

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

UNITED STATES OF AMERICA

v.

MATTHEW HESSLER,
CHRISTOPHER LITCHFIELD,
DANIEL MELTZER
DYLAN PETROHILOS,
CALY RETHERFORD, and
CAROLINE UNGER

Defendants.

Case Nos. 2017 CF2 7212
2017 CF2 1235
2017 CF2 1176
2017 CF2 7216
2017 CF2 1378
2017 CF2 1355

Chief Judge Robert E. Morin

Trial: June 4, 2018

Next Event: May 23, 2018
Trial Readiness Hearing
(Continued)

MOTION FOR SANCTIONS AND DISMISSAL

Comes Now, Dylan Petrohilos Matthew Hessler, Christopher Litchfield, Clay/Caly Retherford, Daniel Meltzer and Caroline Unger (collectively, “Defendants”), by Counsel, pursuant to D.C. Super. Court R. 12 and 16, and hereby requests from this Court, Sanctions in the form of dismissal or exclusion of certain videos in this matter, and for its Motion, states the following:

Motions for Sanctions and dismissal are not something that should be taken lightly by the Court or Defense Counsel when considering filing a motion for such actions. The government has abused its power by hiding discovery from all defendants, purposefully choosing not to disclose *Brady* information, and calling into question the integrity of all of its third-party video evidence and proffers in open court.

In Brady v. Maryland, 373 U.S. 83, 87 (1963), the Supreme Court held that “the suppression by the prosecution of evidence favorable to an accused ... violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”

Favorable information is any information that might help the defense attack the

government's case or mount an affirmative defense. In determining what must be disclosed under Brady "the [prosecution's] guiding principle must be that the critical task of evaluating the usefulness and exculpatory value of the information is a matter primarily for defense counsel, who has a different perspective and interest from that of the police or prosecutor." Zanders v. United States, 999 A.2d 149, 163-64 (D.C. 2010).

One of the key pieces of evidence in this case is the video of the January 8, 2017 meeting to allegedly plan the January 20, 2017 march. The government has used attendance at this meeting and statements made during this meeting to allege that the defendants conspired to commit acts of violence and destruction on January 20, 2018.

During the course of discovery, defendants became aware that they did not have the original video, which was filmed by Project Veritas and provided to the government. Accordingly, defendants filed a motion to compel on March 30, 2018. In response to the defendants' Motion to Compel the unclipped video, the government stated the following on the record:

"We provided to defense counsel the video. The only editing that was done by my office was at the very beginning of the video, and it recorded in segments, and I'm not sure why, if that's how the button camera was recording. That's common with cameras that it records in segments. At the very beginning, it shows an individual who's wearing the camera in the bathroom. It shows their face. We cut that part out, and then provided everything else to defense counsel. We did crop out the undercover officer's face, which is after the communication of planning meeting. The camera pans around and you can see him, and the defense has the exact video we have." See, April 6, 2018 Trial Readiness Hearing p. 9-10, attached hereto as Exhibit 1.

Defense is now in possession of the full unclipped version of that video that proves the government misrepresented – in open court – the contents of the unclipped portions of the planning meeting. After reviewing the information, it is now clear that the government was intending to withhold information favorable to the defense.

In the beginning of the unclipped version of the planning meeting video, the video shows the creator of the video coming from the bathroom, walking past a huge

group of people talking loudly and then sitting down in a breakout session already in progress.

The Government never mentioned that it also clipped the end of the video after the undercover finishes speaking with co-defendant Matthew Hessler. In the unclipped version, you can hear the undercover speaking with someone else saying “I was talking with one of the organizers from the IWW and I don’t think they know anything about any of the upper echelon stuff”.

This is exculpatory evidence to the defense. The government plans to argue that Mr. Petrohilos and everyone else at that meeting were intending to plan a violent protest. What better exculpatory evidence for the Defense than the words from the person sent to capture a nefarious meeting stating right after the meeting, “I don’t think they know anything”. This evidence is clearly exculpatory and but for the Court compelling its production, Defense would have never received it.

