THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
	)	
v.		
	)	**Criminal No. 1:23-cr-00160-RC-1**
DANIEL BALL,	)	
Defendant.	)	

DEFENDANT'S REPLY TO THE GOVERNMENT'S OPPOSITION TO DEFENDANT'S MOTION TO TRANSFER VENUE

Daniel Ball, by and through undersigned counsel, respectfully files this Reply to the Government's Opposition to Defendant's Motion to Transfer Venue. The government's position has many shortcomings, several of which are addressed herein.

ARGUMENT[1]

I. PREJUDICE BASED ON PUBLICITY SUPPORTS MR. BALL'S REQUEST

Contrary to the government's suggestion, Mr. Ball's case does not simply involve the type of publicity where a "juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." ECF No. 28 at 2. Indeed, this case is one of national, and arguably international, importance, unlike many of the cases cited by the government, including *Rideau v. Louisiana*, 373 U.S. 723 (1963). Moreover, the D.C. community, a community which most certainly consumes news and political media more readily than any other judicial district, has been intimately impacted by the events of January 6 in a way that is arguably unprecedented.

[1] As a preliminary matter, the government only addresses the Middle District of Florida in its analysis. However, in his Motion to Transfer Venue, Mr. Ball offered his preference for transfer to the Middle District of Florida but did not so limit his request or analysis. Indeed, in his Motion to Transfer Venue, Mr. Ball offered polling data and arguments that speak to districts other than the Middle District of Florida.

A. Size and Characteristics of the Community

Among other shortcomings, the government's argument about the size and characteristics of the community focuses on population alone—neglecting perhaps the most significant consideration: the characteristics of the community. Indeed, in its analysis, the government omits a key consideration: that the District of Columbia—the nation's capital—is the most politically charged and politically conscious judicial district in the entire country and undoubtedly one of the most, if not the most, news conscious judicial districts as well. For many residents in D.C. and the surrounding area, consuming media of this sort is directly related to their careers/professions, volunteer work, or other commitments. While D.C. has more than four times the population of the small parish in *Rideau*, see ECF No. 28 at 4, this case involves more than just a simple alleged murder where an interview was broadcast. Indeed, Mr. Ball's case is inherently political in nature based on the allegations. Accordingly, it is ripe for the residents of D.C. and the surrounding area to consume.

Other issues with the government's arguments are readily apparent. For instance, the government cites *Mu'Min v. Virginia*, 500 U.S. 415, 429 (1991), a case decided before the internet was available to the public, *see* Julian Ring, "30 years ago, one decision altered the course of our connected world," NPR (April 20, 2023 at 7:00 AM), https://www.npr.org/ (search the article name in the search box), for the Supreme Court's reference to a county with the population of 182,537 as a point of support for the view that an impartial jury could be selected in that case. The government also cites *Skilling v. United States*, 561 U.S. 358, 378 (2010) (citation omitted), for the fact that the Supreme Court approvingly cited a state case in which there was "a reduced likelihood of prejudice" because the "venire was drawn from a pool of over 600,000 individuals." Both referenced cases took place in locations where individuals were geographically more spread

out and presumably farther from the actual event at issue—both figuratively, as discussed below, and literally.

B. Nature of the Pretrial Publicity

The government begins its argument about the nature of the pretrial publicity by stating "[t]his case does not involve a 'confession or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight.'" ECF No. 28 at 5 (citation omitted). The government's position is incorrect. Mr. Ball's case undeniably involves "blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight." To be sure, as addressed in his Motion to Transfer Venue, a number of details that form the basis of the government's case-in-chief have been publicized, including by way of images from body warn camera footage. Moreover, the publicity's mere reference to explosives sensationalizes Mr. Ball's case in a way that ensures immense prejudice.

The government also improperly imparts significance to the fact that recent reportings of Mr. Ball's case have largely been alongside reference to other January 6 defendants. The government also ignores that these referenced reportings list Mr. Ball's case alongside some of the most egregious January 6 cases. *See, e.g.*, "Trump Honors Violent, Law Enforcement-Assaulting Rioters," BLUE VIRGINIA (April 4, 2024), https://bluevirginia.us/2024/04/trump-honors-violent-law-enforcement-assaulting-rioters.

