

United States District Court for the District of Columbia

United States of America

\*

v.

\*

No. 1:21-CR-00353-JDB-1

Nicholas Languerand

\*

**Response to Government Motion for Protective Order**

The government has moved for a protective order. Doc. 10. Unfortunately, the government seeks much more than the protection of sensitive and highly sensitive material. Although captioned simply as “Protective Order Governing Discovery,” the government insists that the defendant must personally sign an “Acceptance,” agree to all of the terms, disclose privileged information regarding the consultation with counsel about it, and affirm full satisfaction with counsel not only regarding the protective order, but **“all matters relating to it.”**

Defendant does not dispute that the Court has the authority to enter an appropriate protective order, if good cause is shown. Fed. R. Crim. P. 16(d)(1); *see United States v. Cordova*, 806 F.3d 1085 (D.C. Cir. 2015). Nor does defendant dispute that discovery materials might contain sensitive information.

Either way, an appropriate protective order would not implicate defendant’s waiver of the right to the effective assistance of counsel (U.S. Const. amend VI; 28 U.S.C. § 2255; *see Strickland v. Washington*, 466 U.S. 668 (1984)), waiver of attorney/client privilege, and compel defendant to make statements (U.S. Const. amend I, V, VI; *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943); *Miranda v. Arizona*, 384 U.S. 436 (1966), *Edwards v. Arizona*, 451 U.S. 477 (1981));

in order to receive disclosures that even the government concedes it must provide (Gov't Mot. at 3). *See* 18 U.S.C. § 3500, Fed. R. Crim. P. 16, 26.2; Loc. Crim. R. 5.1(a); *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972).

Defendant's counsel proposes that if the Court finds good cause to enter a protective order in this case (Fed. R. Crim. P. 16(d)(1); *Cordova, supra*), then defendant would not object to the Court entering the modified version of the proposed Protective Order Governing Discovery, which has been highlighted to show changes. App'x at 1. In support, counsel avers:

1. Defendant is not *pro se*.
2. He is represented by experienced counsel, who is familiar with handling discovery subject to a protective order. Doc. 8; Min. Ent. May 24, 2021; *See* 18 U.S.C. § 3006A(b).
3. If defendant were to demand something that a protective order would prohibit, then counsel would first attempt to negotiate a solution with opposing counsel.
4. If necessary, counsel knows how to seek the Court's assistance to resolve disputes.
5. Parties and counsel are bound to follow the Court's order, regardless of whether they agree with it. *Cordova* at 1090; *see also Alderman v. United States*, 394 U.S. 165 (1969).

6. Defendant might even be notified on the record about an order and asked whether he understands, similar to the reading of charges at an initial appearance, regardless of whether he agrees with them.

7. Curiously, the government claims that defendant's acceptance, which includes agreement to all of the terms, disclosure privileged information regarding the consultation with counsel about it, and affirmation of full satisfaction with counsel regarding the protective order "***and all matters relating to it,***" is an important enforcement mechanism.

8. Yet, the government fails to mention anywhere in either its Motion, its proposed order, or the Acceptance that it insists on, the Court's contempt authority (18 U.S.C. § 401), the consequences for contempt of court (18 U.S.C. §§ 402, 3285, 3691), or the possibility of additional criminal charges that might arise from the disclosure of protected information (*See* 18 U.S.C. § 2).

9. Although defense counsel has heard the government's claims about the addendum "helping defense counsel" before, I understand my ethical responsibilities and duties, particularly when an order directs something, and I do not need the government's "help."

10. Advising a client to sign the "Acceptance" or state on the record "satisfaction with counsel," or what has or has not been discussed with counsel, in order to receive what the law requires the government to provide would probably be a conflict of interest and ineffective for defense counsel to do.

11. In addition, it would likely create a client relations problem, when there is not one, and perhaps lead to a vicious cycle of having to substitute counsel.

12. The government's Affidavit cites Capitol Police Directive 1000.002, which provides an example of a protective order for U.S. Capitol Police surveillance video that does not require the signature of the defendant or counsel. Doc. 10-1 at 2; *see, District of Columbia v. Ricky Wiseman*, D.C. Superior Court Case no. 2018-CTF-17464.

13. A copy of Capitol Police Directive 1000.002 is attached to this Response for the Court's reference. App'x at 7.

14. The government's citations for when the Court has entered a protective order have not involved defendants being required to not only acknowledge a protective order, but affirm agreement to all of the terms, disclose privileged information regarding consultation with counsel about it, and affirm full satisfaction with counsel not only regarding the protective order, but ***“all matters relating to it.”***

15. An identical objection to Attachment A has been litigated recently in this District. *United States v. Miller*, 1:21-CR-00266.

16. In that case, the Court modified the Protective Order and in particular Attachment A. App'x at 23.

17. At best, the government's attempt to have the Court mandate the “Defendant's Acceptance” is misguided, because the Court already has the authority to enter an appropriate protective order, if the Court finds good cause.

18. In addition, both the Court and the government already have appropriate enforcement tools that avoid creating Constitutional problems.

19. At worst, the government is attempting to extract waivers of the right to counsel and attorney/client privilege under the guise of a protective order.

20. Regardless, it is inappropriate and unnecessary.

21. Accordingly, defendant's counsel suggests that if the Court were to find good cause to enter a protective order, then the modified version of the proposed Protective Order Governing Discovery would be more appropriate. App'x at 1.

### **Points and Authorities**

*Alderman v. United States*, 394 U.S. 165 (1969).

*Brady v. Maryland*, 373 U.S. 83 (1963).

*Edwards v. Arizona*, 451 U.S. 477 (1981).

*Giglio v. United States*, 405 U.S. 150 (1972).

*Miranda v. Arizona*, 384 U.S. 436 (1966).

*Strickland v. Washington*, 466 U.S. 668 (1984).

*United States v. Cordova*, 806 F.3d 1085 (D.C. Cir. 2015).

*District of Columbia v. Ricky Wiseman*, D.C. Super. Ct. No. 2018-CTF-17464.

*West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943).