In addition to the planning meeting videos discussed above, on April 12, 2018, Government uploaded 45 additional minutes of video seemingly from the same planning meeting on January 8, 2017 in a folder titled “Pre-planning Meeting Videos” which seems to be from the angle of another person from Project Veritas. This video has never been uploaded prior to that date, mentioned in the Government’s Designation of Evidence, nor did the government ever make counsel aware of the addition of that folder and its contents.

This is notable because the system used by the government deletes files after 12 months. The government informed counsel that it would be re-uploading videos as they are deleted. At the least, the government should have informed defense counsel that a new folder had been created and new videos were available.

The new videos, the misrepresentation of the old videos all call the credibility of

the government in this matter into question. Given the high degree at which the government has mishandled evidence in this matter, the entire proceedings need to be called into question or at least, the evidence surrounding the January 8, 2017 meeting.

Although defense is now in possession of this information, this blatant hiding of evidence leads counsel to have to go through hours of video evidence in this matter again to make sure there aren't any other instances when the government has clipped or misrepresented evidence. That is an impossible task and should not be the burden of the defendants. The government is clear on its obligation pursuant to Brady. The government has misrepresented information to both defense counsel and the Court.

Dylan Petrohilos, by Counsel, is respectfully requesting due to the extreme violation of due process displayed by the Government that a dismissal of the indictment against all the defendants in this trial group is necessary or in the alternative, preclude the government from introducing any of the planning meeting videos in its case in chief against the same.

Respectfully submitted,

s/

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion for Sanctions was sent via case file express to Jessie K. Liu, United States Attorney, and all remaining co-defendants in this case on this 22nd day of May 2018.

/s/ Andrew O. Clarke
Andrew O. Clarke, Esq.

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

UNITED STATES OF AMERICA

v.

MATTHEW HESSLER,
CHRISTOPHER LITCHFIELD,
DANIEL MELTZER
DYLAN PETROHILOS,
CALY RETHERFORD, and
CAROLINE UNGER

Defendants.

Case Nos. 2017 CF2 7212
2017 CF2 1235
2017 CF2 1176
2017 CF2 7216
2017 CF2 1378
2017 CF2 1355

Chief Judge Robert E. Morin

Trial: April 17, 2018

Next Event: April 6, 2018
Trial Readiness Hearing

PROPOSED ORDER

Upon consideration of Defendants Matthew Hessler, Christopher Litchfield, Daniel Meltzer Dylan Petrohilos, Clay/Caly Retherford and Caroline Unger’s Motion for Sanctions in this matter, it is this _____ day of _____, 2018,

ORDERED that the Government’s Superseding Indictment Against Matthew Hessler, Christopher Litchfield, Daniel Meltzer, Dylan Petrohilos, Clay/Caly Retherford, and Caroline Unger is dismissed with prejudice.

The Honorable Robert E. Morin
Superior Court of the District of Columbia

EXHIBIT 1

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION

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 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

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

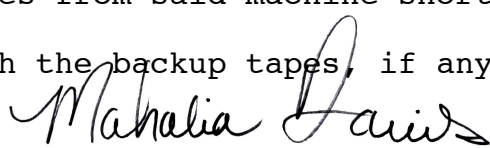
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CERTIFICATE

I, Mahalia Davis, an Official Court Reporter for the District of Columbia Courts, do hereby certify that I reported, by machine shorthand, in my official capacity, the proceedings had and testimony adduced, upon the trial in the case of 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.

In said Court, on the 6th day of April, 2018.

I further certify that I have transcribed the foregoing 102 pages from said machine shorthand notes and reviewed same with the backup tapes, if any, to the best of my ability.



In witness whereof, I have hereto subscribed my name, this the 11th day of April, 2018.

Official Court Reporter