Since undersigned counsel filed Mr. Ball's Motion to Transfer venue, January 6 has continued to be at the forefront of the discourse coming out of Washington, D.C., in the context of the presidential election (one of the most, if not the most, covered events in a respective year). Publicity of Mr. Ball's case, including discussion of the facts to be proved at trial, has continued in other contexts as well. *See* Tom Dreisbach, "The Jan. 6 attack: The cases behind the biggest criminal investigation in U.S. history," NSPR (May 3, 2024 4:06PM),

https://www.mynspr.org/2024-05-03/the-capitol-siege-the-arrested-and-their-stories (discussing the facts of Mr. Ball's case, including allegations that some officers reported they believed they were going to die as a result of Mr. Ball's conduct).

Additionally, the government also seems to suggest that the fact that Mr. Ball is one of over a thousand January 6 defendants weighs against him, *see* ECF No. 28 at 6; this could not be further from the truth, given that, as discussed above, in recent months, the publicity surrounding January 6 has directly singled out Mr. Ball's case (among a number of other defendants' cases).

C. Passage of Time before Trial

The government also incorrectly suggests that the passage of time in this case weighs against Mr. Ball's position. Indeed, as explained in his Motion to Transfer Venue, per the government's own narrative, the exact event that served as the catalyst for what took place on January 6, 2021 (i.e., the U.S. presidential election) more or less corresponds with Mr. Ball's trial. And, as mentioned above, contrary to the government's assertion, new reports about Mr. Ball (and the narrative about January 6) have continued to be published to the public. Accordingly, the passage of time between the alleged conduct and Mr. Ball's trial actually prejudices him and it does so in a way that is arguably unprecedented.

As discussed in more detail the section below pertaining to *voir dire*, although his request for venue transfer is supported by the *Skilling* factors, Mr. Ball's case is one where the alleged crimes result in "effects . . . on [a] community [that] are so profound and pervasive that no detailed discussion of the [pretrial publicity and juror partiality] evidence is necessary." *United States v. McVeigh*, 918 F. Supp. 1467, 1470 (W.D. Okla. 1996).

D. Jury Verdict

As Mr. Ball submitted in his Motion to Transfer Venue, to determine if the presumption of prejudice should attach, a court must consider three factors: (1) the size and characteristics of the

jury pool; (2) the type of information included in the media coverage; and (3) the time period between the arrest and trial, as it relates to the attenuation of the media coverage. *See Skilling*, 561 U.S. at 378. Despite this well-established precedent, the government submits, incorrectly, that the lack of jury verdict should be a consideration as to whether prejudice can be assumed. Indeed, the government conflates the concept of actual and presumed prejudice. *See Patton v. Yount*, 467 U.S. 1025, 1031 (1984) (distinguishing between presumed venire bias and actual juror bias).

Additionally, as an aside, undersigned counsel would respectfully disagree with the notion that jury verdicts can provide much insight as to the existence of prejudice. Most cases utilize general verdict forms. Most defendants who go to trial, especially in federal court, are found guilty. Moreover, most cases, particularly those that are federal cases, resolve pretrial because of concerns such as the inherent risk of going to trial, the natural deference afforded to the prosecution by jurors, and the inherent stigma imposed on defendants simply by virtue of being charged with a crime; this is true even in some of the best defense cases. Under these circumstances, there is no meaningful mechanism to detect juror bias; it only comes to light in narrow, egregious instances.

II. JANUARY 6'S IMPACT ON THE DISTRICT OFF COLUMBIA SUPPORTS A CHANGE OF VENUE

While it is obvious that the harm allegedly caused by Mr. Ball cannot be remotely compared to that caused by the Oklahoma City bombing, such a conclusion is immaterial to the venue analysis. Instead, the consideration for purposes of this analysis is what was the impact of January 6 on the respective community.