U.S. Const. amend I.

U.S. Const. amend V.

U.S. Const. amend VI.

18 U.S.C. § 2.

18 U.S.C. § 401.

18 U.S.C. § 402.

18 U.S.C. § 3006A(b).

18 U.S.C. § 3285.

18 U.S.C. § 3500.

18 U.S.C. § 3691.

28 U.S.C. § 2255.

Fed. R. Crim. P. 16.

Fed. R. Crim. P. 26.2.

Loc. Crim. R. 5.1(a).

*/s/ William L. Welch, III*

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(Appointed by this Court)

**Certificate of Service**

I certify that on this 18<sup>th</sup> day of June, 2021 a copy of the foregoing Response to Government Motion for Protective Order was delivered electronically to electronically to Mr. Robert Craig Juman (robert.juman@usdoj.gov), Office of the United States Attorney, 500 East Broward Boulevard, Fort Lauderdale, Florida 33132.

*/s/ William L. Welch, III*

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William L. Welch, III



- h. Repair estimates from the Architect of the Capitol;
- i. Materials designated as “security information” pursuant 2 U.S.C. §1979; and
- j. Tax returns or tax information.

This Order will not be used to designate materials as Sensitive or Highly Sensitive unless such designation is necessary for one of the reasons stated in this paragraph or for a similar reason not anticipated by this Order. The government agrees to make every effort to provide discovery in a manner that will allow for most discovery to be produced without such designations.

- 2. **Defendant.** Any reference to “Defendant” herein refers individually to each defendant identified in the caption above.
- 3. **Legal Defense Team.** The “legal defense team” includes defense counsel (defined as counsel of record in this case, including any post-conviction or appellate counsel) and any attorneys, investigators, paralegals, support staff, and expert witnesses who are advising or assisting defense counsel in connection with this case.
- 4. **Rules for the Handling of Sensitive and Highly Sensitive Materials.**
  - a. **Limitations on Use.** Defendant and the legal defense team may use Sensitive and Highly Sensitive discovery materials solely in connection with the defense of this case and any other case connected to the events at the United States Capitol on January 6, 2021, including any post-conviction or appellate litigation, and for no other purpose, and in connection with no other proceeding, without further order of this Court.
  - b. **Limitations on Dissemination.** No Sensitive or Highly Sensitive materials, or the information contained therein, may be disclosed to any persons other than Defendant, the legal defense team, or the person to whom the Sensitive or Highly Sensitive information solely and directly pertains or his/her counsel, without agreement of the United States or prior authorization from the Court.
  - c. **Limitations on Re production.** Defendant, the legal defense team, and authorized persons shall not copy or reproduce the Sensitive or Highly Sensitive materials except in order to provide copies of the materials for use in connection with this case by **counsel**, the legal defense team, the person to whom the Sensitive or Highly Sensitive information solely and directly pertains or his/her counsel, and other persons to whom the Court may authorize disclosure (collectively, “authorized persons”).

Copies and reproductions, and any notes or records made in relation to the contents of the Sensitive and Highly Sensitive materials, are to be treated in the same manner as the original materials.

- d. **Court Filings.** Absent prior agreement by the parties or permission from the Court, no party shall disclose materials designated as Sensitive or Highly Sensitive in any public filing with the Court. Such materials shall be submitted under seal in accordance with Local Criminal Rule 49(f)(6). The Clerk of Court shall accept for filing under seal any filings made in compliance with that Rule and so marked by the parties pursuant to this Order.
- e. **Court Hearings.** The restrictions in this Order shall not limit either party in the use of the materials in judicial proceedings in this case. The procedures for use of designated Sensitive and Highly Sensitive materials during any hearing or the trial of this matter shall be determined by the parties and the Court in advance of the hearing or trial. No party shall disclose materials designated Sensitive or Highly Sensitive in open court without agreement by the parties that such materials may be disclosed in open court or prior authorization by the Court.

5. **Additional Rules for Handling of Sensitive Materials.** The following additional terms apply to Sensitive materials:

- a. **Storage.** Sensitive materials must be maintained in the custody and control of **counsel**, the legal defense team, and authorized persons. This restriction shall not apply to the person to whom the Sensitive information solely and directly pertains or his/her attorney.

6. **Additional Rules for Handling of Highly Sensitive Materials.** The following additional rules apply to Highly Sensitive materials:

- a. **Additional Limitations on Dissemination.** Defense counsel may not provide a copy of Highly Sensitive materials to Defendant or permit Defendant to view such materials unsupervised by defense counsel or an attorney, investigator, paralegal, or support staff person employed by defense counsel.

The parties agree that defense counsel or an attorney, investigator, paralegal, or support staff person employed by defense counsel, may supervise Defendant by allowing access to Highly Sensitive materials through a cloud-based delivery system that permits Defendant to view the materials but does not permit Defendant the ability to download; provided that, prior to doing so, defense counsel first provides notice to the United States and allow the United States to file an objection with the Court if no agreement is reached.

- b. **Additional Limitations on Re production.** Counsel agrees that prior to showing materials to Defendant designated as Highly Sensitive, counsel or an attorney, investigator, paralegal, or support staff person employed by defense counsel will read Defendant the relevant parts of this Order, and remind Defendant of the consequences of violating the Order. If Defendant takes notes regarding Highly Sensitive materials, counsel or an attorney, investigator, paralegal, or support staff person employed by defense counsel must take reasonable steps to determine whether Defendant has copied any personal identity information as identified in Rule 49.1 of the Federal Rules of Criminal Procedure or any telephone numbers, email addresses, driver's license numbers, and similar unique identifying information.
- c. **Storage.** Highly Sensitive materials must be maintained in the custody and control of the legal defense team and authorized persons. This restriction shall not apply to the person to whom the Highly Sensitive information solely and directly pertains or his/her attorney.

7. **Viewing by Incarcerated Defendants.** If Defendant is in the custody of the United States Marshals Service, defense counsel is authorized to provide a copy of discovery materials to the appropriate point of contact so that the defendant can view the discovery materials, subject to the terms of this Order.

