantively say that the content on the
12 first three pages of 125-A was the content uttered and that
13 he then moved 20 feet away, was still physically in the room,
14 still physically in a position to observe the meeting going
15 on, but listening to other things spoken by another group at
16 that time.

17 And then, at Page 14 of 125-A, he returned to a
18 position when he's listening substantively to the meeting run
19 by Mr. Petrohilos and from -- and from Page 14 to the end,
20 which on this transcript is Page 22, is able substantively to
21 authenticate the words spoken.

22 He, according to the proffer, will testify that this
23 is a continuous event; that he -- everybody was in the same
24 place they were in the whole time; that he's viewed the
25 videotape and, in the course of viewing it, can see that

1 there are no breaks; that where the videotape came recorded
2 at in three segments, it clearly from segment to segment is
3 mid-sentence such that the second part of the sentence
4 continues on in context; and, therefore, it's clear that the
5 breaks in the recorded segments don't constitute a break in
6 content.

7 To the extent that there are portions where the
8 counter goes out or where there's a black band across the
9 bottom, those are matters that the defense can cross-examine
10 about.

11 In addition, I will permit the defense to
12 cross-examine about the identity of the person recording the
13 video and any potential motive the person may have had in
14 creating and presenting the recording.

15 I do conclude that any inability of the officer to
16 specifically say he heard the particular words spoken in
17 portions of the meeting goes to weight, not admissibility,
18 but the authentication is sufficient to permit the admission
19 of the video and audio of the meeting; that the witness's
20 presence and ability to observe it in context -- this isn't a
21 constantly changing scene. This is a meeting that is a
22 unified, coherent event.

23 And to the extent that there are any apparent
24 changes in counter, those are all at times when the witness
25 actually is present and substantively listening to every word

1 and he can answer questions about those.

2 But, in context, upon review of this transcript, the
3 meeting is a continuous event with a sequence of discussion
4 that, in context, clearly identifies it as the thing it
5 purports to be, that which is -- that is, that it is a
6 recording of the meeting which is identifiable as a meeting
7 about the black bloc demonstrations, the locations that
8 people are being directed to throughout, including the Logan
9 Circle direction, the clothes that are to be worn, and that
10 these details which identify the video in context appear
11 throughout each of the segments throughout the entire event.

12 And so I do conclude that it is admissible and that
13 the objections go to weight and are properly the subject for
14 cross-examination.

15 It's -- can we bring the jury back in?

16 MS. KERKHOFF: Yes.

17 THE COURT: What was the issue you wanted to raise,
18 Ms. Heine?

19 MS. HEINE: Ms. Kerkhoff has used the term "black
20 bloc" twice. The witness has not yet used it. So we object
21 to the use of that term.

22 THE COURT: Wasn't it spoken in the podcast?

23 MS. KERKHOFF: Your Honor, the witness used the term
24 "anti-fascist/anti-capitalist/black bloc," saying that's what
25 Dylan Petrohilos stated the meeting was for.

EXHIBIT 3

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION

-----:
 UNITED STATES OF AMERICA :
 :
 v. : Criminal Action No.
 :
 MATTHEW HESSLER : 2017 CF2 7212
 CHRISTOPHER LITCHFIELD : 2017 CF2 1235
 DYLAN PETROLHILOS : 2017 CF2 7216
 CALY RETHERFORD : 2017 CF2 1378
 CAROLINE UNGER, : 2017 CF2 1355
 :
 Defendant :
 -----:

Washington, D.C.

Friday, April 6, 2018

The above-entitled matter came on for HEARING before the Honorable Robert Morin, Chief Judge, in Courtroom Number 315, commencing at 2:15 p.m.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL REPORTER, ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS HER NOTES AND RECORDS OF TESTIMONY AND PROCEEDINGS IN THE CASE AS RECORDED.

