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.	:	

UNITED STATES' REPLY TO DEFENSE'S OPPOSITION REGARDING THE MOTION FOR PROTECTIVE ORDER

The United States of America hereby respectfully moves the Court to issue the proposed protective order requested by the government, overrule defendants' objection to the proposed order and deny the defendants' proposed modifications to the order. Unique aspects of the Capitol Attack cases provide good cause for requiring defendants to acknowledge their understanding of the order. Moreover, such a provision neither requires defendants to make improperly compelled statements nor deny defendants effective representation. Rather, the acknowledgement helps facilitate defendants to review discovery while providing additional protections given the wide-spread access to it. For these reasons and others, as further explained below, the government asks this court to issue the government's proposed protective order as requested in its Motion for a Protective Order, ECF 15.

A. The proposed protective order, including Defendant's Acceptance, is a reasonable order, supported by good cause, to facilitate discovery given complex challenges unique to the Capitol Attack prosecutions.

1. Unique aspects of the Capitol Attack prosecutions distinguish it from other criminal cases and justify the need for the additional protection covered by the defendants accepting the protective order. The government will provide a vast amount and array of discovery materials, including audio recordings, transcripts, computer files, business records, telephone records, and other materials. Indeed, the investigation already involves thousands of hours of video, over a thousand electronic devices, thousands of reports, and the numbers continue to grow as more suspects are identified and arrested. These materials are very likely to contain sensitive information regarding the defendants themselves as well as others charged in Capitol Attack cases. Moreover, additional obstacles hinder the typical distribution of discovery, including defendants and counsel being geographically separated and limitations on in-person meeting due to the COVID-19 pandemic.

2. To fulfill its discovery obligations in this context, the government plans to provide defendants with direct access to this discovery. Doing so certainly invites risk as all Capitol Attack defendants will have access to all the discovery, in itself creating challenges to identify and hold any one defendant accountable should anyone violate the protective order. A defendant's acknowledgment that he or she understands the protective order, as provided in Attachment A of the proposed order (hereinafter "Defendant's Acceptance), helps offset those risks through ensuring defendants understand the Court's orders on how sensitive discovery is to be treated. Significantly, the government did not create the proposed protective order in a vacuum; rather, the proposed order, including the Defendant's Acceptance, was crafted in collaboration with the Federal Public Defender's Office. Accordingly, that tension between the obligations to provide such a wide-range of discovery and the obstacles involved in doing so in Capitol Attack cases provides good cause to

require defendants to acknowledge they understand the protective order to provide some additional protection to sensitive discovery.

B. Defendant's Acceptance of the protective order does not amount to improperly compelled statements or otherwise impugn the attorney-client relationship.

3. The defendant suggests that the Defendant's Acceptance is tantamount to compelling a defendant's statement and would constitute (or lead to) a violation of the attorney-client privilege. Resp. to Gov. Mot. for Protective Order (hereinafter "Response"), 1-2, ECF 18. Neither suggestion is accurate. First, the Defendant's Acceptance does not create a statement against interest implicating the constitutional protections upheld in *Miranda v. Arizona*, 384 U.S. 436 (1966) or *Edwards v Arizona*, 451 U.S. 477 (1981), on which the defendant relies. Response at 1-2.[1] Proceedings conducted by this Court while defendants are represented by counsel are a far cry from the custodial interrogations at issue in those cases whereby police officers violated individual constitutional rights. Rather, here, the Court would simply be ensuring defendants understand its orders, much like courts engage in a colloquy with defendants when setting conditions of release to ensure defendants understand the conditions and when they need to return to court. Defendants' statements during those advisements would certainly be used in any contempt proceeding or prosecution for failure to appear pursuant to 18 U.S.C. § 3146. Defendant's Acceptance is no different and would not amount to an improperly compelled statement violating constitutional rights.