8. **Disputes.** The parties shall make a good faith effort to resolve any dispute about a sensitivity designation before requesting the Court's intervention. The United States may agree to remove or reduce a sensitivity designation without further order of this Court. Whenever the redaction of specified information will resolve the basis for which a sensitivity designation was applied, the United States will agree to redaction, and such redaction will render the materials no longer subject to this Order. Any agreement to reduce or remove a sensitivity designation or to redact specific information shall be memorialized in writing.

9. **Modification Permitted.** Nothing in this Order shall prevent any party from seeking modification of this Order nor prevent the defense from contesting a sensitivity designation. The parties agree that the burden of demonstrating the need for a protective order remains with the government at all times.

10. **Failure not Waiver.** The failure by the United States to designate any materials as Sensitive or Highly Sensitive upon disclosure shall not constitute a waiver of the United States' ability to later designate the materials as Sensitive or Highly Sensitive but the government must separately identify and memorialize the changed status of those materials in writing.

11. **Automatic Exclusions from this Order.** This Order does not apply to materials that:

- a. Are, or later become, part of the public court record, including materials that have been received in evidence in this or other public trials or hearings;
- b. Were derived directly from Defendant or that pertain solely to Defendant. Examples of such materials include Defendant's own financial records, telephone records, digital device downloads, social media records, electronic communications, arrest records, and statements to law enforcement;<sup>2</sup> and
- c. Materials that the defense obtains by means other than discovery.

12. **Government's Discovery Obligations.** Nothing in this Order modifies the United States' obligations at any stage of discovery in this case pursuant to Federal Rules of Criminal Procedure 16 and 26.2, Local Criminal Rule 5.1, 18 U.S.C. § 3500 (the Jencks Act), and the government's general obligation to produce exculpatory and impeachment information in criminal cases.

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<sup>2</sup> Discoverable materials that were derived directly from Defendant or that pertain solely to Defendant are exempt from this Order regardless of whether the United States has designated any such materials as "Sensitive" or "Highly Sensitive" because the same materials are being provided or made available to co-defendants or other persons charged in connection with the events at the United States Capitol on January 6, 2021.

13. **Defense Counsel's Obligations.** Defense counsel must provide a copy of this Order to, and review the terms of this Order with, members of the legal defense team, Defendant, and any other person, before providing them access to Sensitive or Highly Sensitive materials.

14. **No Ruling on Discoverability or Admissibility.** This Order does not constitute a ruling on the question of whether any particular material is properly discoverable or admissible and does not constitute any ruling on any potential objection to the discoverability or admissibility of any material.

15. **Duration.** The terms of this Order shall remain in effect after the conclusion of this case and the parties shall be bound by it unless otherwise ordered by the Court.

**SO ORDERED** this \_\_\_\_\_ day of June, 2021.

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HONORABLE JOHN D. BATES  
UNITED STATES DISTRICT JUDGE

# Directive



## Retrieval of Archived Video

Directive #: 1000.002  
Initiating Unit: Security Services Bureau  
CALEA: N/A

Effective Date: 02/06/2015  
Review Date: 1<sup>st</sup> February

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### 13 Authority and Coverage

14 The Chief of Police is the chief executive officer of the  
15 United States Capitol Police (USCP) and is  
16 responsible for the day-to-day operation and  
17 administration of the USCP.

18 This policy may be revised at the discretion of the  
19 Chief of Police, consistent with applicable law, rule,  
20 and regulation.

### 21 Definition(s)

22 **CP-411 Request for Copy/Review of Video**  
23 **Recordings.** A form created by the USCP to  
24 document and control the request and dissemination  
25 or archived video footage.

### 26 General Policy

27 The Department must maintain appropriate internal  
28 controls on the use and duplication of archived video  
29 footage to ensure the chain of custody for all copied  
30 video footage. In support of national security and  
31 legitimate law enforcement purposes, the Department  
32 adjudicates any and all requests for recorded security

33 camera video footage to include the dissemination of  
34 footage through established channels. Prescribed law  
35 enforcement purposes for the CP-411 include:  
36 required for court, subpoena, Office of Professional  
37 Responsibility (OPR), or training, but may include any  
38 authorized investigation. This policy will identify the  
39 parties that are able to request video (USCP sworn  
40 officials or their civilian equivalent) and the role of the  
41 Security Services Bureau (SSB) and Chief of  
42 Operations (COO) in assuring that any request for  
43 disseminating archived video follows an appropriate  
44 business purpose.

45 The USCP was tasked by its statutory oversight  
46 committees to expand the video retrieval capabilities of  
47 the Capitol Complex. The design, installation, and  
48 maintenance of this system are delegated to the SSB.  
49 The Capitol Police Board directed that cameras would  
50 only be used for matters related to national security  
51 and legitimate law enforcement purposes (e.g., serious  
52 crimes). The COO is the sole authority for the approval  
53 of any and all requests for archived video footage, with  
54 the exception of the Office of the Inspector General  
55 (OIG) which has the ability to duplicate archived video  
56 footage for its own investigations.

57 In addition, this policy identifies the expectations for  
58 accessing and using video footage. This policy does  
59 not apply to the use of video as an operational aid  
60 (e.g., supporting the USCP Command Center  
61 Operations during an incident). Instead, this policy is  
62 intended to safeguard against the transfer of archival  
63 video for non-operational activities (e.g., as an aid to  
64 officers in filing reports). Video footage received  
65 through an approved request should not be delivered,  
66 copied, or transmitted to anyone other than necessary  
67 parties (e.g., court, General Counsel) without approval  
68 from the COO.