APPEARANCES:

On behalf of the Government:

Jennifer Kerkoff, Esquire
 Amed Basset, Esquire
 Rizwan Querishi, Esquire
 Assistant United States Attorney

On behalf of the Defendant:

Michelle Bradshaw, Esquire (Defendant Litchfield)
 Mark Sweet, Esquire (Defendant Litchfield)
 Sharon Weathers, Esquire (Defendant Retherford)
 Cary Clennon, Esquire (Defendant Hessler)

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Andrew Clarke, Esquire (Defendant Petrolhiles)
Charles Murdter, Esquire (Defendant Unger)

Mahalia M. Davis, RPR
Official Court Reporter (202) 879-1029

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PROCEEDINGS

THE DEPUTY CLERK: Calling the United States versus Matthew Hessler, 2017 CF2 71 -- I'm sorry, 7212, calling co-defendant matter, United States versus Christopher Litchfield, 2017 CF2 1235, calling co-defendant matter, United States versus Dylan Petrolhilos, 2017 CF2 7216, co-defendant matter with Caly Retherford, 2017 CF2 1378 and co-defendant matter with Caroline -- United States versus Caroline Unger, 2017 CF2 1355.

THE COURT: Okay.

MS. KERKHOFF: Good afternoon, Your Honor, Jennifer Kerkhoff for the United States.

MR. BASSETT: Good afternoon, Amad Bassett for the United States.

MR. QUERISHI: Good afternoon, Rizwan Querishi for the United States.

MR. SWEET: Mark Sweet for Mr. Litchfield.

MS. BRADSHAW: Michelle Bradshaw for Mr. Litchfield.

MS. WEATHERS: Sharon Weathers for Quade Retherford, also known as Caly Retherford.

MR. CLENNON: Cary Clennon for Mr. Hessler, who's present.

MR. CLARKE: Andrew Clarke For Dylan Petrolhilos, who is present.

1 MR. MURDTER: Charles Murdter for Caroline Unger,
2 who is present and before the Court.

3 THE COURT: Okay. Thank you. Thank you. You can
4 be seated.

5 So I'm going to try to work through these motions
6 maybe from -- well --

7 MR. CLARKE: Your Honor, so this morning, I
8 actually compiled, I tried to do my best on trying to
9 identify everything that we're going to be talking about
10 today. I have a copy for the government and if they
11 approve, I can hand it up to the Court.

12 THE COURT: Okay. Thank you. I think we all have
13 our compilations.

14 DEFENSE COUNSEL: Very good, thank you.

15 THE COURT: So what I -- with regard to the motion
16 to suppress, which I believe all defendants are joining in.

17 MS. KERKHOFF: I'm not certain about that, Your
18 Honor.

19 THE COURT: Well, that's what I'm going to -- that
20 was a question more than an answer.

21 Which defendants are not joining in the motion?

22 MR. CLENNON: Your Honor, on behalf of
23 Mr. Hessler, I don't believe we have joined that.

24 THE COURT: Okay. Thank you.

25 DEFENSE COUNSEL: May I approach, Your Honor?

1 THE COURT: Sure. So the defendant is not joining
2 the motion to suppress.

3 MR. CLARKE: Dylan Petrolhilos is not joining the
4 motion to suppress.

5 THE COURT: Okay. So that would leave
6 Mr. Litchfield, Mr. Retherford and Ms. Unger.

7 MS. WEATHERS: Sharon Weathers on behalf of
8 Mr. Retherford. Mr. Retherford is joining, Your Honor.

9 THE COURT: Right. Everybody else is joining. So
10 what I was wondering is whether or not we could set that for
11 a hearing, either one of the Fridays coming up before the
12 trial. And it would be anticipated that -- are you going to
13 call the same witness, government?

14 MS. KERKHOFF: Yes, Your Honor.

15 THE COURT: It's anticipated that the government
16 will call the same witness and incorporate their testimony
17 at the prior suppression hearing, and then we'd allow the
18 defense counsel to cross-examine.

19 DEFENSE COUNSEL: It's fine, Your Honor, for us.

20 THE COURT: Okay. Anybody object to that?

21 DEFENSE COUNSEL: No, Your Honor.

22 THE COURT: Which is preferable, this coming
23 Friday or the week from Friday.

24 MS. WEATHERS: Your Honor, may I -- may I be heard
25 on that issue? I understand the government wants to

1 streamline the process of putting its witness in this
2 hearing in court today.