4. Second, the Defendant's Acceptance does not violate—nor would it lead to a violation of—the attorney-client privilege. At bottom, the Defendant's Acceptance requires a defendant to

[1] The defendant also invokes *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943), apparently for the proposition that the First Amendment protects his decision not to sign the Defendant's Acceptance. *See* Response, 1-2. But *Barnette* involved a student's refusal to salute the flag on religious grounds, *id.* at 627-30, which is far afield from the issue currently before the Court. The defendant does not argue, nor is it otherwise apparent, that his refusal to sign the Defendant's Acceptance rests on a religious objection.

acknowledge that he or she has reviewed the protective order with counsel, understands the protective order's provisions, and is satisfied with counsel's services with respect to review of the protective order. Ensuring defendants are satisfied with their defense attorneys does not foreclose their opportunity to seek relief regarding their representation. Other court proceedings, such as in a guilty plea, ask defendants the very same question. Even when pleading guilty, defendants still maintain their right to file a claim for relief under 18 U.S.C. § 2255, regardless of any representation that they are satisfied with their counsel. *See Hill v. Lockhart*, 474 U.S. 52 (1985). Likewise, defendants here would still preserve their ability to pursue a claim under 18 U.S.C. § 2255, presuming they can show their defense attorney failed to provide effective assistance of counsel pursuant to *Strickland v. Washington*, 466 U.S. 688 (1984).

C. Defendants refusing to acknowledge the protective order would result in more restrictive access to sensitive discovery.

5. While the government requests the Court use its authority to issue the proposed protective order, including Defendant's Acceptance, the Defendant's Acceptance is in no way a precondition for providing discovery to the legal defense team and the defendant. The government requests that the defendant acknowledge understanding of the order, whether in writing as contemplated by the Defendant's Acceptance or through an on-the-record colloquy with the Court covering the same substantive information.[2] As previously argued, such acknowledgment would offset the specific risks involved in the Capitol Attack prosecutions.

[2] In its initial motion, the government suggested a colloquy with the Court would be a sufficient substitute to signing Attachment A. U.S.'s Mot. for a Prot. Order, n. 6, ECF 15. As discussed below, government counsel raised this possibility with defense counsel as a means of resolving defense counsel's concerns with Defendant's Acceptance. The government remains open to this alternative to signing Defendant's Acceptance.

6. Should the defendant nonetheless refuse to acknowledge understanding of the protective order, the government would move to modify the protective order to further restrict the means by which the legal defense team can share sensitive information with defendants to provide additional protections for those materials. Rather than having direct access to sensitive materials, defendants would only be able to view sensitive and highly sensitive discovery in the physical presence of the legal defense team. Defense counsel and the legal defense team would be responsible for logistics ensuring defendants had the ability to review sensitive materials in their physical presence. If such a situation arises, whereby defendants refuse to acknowledge understanding of the protective order, the government would request the Court admonish defendants of such a protective order and specifically advise defendants of the more restricted access defendants will have to sensitive discovery. If, in such a situation, defense counsel later determines the more restrictive access is too burdensome, the government will remain open to defendants accepting the protective order later and receiving direct access to sensitive material as contemplated in the proposed protective order.

D. Additional objections fail to undermine the good cause presented in Capitol Attack cases to issue the proposed protective order, including Defendant's Acceptance.

7. The government has made efforts to resolve some of the disputes defense counsel continues to raise. For instance, the defense highlights an unspecified concern with language from the Defendant's Acceptance stating, "and all matters related to it." *See* Response at 1 and ¶ 7. In an effort to resolve this concern, the government emailed defense counsel on April 9, 2021 with the following suggestion of modifying the language in the Defendant's Acceptance:

> Regarding the issue that the Attachment A would hinder a potential subsequent sec 2255 claim, we can modify the language to better qualify that your clients are satisfied with your service in

> explaining the order. We could use a different phrase, so the sentence would read "I am fully satisfied with legal services provided by my attorney in explaining this Order to me." If you have other language that you think would better address the issue, please let me know what language you think would work.