69 The USCP, through SSB, maintains a sophisticated  
70 closed circuit television system (CCTV) system that  
71 includes cameras strategically placed throughout the  
72 Capitol Complex to provide situational awareness to

1 USCP personnel, supporting national security, and  
2 legitimate law enforcement purposes.

### 3 Requesting Archived Video Footage

4 The CP-411 must be routed through the chain of  
5 command and ultimately approved by the COO. A  
6 requesting official must also have signed the signature  
7 sheet acknowledging they have received and reviewed  
8 this policy and relevant standard operating  
9 procedures. Requests for archived video footage via  
10 the CP-411 must be made at least at the level of  
11 Sergeant (or their civilian equivalent) and should be  
12 reviewed and approved by the relevant Deputy Chief  
13 (or civilian equivalent) before it is sent to the Office of  
14 the COO for official approval. The COO will forward  
15 the request to the SSB upon approval.

### 16 Accessing Archived Video Footage

17 Workstations, as well as the requisite access  
18 privileges for access to archived video footage from  
19 the Video Management System (VMS), are issued by  
20 the SSB to officials (mostly at the rank of Captain and  
21 above) in the Operational Bureaus. In addition, the  
22 SSB provides access privileges to any individual in  
23 organizations that frequently require video footage for  
24 operational purposes, including the USCP Command  
25 Center, Communications, the Criminal Investigations  
26 Section, OGC, OPR, OIG, and SSB. Archived video  
27 can be used for operational activities, including  
28 supporting Command Center Operations during an  
29 incident or supporting USCP investigation. USCP  
30 personnel should not use or reference archived video  
31 in their reports which are used in court proceedings  
32 unless they have written approval from the COO.

33 Retrieving, using, or duplicating archived video footage  
34 in cases not related to national security or significant  
35 law enforcement operations (e.g., traffic stops,  
36 accident reporting), could expose the location of our  
37 CCTV cameras or identify our surveillance tactics. This  
38 presents a threat to national security, as making this  
39 information public could be utilized by a potential  
40 adversary.

41 Video footage should be used only in the prescribed  
42 manner documented in the CP-411 within the strict  
43 controls outlined in this policy. If the reason for a  
44 request or usage of the video footage changes,  
45 another CP-411 form should be completed and

46 provided through the proper chain of command to  
47 amend the initial CP-411.

## 48 Responsibilities/Procedures

### 49 Security Services Bureau

50 SSB is responsible for the following:

- 51 1. Process an approved request and schedule a time  
52 for the requesting official to pick-up the video  
53 footage. Only the requesting official or an alternate  
54 designated in writing by the requesting official may  
55 pick up the video.
- 56 2. Assign a request tracking number to ensure  
57 accountability and proper internal controls and  
58 record all video requests and custody transfers  
59 with the assigned tracking number in an approved  
60 location. Any changes to the original request will  
61 require a new CP-411.
- 62 3. Stores video footage for 30 days per system  
63 capabilities. Officials should be aware that system  
64 maintenance or malfunctions may make video  
65 unavailable prior to the 30 days. For this reason,  
66 video retrieval requests should be made promptly.  
67 SSB will maintain an archive of any approved  
68 video footage requests.

## 69 Additional Information

70 Retrieval, use, or duplication of archived video footage  
71 would not be in compliance with the intent of Congress  
72 when it established the VMS.

## 73 Cancellation

74 None.

## 75 Appendices

76 None.



77 **Kim C. Dine**  
78 **Chief of Police**



**UNITED STATES CAPITOL POLICE  
REQUEST FOR VIDEO RECORDINGS**

(Please Type or Print Legibly)

TO BE COMPLETED BY REQUESTING EMPLOYEE			
<b>1. TYPE OF RECORDING</b>	<input type="checkbox"/> REVIEW <input type="checkbox"/> CD/DVD <input type="checkbox"/> PHOTO/SHOT		
<b>2. REASON FOR REQUEST</b>	<input type="checkbox"/> COURT <input type="checkbox"/> SUBPOENA <input type="checkbox"/> TRAINING <input type="checkbox"/> OPR <input type="checkbox"/> OGC/OEC <input type="checkbox"/> OTHER (explain) _____		
<b>3. REQUEST DATE</b>		<b>4. DATE NEEDED</b>	
<b>4. TYPE OF EVENT</b>	<b>5. EVENT DATE AND TIME</b>	<b>6. LOCATION OF EVENT</b>	<b>7. CAMERAS</b>
<b>8. VIDEO START DATE</b>		<b>10. VIDEO END DATE</b>	
<b>9. VIDEO START TIME</b>		<b>11. VIDEO END TIME</b>	
<b>12. CFN</b>		<b>13. CCN</b>	
<b>14. NAME AND UNIT OF OFFICER(S) INVOLVED</b>		<b>15. UNIT</b>	
<b>16. REQUESTING OFFICIAL</b>		<b>17. UNIT</b>	
<b>18. OFFICE PHONE</b>		<b>19. CELL PHONE</b>	
<b>20. DESIGNATED ALTERNATE (PICK-UP)</b>		<b>21. UNIT</b>	
<b>22. OFFICE PHONE</b>		<b>23. CELL PHONE</b>	
CHIEF OF OPERATIONS APPROVAL			
<b>24. SIGNATURE</b>	<b>25. PRINTED NAME</b>	<b>26. DATE</b>	
TO BE COMPLETED BY SYSTEM OPERATIONS SECTION (SOS)			
<b>27. SIGNATURE</b>	<b>28. PRINTED NAME</b>		
<b>29. VIDEO REQUEST TRACKING NUMBER</b>	<b>30. DATE COMPLETED</b>		
TO BE COMPLETED BY EMPLOYEE RECEIVING VIDEO			
<b>WARNING: UNAUTHORIZED USE, DUPLICATION OR DISSEMINATION OF INFORMATION CONTAINED ON THIS CD/DVD MAY RESULT IN APPROPRIATE ADVERSE ACTION</b>			
<b>31. EMPLOYEE SIGNATURE</b>	<b>32. EMPLOYEE PRINTED NAME</b>	<b>33. DATE</b>	



**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA  
CRIMINAL DIVISION**

<b>DISTRICT OF COLUMBIA</b>	:	
	:	<b>Docket No.: 2018 CTF 017464</b>
v.	:	<b>Court Date: January 22, 2019</b>
	:	<b>Courtroom 116</b>
	:	
<b>RICKY WISEMAN</b>	:	