3 THE COURT: No, the Court wants to streamline the
4 process.

5 MS. WEATHERS: But it's not the Court's motion and
6 the Court certainly -- and I certainly understand the need
7 to streamline testimony that took three days to present.
8 However, it does seem to me that even with that, defense
9 will have an opportunity to cross-examine the witness.
10 But it -- there's just a difference in hearing live
11 testimony and reading through a transcript.

12 And so I do, for the record, object to --

13 THE COURT: First of all, we will have live
14 testimony.

15 MS. WEATHERS: Well, we'll have live testimony
16 through cross-examination, Your Honor, not through direct
17 examination.

18 THE COURT: Well, the government may have
19 additional witnesses -- additional testimony, I don't know.
20 So we'll just see where it goes.

21 MS. WEATHERS: Very well, Your Honor, but for the
22 record, I just note -- I note my objection.

23 THE COURT: Well, again, motions hearing, hearsay
24 is admissible.

25 MS. WEATHERS: Yes, Your Honor.

1 THE COURT: Adoptions of affidavits and other
2 forms of testimony are pretty routinely done and other
3 formats as well. So unless there's specific prejudice, I
4 think I'll proceed in that fashion. So that will be next
5 Friday. That's next Friday will be --

6 MS. WEATHERS: Your Honor, can I just have a
7 moment, please, to verify?

8 THE COURT: We can start at a later time in the
9 morning if that's easier for people.

10 MS. WEATHERS: So is Your Honor suggesting that --

11 THE COURT: I just need a start time.

12 MS. WEATHERS: I anticipate that that will be a
13 rather long hearing, Your Honor. I do have other matters on
14 my calendar.

15 THE COURT: I need a start time, Ms. Weathers.

16 MS. WEATHERS: Is the afternoon better for Your
17 Honor?

18 THE COURT: Any -- any time is better.

19 MS. WEATHERS: Your Honor, 1:00?

20 THE COURT: 1:30.

21 MS. WEATHERS: 1:30.

22 MR. CLENNON: I was actually going to suggest
23 earlier, Judge, but time really is ruling the --

24 THE COURT: Well, I mean, whatever we don't get
25 accomplished, we're just going to carry it until Monday,

1 so --

2 MR. CLENNON: Very well, Your Honor.

3 MS. WEATHERS: Thank you, Your Honor, the 13th and
4 the 16th will be reserved.

5 MS. KERKHOFF: The 16th is a court holiday.

6 THE COURT: Oh, it is? Thank you for reminding
7 me, correct.

8 Now, I'd like to deal next is the motion to compel
9 discovery.

10 I apologize, just one second. And that primarily
11 has to do with the proffer of exhibit -- of a video of the
12 planning meetings; is that correct?

13 DEFENSE COUNSEL: That's correct, Your Honor.

14 THE COURT: What don't I -- do you mind if I get
15 the government's position on what they have and what's
16 available to them or not before you argue?

17 MS. KERKHOFF: Yes, Your Honor.

18 As outlined and as testified to by the detective
19 during the first trial, the government -- the Metropolitan
20 Police Department requested from a number of sources where
21 we got information they may have videos, such as news
22 organizations or in this case, the Veritas group that we had
23 observed portions of edited video. Detective Cumberson
24 contacted the group and asked if they would be willing to
25 provide unedited video. They provided unedited video. We

1 posted the video. It's not the original. We did not have a
2 witness. We did not take any testimony.

3 THE COURT: And can I just get you to flush out a
4 little -- your representations that it's unedited is based
5 on what?

6 MS. KERKHOFF: It was based on -- he made the
7 request for unedited video. We received it, watched it. It
8 did not appear to skip or move. It appeared to be
9 continuous conversation.

10 In addition, what we learned as we were watching
11 the video is we observed an undercover officer in the room.
12 We asked the undercover officer, who had been unaware it was
13 recorded if he could come and watch the video. The officer
14 came and watched the video and said that's what happened.
15 That is true and accurate to what I observed and what I was
16 present for, that appears to be the same.