(Attachment 1). Likewise, the government extended an offer much like what defense counsel proposes that "Parties might even be notified on the records about an order and asked whether they understand, similar the reading of charges at an initial appearance, regardless of whether they agree." Response at ¶ 6. In a previous effort to address this concern, government counsel emailed defense counsel on April 15, 2021 and suggested that defendants engage in a colloquy with the court on the record:

> in which the defendant states that he had time to go over the order with his attorney, that he understands it in full and nothing is impeding his ability to do so, and that he is satisfied with the services of his attorney in explaining the order to him, and the potential consequences of violating it, then we could waive the signing and filing of attachment A.

(Attachment 2.) Accordingly, the government has tried to move beyond semantics and form simply to secure the defendant's understanding of the protective order on the record to provide the additional protections warranted by the unique aspects of the Capitol Attack cases. As noted above, the government remains flexible to the form and specific language of the acknowledgement as long as it covers the same concerns as articulated in Attachment A of the proposed order.

8. The defendant's arguments regarding cases cited in the government's Motion for a Protective Order does not undermine the analysis laid out above. Response at 4. The defendant is correct that the protective order in *District of Columbia v. Ricky Wiseman*, 2018 CTF 017464, did not require an acceptance of the protective order, but that was not a Capitol Attack case and thus did not involve the unique challenges discussed above. And although *United States v. Cudd*, 21-cr-68 and *United States v. McCaughty III*, 21-cr-40, did not directly address the Defendant's

Acceptance, taken with the other Capitol Attack cases cited by the government, they nonetheless collectively demonstrate the widespread acceptance of the government's proposed protective order in Capitol Attack cases, including Defendant's Acceptance.

9. Another Judge of this Court recently considered, and largely rejected, a claim similar to the defendant's here. On May 4, 2021, Judge Mehta denied defense's objection to the proposed protective order, which also addressed the Defendant's Acceptance, in *U.S. v. Muntzer*, 21-cr-105.[3] According to government counsel, while denying the defense objection and maintaining Defendant's Acceptance in the order, the Court required the government to omit the sentence: "I am fully satisfied with the legal services provided by my attorney in connection with this Protective Order and all matters relating to it" in the Defendant's Acceptance. Nonetheless, the government continues to assert defendants should express satisfaction with their counsel in some form to ensure their understanding of the order is thorough.

10. Finally, while left unaddressed in defense counsel's motion, the suggested changes to the protective order referenced in the defense's Appendix A make changes other than addressing the defendants' acceptance of the motion. Specifically, the edits modify the individuals responsible for the limits on reproduction and storage of sensitive materials in paragraphs 4(c) and 5(a) of the proposed protective order. Response, Appendix A, 3, ECF 18.1. The government objects to the suggested edits replacing "defendant" with "counsel" in those paragraphs. Initially, "counsel" would already be covered as part of the "legal defense team," as defined in paragraph 3 of the proposed order. Additionally, the changes serve to unnecessarily dilute defendant's responsibilities in handling sensitive and highly sensitive discovery.

[3] At the time of this filing, the criminal docket for *U.S. v. Muntzer*, 21-cr-105, had not been updated to reflect the ruling on the order.

WHEREFORE, for the reasons stated above, to adequately protect the United States' legitimate interests, the government requests that, pursuant to the Court's authority under Fed. R. Crim. P. 16(d)(1), the Court enter the government's proposed order.