**PROTECTIVE ORDER CONCERNING THE DISCLOSURE AND USE OF UNITED STATES CAPITOL POLICE SURVEILLANCE VIDEO**

It is this \_\_\_\_\_ day of \_\_\_\_\_, 201\_, hereby

ORDERED that Bryan Brown, attorney for the defendant be permitted to obtain a copy of the street video; and it is

FURTHER ORDERED that Bryan Brown may show the street video in court as necessary to litigate this matter and the video shall not be used for any other case or purpose; and it is

FURTHER ORDERED that Bryan Brown may only show the street video to the defendant and any investigators working on this case and shall not share the street video nor show it to any other person not directly affiliated with this case; and it is

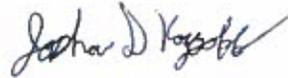
FURTHER ORDERED that neither Bryan Brown, his investigators, nor the defendant are to reproduce, share, disseminate, nor discuss with any person not named in this Order, the depictions shown in the street video; and it is

FURTHER ORDERED that Bryan Brown must return the street video to the Office of the Attorney General after the later of a plea, trial or sentencing in the above-entitled case.

\_\_\_\_\_  
Honorable Judge \_\_\_\_\_

**CERTIFICATE OF SERVICE**

I hereby certify that on this 26th day of December, 2018, a true copy of the foregoing District of Columbia's Motion for Protective Order Concerning the Disclosure and Use of United States Capitol Police Street Video was sent electronically to Bryan Brown, counsel for the defendant.



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JOSHUA KARPOFF  
Assistant Attorney General

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA  
CRIMINAL DIVISION**

<b>DISTRICT OF COLUMBIA</b>	:	
	:	<b>Docket No.: 2018 CTF 017464</b>
v.	:	<b>Court Date: January 22, 2019</b>
	:	<b>Courtroom 116</b>
	:	
<b>RICKY WISEMAN</b>	:	

**DISTRICT OF COLUMBIA’S MOTION FOR PROTECTIVE ORDER CONCERNING  
THE DISCLOSURE AND USE OF UNITED STATES CAPITOL POLICE STREET  
VIDEO**

The District of Columbia (“District”), by and through its attorney, the Office of the Attorney General, hereby moves for a protective order concerning the disclosure and use of United States Capitol Police (“USCP”) street video. In support of its motion, the District makes the following representations:

**PROCEDURAL BACKGROUND**

On November 28, 2018, the defendant was charged with Driving Under the Influence (“DUI”), in violation of D.C. Code § 50-2206.11(2014 Repl.), and Operating a Vehicle While Impaired (“OWI”), in violation of D.C. Code § 50-2206.14 (2014 Repl.). The case is set for status on January 22, 2019. On December 26, 2018, undersigned counsel received a copy of street video footage related to this case. For national security reasons, as indicated below, the District now files its motion for a protective order.

**STATEMENT OF FACTS**

On November 1, 2018, at approximately 11:01 p.m., Ricky Wiseman (“defendant”) was arrested for impaired driving after he was observed exiting the C-Street garage of the U.S. House of Representatives Cannon building, located at 25 Independence Avenue, S.E., Washington, D.C.

## ARGUMENT

### **THE COURT HAS DISCRETION TO ISSUE THE PROTECTIVE ORDER IN THIS CASE.**

The Court has discretion to issue the protective order given the parameters the government requests. *See, e.g., Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 219 (1979) (recognizing the need to protect confidential sources in criminal investigations); *Black v. Sheraton Corp. of America*, 184 U.S. App. D.C. 46, 60-61, 564 F.2d 531, 545-46 (1977) (same). Courts also have recognized the importance of protecting investigative techniques. *Id.* at 60-61, 564 F.2d at 545-46. *Harris v. United States*, 594 A.2d 546, 548-49 (D.C. 1991) is instructive. In *Harris*, the Court issued a protective order to defense counsel prohibiting him from sharing a video-taped statement with the defendant, but allowed defense to speak to the defendant regarding the substance of the information. *Id.* The Court held that “[a] restriction on defense counsel that prevents him from revealing what is possibly *Jencks* material does not materially interfere with counsel's duty to advise a defendant on trial-related matters.” *Id.*, 594 A.2d at 549, citing *State v. Schaeffer*, 217 Neb. 4, 6, 346 N.W.2d 701, 703 (1984) (“It is difficult to equate denial of the right to speak to a client with a prohibition against disclosure of the contents of a nonrelevant document...”). Furthermore, the Court found that this restriction was reasonable. It went on to hold that “the trial court imposed the temporary restriction on defense counsel to allow him the opportunity to review the tape before the trial court ruled on the government's request for a protective order. The trial court's procedure enabled counsel to argue the next day against the issuance of a protective order.” *Id.*, 594 A.2d at 549, relying on *United States v. Eniola*, 282 U.S.App.D.C. 176, 181, 893 F.2d 383, 388 (1990) (“The essence of the sixth amendment threshold is whether defense counsel has demonstrated that the [argued] defense has

legitimate potential such that [defense counsel] is entitled freely to discuss the strategies with his client for attempting to prove the defense.”).

Here, the release of Capitol security street videos could compromise USCP’s ability to protect the Capitol. The USCP’s primary mission is to police the United States Capitol Buildings and Grounds,<sup>1</sup> and it has the power to enforce the laws of the District of Columbia pursuant to 2 U.S.C. §1961. As part of its policing responsibilities, the USCP maintains and controls a series of video surveillance cameras throughout the Capitol Grounds. The purpose of the cameras is to assist in the maintenance of national security by detecting threats to U.S. Congressmen, their staff, and constituents, deterring and preventing terrorism, and providing for the safety and security of the Capitol Buildings and Grounds. The cameras are generally not used to collect evidence in criminal matters.

The release of security information by USCP is governed by 2 U.S.C. § 1979 (b):

Notwithstanding any other provision of law, any security information in the possession of the Capitol Police may be released by the Capitol Police to another entity, including an individual, only if the Capitol Police Board determine in consultation with other appropriate law enforcement officials, experts in security preparedness, and appropriate committees of Congress, that the release of security information will not compromise the security and safety of the Capitol buildings and grounds or any individual whose protection and safety is under the jurisdiction of the Capitol Police.