17 We provided to defense counsel the video. The
18 only editing that was done by my office was at the very
19 beginning of the video, and it recorded in segments, and I'm
20 not sure why, if that's how the button camera was recording.
21 That's common with cameras that it records in segments.

22 At the very beginning, it shows an individual
23 who's wearing the camera in the bathroom. It shows their
24 face. We cut that part out, and then provided everything
25 else to defense counsel. We did crop out the undercover

1 officer's face, which is after the communication of planning
2 meeting. The camera pans around and you can see him, and
3 the defense has the exact video we have.

4 THE COURT: Do you -- other than the two pieces of
5 information, you don't have any other presentation of that
6 meeting other than what's been provided to you?

7 MS. KERKHOFF: Correct. And we doesn't have an
8 original. So the request very much appeared to me,
9 something they can go subpoena or try to get from the third
10 party. We don't have it. We have this, it's how we
11 received it. We believe it to be authentic, based on a
12 number of things and corroborated by text messages and
13 reports about that, but principally by the undercover
14 officer.

15 THE COURT: And so just if I could get your
16 representation on the Court, the individual taking the video
17 was not in coordination with law enforcement efforts --

18 MS. KERKHOFF: Correct.

19 THE COURT: That you're aware of?

20 MS. KERKHOFF: No. And, in fact, the Metropolitan
21 Police Department were not aware of the meeting. The
22 undercover officer was not aware that anyone was there
23 recording it. He was not recording it. He was simply
24 present. We did not find out until later about it and that
25 was simply because we had observed on the news they had put

1 out edited portions. And while we observed edited portions
2 that appeared to be the meeting, we didn't have anything
3 that appeared complete.

4 The other thing I would note is that there is a
5 time stamp and counter on the video, and indication, and
6 that's also there as well.

7 THE COURT: Okay. Thank you.

8 Counsel?

9 MR. CLENNON: Well, Your Honor, I don't believe
10 that we have received what they -- I think the prosecutor
11 represented during the first trial that they played the
12 video and recorded it from a screen and that's what we have.
13 We don't even have the original files that they have.

14 I don't think that we are -- should have to rely.

15 THE COURT: They said what, first off?

16 MS. KERKHOFF: Your Honor, if I could clarify. At
17 the first trial, we had these clips. Detective Pemberton
18 and myself were trying to put the clips together. To use
19 that, we used a program called Camtasia which captures the
20 screen so you can -- instead of clip one, stop, replay clip
21 two, it ran it together.

22 When we played what they had been produced in
23 original form, there was no -- or however we got it, we had
24 screen captured for the compiled exhibit. We had screen
25 captured and left the time stamp at the bottom for the

1 compiled.

2 THE COURT: For the compilation.

3 MS. KERKHOFF: Correct. They have exactly what we
4 have as I've described. That's what was testified to about
5 the screen capture.

6 THE COURT: Okay. Thank you.

7 MR. CLENNON: Well, Your Honor, I think that we're
8 entitled to the original video files that were introduced to
9 the government.

10 THE COURT: You're misunderstanding what the
11 government is saying. They have representing that those
12 have been produced to you. Am I misunderstanding what the
13 government's saying? They've indicated that they've
14 produced that to you.

15 Now, if you're talking about the original, they
16 appear to be in the possession of a third party, unless I'm
17 misunderstanding something.

18 MR. CLENNON: Well, I don't think the government
19 should be allowed to rely on the representations of the
20 third party that these videos have been unedited and I don't
21 think that we should have to rely on their representation
22 that they appear to be unedited. As we know, date stamps,
23 time stamps, counters can all be easily manipulated with
24 digital files, and the digital files that our expert has
25 looked at has had said -- has said, I can't really analyze

1 these form manipulations or edits. It doesn't have the
2 original metadata. It doesn't have what anything any
3 videographer analyzer would need to determine whether the
4 videos are, in fact, what they purport to be.