The government presents an incorrect narrative about January 6 and its impact on residents of the District of Columbia. Contrary to the government's claims, the number of individuals ultimately prosecuted in relation to an event at issue bears no significance on the analysis, except to the extent it offers support to Mr. Ball's position. Indeed, unlike the Oklahoma City bombing,

the thousand-plus individuals who would ultimately become January 6 defendants crossed or otherwise effected the paths of many D.C. residents before, during, and after their time in the District of Columbia on January 6: individuals tried to unlawfully enter residential buildings, bomb threats were made, businesses were closed and/or boarded, a curfew was implemented, so on and so forth. Unlike the Oklahoma City bombing, January 6 was not isolated to a single brief but devastating action taken against a lone office building. As already discussed, for many January 6 defendants, their conduct was far more invasive. However, similar to the Oklahoma City bombing, January 6 left many questions about what, if anything, would come next for the community in the hours and days thereafter. Fortunately, though, but in contrast to most of the January 6 defendants, Timothy McVeigh and his accomplice were identified and arrested within days of their conduct, helping to quickly alleviate anxieties within the community. *See* "Oklahoma City Bombing," FBI, https://www.fbi.gov/history/famous-cases/oklahoma-city-bombing (discussing McVeigh's arrest); Laura Lambert, "Terry Nichols: American terrorist," https://www.britannica.com/biography/Terry-Nichols (discussing Nichols's arrest). Moreover, just as the Oklahoma City bombing was a historical first for our nation, January 6 was arguably a first in our nation's modern history.

The government submits that a fair trial can be held in a district where "some" members of the community were victimized. ECF No. 28 at 8. Well, of course. However, when every D.C. resident was directly prejudiced by the events of January 6, as discussed *supra*, the possible untainted jury pool becomes, at most, a puddle. The District of Columbia is a community of a much different size and nature than those the government cites for its position, *see id.* Moreover, for residents, the National Mall is the heart of D.C. It is, effectively, the "backyard" that most D.C. residents otherwise do not have. It is a meeting place. It is a cultural center. Indeed, it is where

many residents go to play organized sports, take in quiet summer nights, go on their daily morning runs, and engage in the variety of events offered every year that are hosted by local museums and other organizations. Any tragic event that would take place at the National Mall, of which the U.S. Capitol is a part, would be deeply personal to the community in a way that distinguishes it from the government's cited locations (e.g., a federal office building in a largely commercial area, a street within a vast city, a corporate office building in the financial district), covert scandal, and company collapse.[2] *See id.* at 6, 8. Indeed, while certainly tragic on a national level, the cases to which the government cites had direct effects that were more remote on the whole.

[2] The September 11 case that the government cites is one prosecuted out of the Eastern District of Virginia where the defendant argues that the venue is improper since there is "no factual basis for venue in the Eastern District of Virginia." *United States v. Moussaoui*, 591 F.3d 263, 300 (4th Cir. 2010). Accordingly, this case does not offer support to the government's position and undersigned counsel need not compare the September 11 attacks to January 6 beyond what is already discussed in Mr. Ball's Motion to Transfer Venue. However, it is of note that the government fails to acknowledge a case cited by Mr. Ball in his Motion to Transfer Venue where a court suggests that, had the defendant been charged in relation to the September 11 attacks, venue transfer would be warranted. *See United States v. Awadallah*, 457 F. Supp. 2d 246 (S.D.N.Y. 2006) (suggesting that had the defendant, who was charged with perjury, actually participated in the 9-11 attacks on New York, "the effects that a massive, disastrous event has wrought on the jury pool" would require a change of venue).

It is also of note that the World Trade Center bombing case that the government references does not support its position. *See United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003). In fact, this case relates to a venue argument made pursuant to certain venue provisions in the U.S. Constitution, *see* U.S. Const. Art. III, § 2, cl. 3, and Federal Rule of Criminal Procedure 18; the defendant was requesting that venue be transferred to another country because his conduct occurred exclusively in the Philippines. *See id.* at 114-15. Moreover, the court in *Yourself* noted that all of the news articles underlying the defendant's publicity argument did not relate to the conduct charged in that case; instead, the defendant solely relied on news stories that speculated that he was involved in unrelated crimes, such as the Oklahoma City bombing. *See id.* at 155. Additionally, the Second Circuit found significance in the fact that, after *voir dire*, the defendant's counsel did not challenge the *voir dire* or suggest that the *voir dire* resulted in a jury tainted by pretrial publicity. *See id.* While the court did not address considerations such as the lack of geographical and temporal proximity between the defendant's criminal conduct and the ultimate harm, undersigned counsel would argue that those considerations also inform the venue analysis. In any event, to put it simply, the government's reference to this case does not meaningfully support its position.