“Security information” is defined as any information that is “sensitive with respect to the policing, protection, physical security, intelligence, counterterrorism actions, or emergency preparedness and response relating to Congress ... and the Capitol building and grounds” which is obtained by the Capitol Police. 2 U.S.C. § 1979 (a). The locations and capabilities of the

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<sup>1</sup> The streets and physical locations included in USCP’s jurisdiction are outlined in 2 U.S.C. § 1967 (b).

street cameras fall under this definition of security information, as this information directly concerns the policing and protection of the Capitol grounds.

Revealing the locations and capabilities of these cameras could jeopardize USCP's mission to protect the Capitol grounds. The dissemination of information concerning the location and technical capabilities, including the ability to focus, pan, and zoom on a moving or stationary object, as well as information about the image quality will aid people who are intent on finding weaknesses in the United States' ability to protect the Capitol buildings, grounds, and individuals whose protection and safety is under the jurisdiction of the Capitol Police. In the past year the District has prosecuted hundreds of impaired driving cases brought by Capitol Police. Even assuming that many of these arrests were not caught on video and that some of the arrests occurred at the same locations, the systematic release of all of these Capitol security videos in the future would compromise the ability of USCP to protect the Capitol.

The District acknowledges that pursuant to its duty under Super Ct. Crim. R. P. 16, street video obtained by USCP may be discoverable. In *Howard v. United States*, 656 A.2d 1106, 1111 (D.C. 1995), the Court also allowed reasonable issuance of a protective order. The Court held

Before trial, the prosecutor, out of concern for his obligations under *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), informed the court and defense counsel that Derrick Ross was a suspect in an unrelated armed robbery, although there was no basis for believing that Ross was aware he was under suspicion. The court ruled that this information was too attenuated to fall within the demands of *Brady*. The court issued a protective order prohibiting defense counsel from discussing this information with appellant Howard and from using it as a basis for cross-examining Ross. On appeal, Howard contends that this protective order violated his Sixth Amendment right to counsel, as well as his rights under the Confrontation Clause. We find no abuse of discretion in the court's issuance of this protective order.

*Howard*, 656 A.2d 1106, at 1111 relying on *United States v. Anderson*, 509 F.2d 724, 730 (9th Cir. 1975) ("the district court can and should, when appropriate, place defense counsel under

enforceable orders against unwarranted disclosure of the evidence that he has heard.”). The government seeks to impose a similar reasonable restriction in this case. Preventing the defense from sharing the locations of these cameras does not interfere with the defendant’s rights to confer with counsel or assist with his defense.

The Court should balance the public safety interest of protecting our elected officials with the defendant’s right to prepare his defense by issuing a protective order that permits the defendant to prepare for trial and litigate the case but which limits the defendant, and his counsel, from reproducing the videos or using them for any reason not directly related to the litigation of this matter. Thus, the District respectfully asks this Court to issue a protective order pursuant to Super Ct. Crim. R. P. 16 (d), which would control the disclosure and use of the street camera video by the defendant and defense counsel.

A protective order is required in this case because the release of USCP security street videos could compromise USCP’s ability to protect the Capitol. Therefore, the government requests that the Court order that when the defendant obtains a copy of the street video, he shall not use this video for any other case or purpose and that his defense counsel shall only be allowed to show the video to the defendant and any investigators working on the case. The government also requests that the Court order that neither defense counsel, his investigators, nor the defendant are to reproduce, share, disseminate, nor discuss with any person not named by the Court in the requested protective order, the depictions shown in the street video. This order should include that all shall be identified to the government and they shall sign a protective order to be prepared by the government which precludes the dissemination to any other person of the disclosed information; "disclosed information" includes any later acquired information derived from the initial disclosure. Finally, the government requests that the Court order that defense

counsel must return the street video to the Office of the Attorney General after the later of a plea, trial or sentencing in the above-entitled case.

This protective order would serve the security interests of USCP in protecting our elected officials while allowing the District to comply with its Rule 16 obligations.

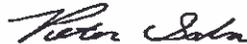
**CONCLUSION**

Based upon the foregoing facts and arguments, the District respectfully requests that this Court grant the District's motion for a protective order concerning the use, reproduction, and disclosure of the United States Capitol Police street video.

Respectfully submitted,

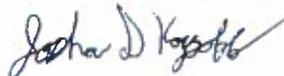
KARL A. RACINE  
Attorney General for the District of Columbia

TAMAR MEEKINS  
Deputy Attorney General, Public Safety Division



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PETER SABA [975945]  
Chief, Criminal Section



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UNITED STATES CAPITOL POLICE  
WASHINGTON, DC 20510-7218

Phone 202-224-5151

January 11, 2021

**Information Sharing Agreement**

Officials and agents of the Metropolitan Police Department of the District of Columbia (MPD) coordinating with the United States Capitol Police (USCP) during the course of investigations related to the events of January 6, 2021 relating to the U.S. Capitol, acknowledge, understand, and agree that the USCP is a legislative branch agency and, as such, all information, to include video, audio, photographic and documentary information, shared by the USCP during these investigations, shall remain in the legal control of the USCP subject to any and all applicable release and non-disclosure requirements of Congress. Information exchanged as part of these investigations shall not be reclassified. All information originating with and provided by the USCP as part of these investigations remains the property of and under the legal control of the USCP, and if provided to MPD will be returned to the USCP at the conclusion of the investigation. This restriction does not apply to any video, audio, photographic or documentary evidence that is used as evidence or discovery as part of any prosecution of any criminal offense.

Handwritten signature of Sean P. Gallagher in black ink.

Sean P. Gallagher  
Acting Assistant Chief  
United States Capitol Police

Handwritten signature of Captain Carlos Heraud in black ink.