5 THE COURT: But it appears that that's in the
6 possession of the third party, again.

7 MR. CLENNON: It was sought out and requested by
8 the United States, and therefore, they've involved
9 themselves in the process of producing this material and
10 they're basically vouching for it, so I think it's --

11 THE COURT: They have to authenticate it, I agree
12 with that, but that's a separate objection. I mean, if they
13 don't authenticate it at trial, obviously, you'll have an
14 objection to that. But I'm not aware of authority that
15 allows me to order the government to go to a third party
16 that they're not -- that's why I asked the particular
17 question, whether they were doing it in coordination with
18 the law enforcement and government has represented no.

19 MR. CLENNON: Well, I think the fact that the law
20 enforcement officer approached the group and said, do you
21 have some video here that may be useful to us, that's the
22 coordination right there.

23 THE COURT: That's done on a daily basis, as you
24 know, with regard to convenient store robberies. Failure --
25 a fairly common law enforcement technique is to go around to

1 third parties and ask for videos. I don't think.

2 MR. CLENNON: Well, the government has -- has
3 represented that they, what they produced to us, they have
4 edited, and so I think we're entitled to at least the
5 original videos that were provided to them, so we can see
6 what they're claiming to have edited out.

7 THE COURT: To the -- so that's the identity of
8 the person making the video, which they cropped at the
9 beginning and the identity of the --

10 MR. CLENNON: Undercover officer who was present
11 and testified in public at trial.

12 THE COURT: Correct. Okay. So I have your two
13 points on that. Anything else?

14 MR. CLENNON: No.

15 THE COURT: Okay. Anybody else wish to be heard
16 on that?

17 MR. CLARKE: Your Honor, if I may?

18 THE COURT: If you could just state your name.

19 MR. CLARKE: Andrew Clarke, counsel for Mr.
20 Petrolhilos.

21 There's actually audio of the beginning of that
22 meeting where there's someone that stands up and talks about
23 everything that they're going to be talking about the entire
24 day.

25 THE COURT: I apologize, audio on the video or

1 some --

2 MR. CLARKE: No, it's a -- it's a separate audio
3 of that, that meeting in the beginning. I actually -- we
4 cited to it on our motion --

5 THE COURT: Correct.

6 MR. CLARKE: -- our motion in limine, and the
7 reason that I bring this up and this is relevant here is
8 because the government has stated that the only thing
9 that -- the only thing that's missing in this video is
10 someone in the bathroom putting on a button with a camera,
11 and an undercover officer. But that's impossible. If you
12 look at the video, there's no bathrooms around at all. So
13 there has to be some portion of that video that's missing
14 from the time he goes to the bathroom, puts on his -- puts
15 on his camera button, and then walks into the meeting, sits
16 down in a meeting that's already taking place. So that's
17 why we're asking for the raw video so that we can understand
18 everything that happened in the video and if they have that,
19 that beginning portion.

20 THE COURT: I understand your desire for the raw
21 video. It -- I understand the government, they're not in
22 possession of it, it's in possession of the third party.

23 MR. CLARKE: I understand, Your Honor, but counsel
24 has just stated that the only thing that they cropped out
25 was from the portion when the project Veritas agent was in

1 the bathroom. What I'm saying is that there has to be more
2 than that that's missing in the video, from just off of what
3 they're saying.

4 THE COURT: Okay. May -- we may be talking about
5 two different things. You -- you may be correct or
6 incorrect, I have no idea whether the third-party videotaped
7 more matters.

8 MR. CLARKE: No, no, what I'm saying is that the
9 government has just stated on the record that the only thing
10 that they've cropped out is when the undercover party was
11 actually in the bathroom.

12 THE COURT: Correct.

13 MR. CLARKE: What I'm saying is that when you look
14 at the videos, the video that we got only starts when the
15 undercover person is sitting down at the meeting. There has
16 to be some portion -- and I don't -- I guess I don't
17 understand how this -- how the undercover camera works, but
18 I don't think that it's something that you can just turn on
19 and turn off. I think it has to be something that once it's
20 on, it's on. So if someone's in the bathroom, it's on, once
21 they're talking towards the meeting, it's still on. Once
22 they sit down, it's still on. There's a portion that they
23 say that the undercover -- that another -- that the
24 undercover officer is in. We don't know when that is.