III. MIDDLE DISTRICT OF FLORIDA OFFERS A CONVENIENT VENUE FOR THE PARTIES[3]

In arguing that the government and its witnesses would be inconvenienced by a transfer of venue, the government states that all but one of its witnesses are located in Florida; that is not the message that has been communicated to defense counsel. Indeed, the government has expressed that a number of its anticipated lay witnesses are located in Florida. Additionally, undersigned counsel understands that at least one of its experts are also located in Florida. The number of witnesses in D.C. versus Florida ends up being, at a minimum, quite comparable.

The government also implies that, because undersigned counsel is located in D.C., such a fact would weigh in favor of its argument that the parties are inconvenienced. To be clear, whatever it takes for Mr. Ball to receive a fair trial is of no inconvenience to the defense.

The government also fails to address the fact that the physical evidence (which also includes some digital evidence located on electronic drives) is located in Florida.

In support of its argument, the government also states that "Mr. Ball has pointed to no other instance in which this or any other [c]ourt has ordered a change of venue for convenience based on that consideration alone." Mr. Ball did not need to; although a finding of convenience can be a basis used in concert with a finding of prejudice, there is a distinct enumerated basis for a court to transfer venue for convenience: Federal Rule of Criminal Procedure 21(b). To suggest Rule 21(b) does not provide a distinct basis is unfounded. It is also not a unique concept, as demonstrated by a recent case in this Court, where transfer appears to have been, in fact, granted solely on the basis of convenience. *See, e.g.*, *Nat'l Wildlife Fed'n, Inc. v. U.S. Army Corps of Engineers*, 312 F. Supp. 3d 167, 169 (D.D.C. 2018).

[3] As a preliminary matter, the defense team anticipates that at least one additional witness (a defense witness) will be located in Florida.

IV. *VOIR DIRE* CANNOT ENSURE A FAIR TRIAL IN MR. BALL'S CASE

At the end of the day, we can never truly know if *voir dire* was effective in a particular case. Unfortunately, unless something egregious is made readily apparent, our assessment of whether *voir dire* was effective is based on the assumption and the hope that the justice system and its mechanisms are, in fact, working. In any event, the government submits that the Court can glean insight from the *voir dire* practices in January 6 cases that it believes have, so far, garnered more press exposure. A number of specific reasons come to mind why the government's position is misguided, including the fact that in a multi-codefendant case, jurors have the ability to compare the respective conduct among the defendants to determine culpability in a way that they cannot in Mr. Ball's case; in many co-defendant cases, the least culpable defendant has a *lesser* chance of being inflicted by potential juror biases.

The government's position that the presidential candidates' "attempts to gain the attention of potential voters does not mean the potential voters' attentions will be obtained" is disingenuous and not commensurate with the way in which we, as a society, know U.S. presidential elections work. It would be fair to say that most of the American public (and, certainly, most D.C. residents) remembers various sound bites (and more) from the 2020 presidential election and preceding presidential elections. As it has been positioned, January 6, with Mr. Ball and only a number of other January 6 defendants at the helm, is *the* talking point the presidential candidates have embraced for this election cycle. With all of the polling and on-the-ground insight that goes into strategic campaign decisions, the presidential candidates hope and believe January 6 will be a topic to divide the nation in a way that favors their candidacy and ultimately wins their vote. Arguably, when it comes to shaping the beliefs of the average American, there is no more powerful of a force than that of a U.S. presidential campaign. (And, as we all know, President Biden's campaign runs

out of the District of Columbia.) In this setting, it is fair to say that there had never before been a criminal case with this type of temporal, geographical, and cultural context or external influence.

The government also speculates that the number of topics will increase as we near November and ignores what we know to be true and cannot reasonably deny: both candidates have declared that January 6 will be a fundamental focus in their respective campaigns and media attention and campaign messages will continue to increase exponentially as we close in on Election Day in November.

CONCLUSION

In light of the foregoing, Daniel Ball, by and through undersigned counsel, respectfully requests that this Court transfer venue in this case to the Middle District of Florida or another appropriate venue.

Respectfully submitted,

_____/s/_____
Amy C. Collins
D.C. Bar No. 1708316
888 17th Street, N.W., Suite 1200
Washington, D.C. 20006
(228) 424-0609
amy@amyccollinslaw.com
acollins@kalbianhagerty.com
Counsel for Daniel Ball

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 8th day of May 2024, I have served this Reply upon all parties in this matter through the CM/ECF system.

_____/s/_____
Amy C. Collins