Captain Carlos Heraud  
Homicide Branch Commander  
Metropolitan Police Department of the District of Columbia





UNITED STATES CAPITOL POLICE  
WASHINGTON, DC 20510-7218

Phone 202-224-5151

January 10, 2021

**Information Sharing Agreement**

Officials and agents of the Federal Bureau of Investigation (FBI) coordinating with the United States Capitol Police (USCP) during the course of investigations related to the events of January 6, 2021 relating to the U.S. Capitol, acknowledge, understand, and agree that the USCP is a legislative branch agency and, as such, all information, to include video, audio, photographic and documentary information, shared by the USCP during these investigations, shall remain in the legal control of the USCP subject to any and all applicable release and non-disclosure requirements of Congress. Information exchanged as part of these investigations shall not be reclassified. All information originating with and provided by the USCP as part of these investigations remains the property of and under the legal control of the USCP, and if provided to the FBI will be returned to the USCP at the conclusion of the investigation. This restriction does not apply to any video, audio, photographic or documentary evidence that is used as evidence or discovery as part of any prosecution of any criminal offense.

  
Sean P. Gallagher  
Acting Assistant Chief  
United States Capitol Police

  
Steven Michael D'Antuono  
Assistant Director in Charge  
Washington Field Office  
Federal Bureau of Investigation

*Nationally Accredited by the Commission on Accreditation for Law Enforcement Agencies, Inc.*



UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	Case No.: 21-CR-266
v.	:	
	:	
BRANDON MILLER	:	
	:	
AND	:	
	:	
STEPHANIE MILLER,	:	
	:	
Defendants.	:	

**PROTECTIVE ORDER GOVERNING DISCOVERY**

To expedite the flow of discovery material between the parties and adequately protect the United States’ legitimate interests, it is, pursuant to the Court’s authority under Fed. R. Crim. P. 16(d)(1) and with the consent of the parties, ORDERED:

1. **Materials Subject to this Order.** This Order governs materials provided by the United States at any stage of discovery during this case and which the United States has identified as either “Sensitive” or “Highly Sensitive.” Examples of materials that the United States may designate as “Sensitive” or “Highly Sensitive” pursuant to this Order include but are not limited to:

- a. Personal identity information as identified in Rule 49.1 of the Federal Rules of Criminal Procedure, as well as telephone numbers, email addresses, driver’s license numbers, and similar unique identifying information;
- b. Information regarding the government’s confidential sources;
- c. Information that may jeopardize witness security;
- d. Contact information for, photographs of, and private conversations with individuals that do not appear to be related to the criminal conduct in this case;
- e. Medical or mental health records;
- f. Sources and methods law-enforcement officials have used, and will continue to use, to investigate other criminal conduct related to the publicly filed charges;
- g. Surveillance camera footage from the U.S. Capitol Police’s extensive system of cameras on U.S. Capitol grounds;<sup>1</sup>

<sup>1</sup> To be clear, this does not include footage from body worn cameras from other police departments that responded

- h. Repair estimates from the Architect of the Capitol;
- i. Materials designated as “security information” pursuant 2 U.S.C. §1979; and
- j. Tax returns or tax information.

This Order will not be used to designate materials as Sensitive or Highly Sensitive unless such designation is necessary for one of the reasons stated in this paragraph or for a similar reason not anticipated by this Order. The government agrees to make every effort to provide discovery in a manner that will allow for most discovery to be produced without such designations.

2. **Defendant.** Any reference to “Defendant” herein refers individually to each defendant identified in the caption above.

3. **Legal Defense Team.** The “legal defense team” includes defense counsel (defined as counsel of record in this case, including any post-conviction or appellate counsel) and any attorneys, investigators, paralegals, support staff, and expert witnesses who are advising or assisting defense counsel in connection with this case.

4. **Rules for the Handling of Sensitive and Highly Sensitive Materials.**

- a. **Limitations on Use.** Defendant and the legal defense team may use Sensitive and Highly Sensitive discovery materials solely in connection with the defense of this case and any other case connected to the events at the United States Capitol on January 6, 2021, including any post-conviction or appellate litigation, and for no other purpose, and in connection with no other proceeding, without further order of this Court.
- b. **Limitations on Dissemination.** No Sensitive or Highly Sensitive materials, or the information contained therein, may be disclosed to any persons other than Defendant, the legal defense team, or the person to whom the Sensitive or Highly Sensitive information solely and directly pertains or his/her counsel, without agreement of the United States or prior authorization from the Court.
- c. **Limitations on Reproduction.** Defendant, the legal defense team, and authorized persons shall not copy or reproduce the Sensitive or Highly Sensitive materials except in order to provide copies of the materials for use in

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on January 6, 2021, the vast amount of which the United States will *not* designate as Sensitive or Highly Sensitive. (Body worn camera footage will be marked Sensitive or Highly Sensitive only if it contains material described in paragraph one above or for a similar reason not anticipated by this Order.)

connection with this case by Defendant, the legal defense team, the person to whom the Sensitive or Highly Sensitive information solely and directly pertains or his/her counsel, and other persons to whom the Court may authorize disclosure (collectively, “authorized persons”).

If defense counsel provides Defendant access to Sensitive or Highly Sensitive materials, defense counsel must advise Defendant that Defendant may not record any personal identity information as identified in Rule 49.1 of the Federal Rules of Criminal Procedure or any telephone numbers, email addresses, driver’s license numbers, and similar unique identifying information. By signing the attached affirmation, Defendant agrees not to do so.

Copies and reproductions, and any notes or records made in relation to the contents of the Sensitive and Highly Sensitive materials, are to be treated in the same manner as the original materials.

- d. **Court Filings.** Absent prior agreement by the parties or permission from the Court, no party shall disclose materials designated as Sensitive or Highly Sensitive in any public filing with the Court. Such materials shall be submitted under seal in accordance with Local Criminal Rule 49(f)(6). The Clerk of Court shall accept for filing under seal any filings made in compliance with that Rule and so marked by the parties pursuant to this Order.
- e. **Court Hearings.** The restrictions in this Order shall not limit either party in the use of the materials in judicial proceedings in this case. The procedures for use of designated Sensitive and Highly Sensitive materials during any hearing or the trial of this matter shall be determined by the parties and the Court in advance of the hearing or trial. No party shall disclose materials designated Sensitive or Highly Sensitive in open court without agreement by the parties that such materials may be disclosed in open court or prior authorization by the Court.