25 So that's why we're asking for the raw video. If

1 he's already testified in open court like Mr. Clennon has
2 stated, then I don't see what the problem is with seeing
3 that.

4 THE COURT: You said your request for the raw
5 video. What's being presented to me by the government is
6 they have turned over all the video that they have received
7 to you.

8 MR. CLARKE: No, that's -- that's not what they
9 said.

10 THE COURT: Other than the two things they cropped
11 out.

12 MR. CLARKE: Right. And that's -- that's what I'm
13 saying is that there has to be more than just those two
14 things --

15 THE COURT: Okay.

16 MR. CLARKE: -- that they cropped out that's in
17 that video that they're in possession of.

18 THE COURT: Thank you. Anything else?

19 Is there any reason why the cropped portions
20 should not be turned over at this point?

21 MS. KERKHOFF: Well, the government does object to
22 the cropped portions, at least being produced without a
23 protective order.

24 I will say this that there have been individuals
25 who has taken materials like that and disseminated them or

1 attempted to disseminate them. I am concerned about it, and
2 it all being off in a public domain, and I don't necessarily
3 think that whoever videotaped it, -- I don't know who that
4 person is in terms of -- I don't know their name or
5 anything. I don't think that person should be subjected to
6 be -- I don't think the public has a right to that
7 information.

8 THE COURT: Maybe I'm missing something. Why
9 doesn't the defense have the right to investigate that
10 person?

11 MS. KERKHOFF: I'm not saying the defense, Your
12 Honor. I'm talking pursuant to a protective order.

13 THE COURT: And what would you mean by a
14 protective order?

15 MS. KERKHOFF: That images, the image of the
16 person shouldn't go out on social media or any other
17 mechanism or be produced and --

18 THE COURT: Okay.

19 MS. KERKHOFF: -- disseminated. That's the part
20 I'm talking about.

21 THE COURT: Anything else?

22 MS. WEATHERS: Good afternoon, Your Honor, Sharon
23 Weathers. May I respond to government counsel's concern
24 about dissemination of the photo of the person who took the
25 videotape?

1 I believe we're under a blanket protective order.
2 Government has given to the Court numerous protective
3 orders, all of the parties have signed them, and so the
4 government's concern about the defense counsel sharing that
5 information with the general public is a concern they need
6 not have, because we're under a protective order right now,
7 and so --

8 THE COURT: And you're speaking -- speaking on
9 behalf of everybody, I take it?

10 MS. WEATHERS: I believe I am, Your Honor.

11 THE COURT: Okay.

12 MS. WEATHERS: Thank you.

13 THE COURT: Thank you. With that representation,
14 I'm going to order the uncropped or the cropped portions be
15 turned over to the defense. And again -- let me just put a
16 formal order here and it's not to suggest -- I doubt the
17 government's representations. It's -- you are officers of
18 the Court, but I am ordering you, the entirety of whatever
19 is in the government's possession to be turned over to the
20 defense.

21 Okay. I have a motion to exclude identifying
22 images. I think part of this motion is encompassed -- or
23 maybe all of it's encompassed by Judge Leibovitz's previous
24 ruling, but assuming that the Court is not going to allow
25 any detective or witness who has reviewed the videos to

EXHIBIT 4

REALTIME UNCERTIFIED TRANSCRIPT DISCLAIMER

IN THE MATTER OF:

CASE NAME

A transcript of proceedings the the above titled matter is being delivered UNEDITED and UNCERTIFIED by the Official Court Reporter at the request of counsel.

The Purchaser AGREES not to disclose and/or disseminate this realtime UNEDITED and UNCERTIFIED transcript in any form (written or electronic) to ANYONE. This is an unofficial transcript which should not be relied upon for purposes of verbatim citation of testimony, nor shall it be cited or used in any way or at any time to rebut or contradict the official record or certified transcript of the proceedings. The Purchaser agrees to use this realtime draft only for the purpose of augmenting counsel's notes and NOT to quote from or cite it in any court proceeding.

This transcript has not been checked, proofread, or corrected. It is a draft transcript, NOT a certified transcript. As such, it may contain computer-generated mistranslations of stenotype code or electronic transmission errors, resulting in inaccurate or nonsensical word combinations, or untranslated stenotype symbols which cannot be deciphered by non-stenotypists.

Corrections will be made during the preparation

1 of a certified transcript, resulting in differences in
2 content, page and line numbers, punctuation, and
3 formatting.

4 This realtime unedited draft contains no
5 appearance page, index or certification.

6 THE COURTROOM CLERK: Your Honor, calling from
7 your jury trial calendar: United States versus Michael
8 Basillas, case number 2017 CF2 1334; codefendant with Seth
9 Cadman, case number 2017 CF2 1172; codefendant United
10 States versus Anthony Felice, case 2017 CF2 1163;
11 codefendant United States versus Casey Webber, case 2017
12 CF2 1156.

13 MS. KERKHOFF: Good morning, Your Honor.
14 Jennifer Kerkhoff for the United States.

15 MR. QURESHI: Good morning, Your Honor. Rizwan
16 Qureshi for the United States.

17 MR. JACOBSON: Good morning, Your Honor. Billy
18 Jacobson along with Mr. Basillas, who is present, along
19 with my colleague Adam, Rich Gallena, Nathaniel Ingraham,
20 and Caitlin Garrigan-Nass.

21 MR. SCHRAGER: Good morning, Your Honor. Seth
22 Schrager on behalf of Seth Cadman.

23 MR. QURESHI: Good morning, Your Honor. Matthew
24 Rist on behalf of Mr. Felice, who's present.

25 MS. DOWNS: And April Downs on behalf of Mr.

1 A. No.

2 Q. Okay. At some point, do you know somebody by
3 the name of Detective Gregory Pemberton?

4 A. Yes, I do.

5 Q. At some point, well after January 20, 2017, were
6 you contacted by Detective Pemberton?

7 A. Yes, I was.

8 Q. Were you asked to watch a series of videos?

9 A. Yes.

10 Q. Did you watch them?

11 A. I did.

12 Q. Did you recognize what was captured in the
13 videos?

14 A. Yes, I did.

15 MR. SCHRAGER: Your Honor.

16 MS. DOWNS: Yeah, leading.

17 MR. SCHRAGER: Can we approach.

18 THE COURT: Sure.

19 MR. SCHRAGER: Your Honor, I just want to make
20 clear.

21 THE COURT: Let me make sure everybody is --

22 MR. SCHRAGER: I just wanted to be clear we're
23 objecting to the Veritas videos being put in evidence,
24 Your Honor. I would, you know, my understanding is it's
25 not original, but it has -- there are some changes that

1 were made in it as far as -- and we would object to them
2 coming in. Your Honor, I think simply the best evidence
3 rule applies here as to the fact that we have basically --
4 my understanding the government just has a copy of the
5 video as opposed to the original of the video that was
6 taken, Your Honor, so we would object.

7 THE COURT: You're objecting is that it's a copy
8 and not the original.

9 MR. SCHRAGER: Yes, Your Honor.

10 THE COURT: Okay.

11 MR. SCHRAGER: And the group is -- well, the
12 group is known for changing things around as far as
13 individuals and also manipulating videos, Your Honor.

14 THE COURT: Okay.

15 Yes.

16 MR. GALLEN: We'd also object based on the lack
17 of foundation. We would ask Ms. Kerkhoff to elicit
18 testimony about what portions of the video with a little
19 bit more specificity and I assume the transcript which
20 portions he was present for and when he was not present.

21 THE COURT: Okay.

22 MS. KERKHOFF: And I would note.

23 THE COURT: One second.

24 MS. KERKHOFF: One more.

25 MR. RIST: Just for the record, Your Honor, I

1 make an objection to this based upon reliability, not only
2 does evidence have to be relevant, but it has to be
3 reliable as well. And I would argue that a video made by
4 Project Veritas is inherently unreliable and biased.