5. **Additional Rules for Handling of Sensitive Materials.** The following additional terms apply to Sensitive materials:

- a. **Storage.** Sensitive materials must be maintained in the custody and control of Defendant, the legal defense team, and authorized persons. This restriction shall not apply to the person to whom the Sensitive information solely and directly pertains or his/her attorney.

6. **Additional Rules for Handling of Highly Sensitive Materials.** The following additional rules apply to Highly Sensitive materials:

- a. **Additional Limitations on Dissemination.** Defense counsel may not provide a copy of Highly Sensitive materials to Defendant or permit Defendant to view such materials unsupervised by defense counsel or an attorney, investigator, paralegal, or support staff person employed by defense counsel. The parties agree that defense counsel or an attorney, investigator, paralegal, or support staff person employed by defense counsel, may supervise Defendant by allowing access to Highly Sensitive materials through a cloud-based delivery system that permits Defendant to view the materials but does not permit Defendant the ability to download; provided that, prior to doing so, defense counsel first provides notice to the United States and allow the United States to file an objection with the Court if no agreement is reached.
- b. **Additional Limitations on Reproduction.** Counsel agrees that prior to showing materials to Defendant designated as Highly Sensitive, counsel or an attorney, investigator, paralegal, or support staff person employed by defense counsel will read Defendant the relevant parts of this Order, and remind Defendant of the consequences of violating the Order. If Defendant takes notes regarding Highly Sensitive materials, counsel or an attorney, investigator, paralegal, or support staff person employed by defense counsel must take reasonable steps to determine whether Defendant has copied any personal identity information as identified in Rule 49.1 of the Federal Rules of Criminal Procedure or any telephone numbers, email addresses, driver's license numbers, and similar unique identifying information.
- c. **Storage.** Highly Sensitive materials must be maintained in the custody and control of the legal defense team and authorized persons. This restriction shall not apply to the person to whom the Highly Sensitive information solely and directly pertains or his/her attorney.

7. **Viewing by Incarcerated Defendants.** If Defendant is in the custody of the United States Marshals Service, defense counsel is authorized to provide a copy of discovery materials to the appropriate point of contact so that the defendant can view the discovery materials, subject to the terms of this Order.

8. **Disputes.** The parties shall make a good faith effort to resolve any dispute about a sensitivity designation before requesting the Court's intervention. The United States may agree to remove or reduce a sensitivity designation without further order of this Court. Whenever the redaction of specified information will resolve the basis for which a sensitivity designation was applied, the United States will agree to redaction, and such redaction will render the materials no

longer subject to this Order. Any agreement to reduce or remove a sensitivity designation or to redact specific information shall be memorialized in writing.

9. **Modification Permitted.** Nothing in this Order shall prevent any party from seeking modification of this Order nor prevent the defense from contesting a sensitivity designation. The parties agree that the burden of demonstrating the need for a protective order remains with the government at all times.

10. **Failure not Waiver.** The failure by the United States to designate any materials as Sensitive or Highly Sensitive upon disclosure shall not constitute a waiver of the United States' ability to later designate the materials as Sensitive or Highly Sensitive but the government must separately identify and memorialize the changed status of those materials in writing.

11. **Automatic Exclusions from this Order.** This Order does not apply to materials that:

- a. Are, or later become, part of the public court record, including materials that have been received in evidence in this or other public trials or hearings;
- b. Were derived directly from Defendant or that pertain solely to Defendant. Examples of such materials include Defendant's own financial records, telephone records, digital device downloads, social media records, electronic communications, arrest records, and statements to law enforcement;<sup>2</sup> and
- c. Materials that the defense obtains by means other than discovery.

12. **Government's Discovery Obligations.** Nothing in this Order modifies the United States' obligations at any stage of discovery in this case pursuant to Federal Rules of Criminal Procedure 16 and 26.2, Local Criminal Rule 5.1, 18 U.S.C. § 3500 (the Jencks Act),

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<sup>2</sup> Discoverable materials that were derived directly from Defendant or that pertain solely to Defendant are exempt from this Order regardless of whether the United States has designated any such materials as "Sensitive" or "Highly Sensitive" because the same materials are being provided or made available to co-defendants or other persons charged in connection with the events at the United States Capitol on January 6, 2021.

and the government's general obligation to produce exculpatory and impeachment information in criminal cases.

13. **Defense Counsel's Obligations.** Defense counsel must provide a copy of this Order to, and review the terms of this Order with, members of the legal defense team, Defendant, and any other person, before providing them access to Sensitive or Highly Sensitive materials. Defense counsel must obtain a fully executed copy of Attachment A before providing Defendant access to Sensitive or Highly Sensitive materials, and must file a copy with the Court within one week of execution.

14. **No Ruling on Discoverability or Admissibility.** This Order does not constitute a ruling on the question of whether any particular material is properly discoverable or admissible and does not constitute any ruling on any potential objection to the discoverability or admissibility of any material.

15. **Duration.** The terms of this Order shall remain in effect after the conclusion of this case and the parties shall be bound by it unless otherwise ordered by the Court.

**SO ORDERED** this 27th day of May, 2021.

*Tanya S. Chutkan*

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HONORABLE TANYA S. CHUTKAN  
United States District Judge

**ATTACHMENT A**

**Defendant's Acknowledgment**

I have reviewed this Protective Order in its entirety and have been given the opportunity to ask any questions I may have had. I am satisfied that I fully understand this Protective Order and I agree to abide by its terms. No threats have been made to me, nor am I under the influence of anything that could impede my ability to understand this Protective Order fully. My agreement to abide by this Order shall not be construed as a waiver of any of my Constitutional or statutory rights as a Defendant before this court.

\_\_\_\_\_  
Date

\_\_\_\_\_  
NAME:  
Defendant