5 THE COURT: Okay.

6 MS. KERKHOFF: And, Your Honor, the government
7 will note, as we provided to counsel, we've provided the
8 clips as we have them and have provided it, the only
9 editing that was done as related to the government was to
10 combine the three clips, which appear and have a counter
11 at the bottom which shows that they effectively running, I
12 think there's two or three seconds, because one clips
13 stops, the next begins, because it's like a button camera,
14 that the officer was present for this and, in fact, the
15 officer can actually be seen on the videos that we
16 produced at one portion, that the officer has and can say
17 and as he testified before, that it fairly and accurately
18 depicts the location, that it captures the portions while
19 he was moving around in the basement for some part of it,
20 he was there at the beginning and he was there for the
21 vast majority towards the end, that it fairly and
22 accurately depicts the people, the discussions he heard,
23 it is a apparent continuous stream, that this all goes to
24 weight, not admissibility. I fully anticipate counsel
25 will want to be asking questions about what he knew, but

1 this is weighing, not admissibility. He was present for
2 this meeting. And as Judge Leibovitz ruled previously,
3 the officer doesn't have to be present for every moment of
4 the video if he can fairly provide a foundation for it.
5 We believe he can. And so that's our response.

6 MR. SCHRAGER: Your Honor, he could testify
7 himself as to what was said at the meeting. We don't need
8 the video even in that regard, Your Honor.

9 THE COURT: Okay. Well, if this officer, this
10 witness, can identify and authenticate that this is the
11 time and the place of the meeting, generally, and people
12 who are in it, then I do believe -- and it rents what the
13 government is presenting it for, then I believe it is
14 admissible and it is cross-examination evidence the fact
15 that it's not the original and it's a copy. Again, he's
16 going to -- the witness is going to identify what's being
17 presented. So he's going to be authenticating it. I
18 don't know if it's all the else.

19 MR. GALLENA: Two more clarifications for the
20 record. We believe there were two additional edits made
21 to the video. The undercover's face was redacted and the
22 individual filmings it in the initial question -- I'm
23 sorry, is this a new version.

24 MS. KERKHOFF: So the undercover -- so the
25 portion the government intends to introduce, which is why

1 we provided the as edited exhibits to counsel weeks ago,
2 is a portion when the meeting begins and it stops when the
3 meeting ends. If you would like to see the undercover
4 officer as well as the person who filmed it, we produced
5 several months ago the complete fully copy. We didn't
6 edit. The undercover officer doesn't appear in this
7 because the camera swings around and it's capturing other
8 conversation after the meeting concludes where you can see
9 the officer. Counsel has the full unedited every clip,
10 they've had it for months, we folk had them on it.

11 MR. GALLENA: Sure I'm just clarifying that you
12 are aren't showing those portions of it.

13 MS. KERKHOFF: Correct, there's nothing that's a
14 been edited and I want they've been put in a stream so we
15 don't have to stop and start three sides.

16 MR. SCHRAGER: My understanding too is that at
17 the least readiness, trials were continued, that it came
18 out that there was a part of the video that concludes the
19 end of it where the -- where they talked about things with
20 Project Veritas people talking about it, Your Honor.

21 MS. KERKHOFF: They have all of these videos,
22 Your Honor. That is not a part of this meeting so it
23 wasn't ruled as a co-conspirator statement. The counsel,
24 I didn't seek to admit. They have all of these
25 individuals. I would look for them to put the entirety

1 in.

2 THE COURT: That's not part of your clip.

3 MS. KERKHOFF: No. This is just the meeting.

4 MR. SCHRAGER: As I said, I had you haven't
5 found it actually myself so.

6 THE COURT: Okay.

7 MR. GALLENA: And, at this point, we would just
8 renew our objection under Butler for the co-conspirator
9 statements.

10 THE COURT: Okay.

11 MR. GALLENA: Thank you, Your Honor.

12 (Open court.)

13 THE COURT: Thank you, sir.

14 All right. So it will be admitted over
15 objection.

16 MS. KERKHOFF: Thank you.

17 BY MS. KERKHOFF:

18 Q. So Officer Adelmeyer, you reviewed video,
19 correct?

20 A. Yes, correct.

21 Q. And did it come in, is it fair to say, three
22 segments?

23 A. Yes.

24 Q. Did the segments appear to be one right after
25 the other?