Respectfully submitted,

CHANNING D. PHILLIPS
Acting United States Attorney

By: /s/ Clayton O'Connor
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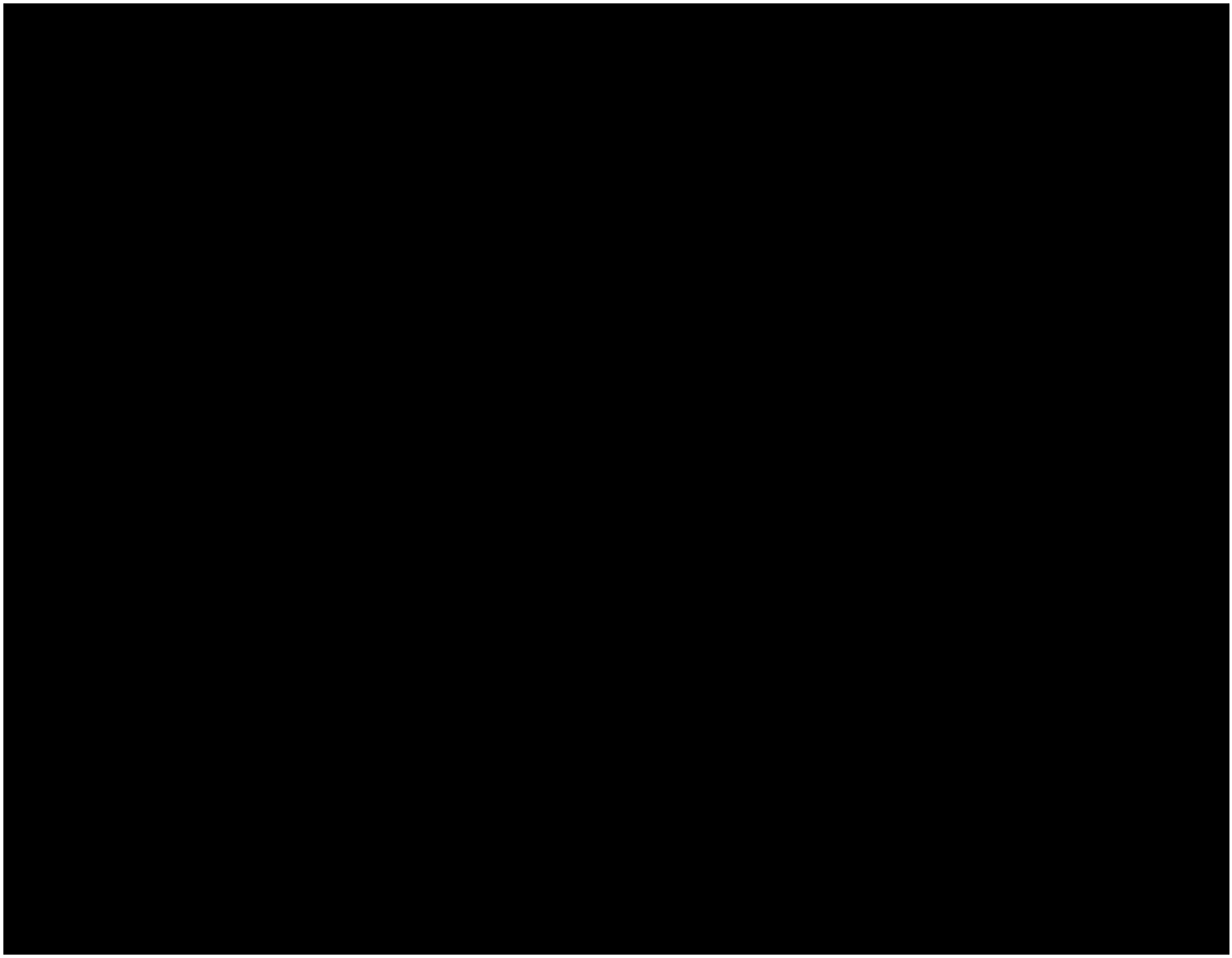
From: O"Connor, Clayton (CRM)
To: jslaight@att.net; "wlw wwelchattorney.com"
Subject: RE: U.S. v. Brandon and Stephanie Miller - protective order
Date: Friday, April 9, 2021 1:49:00 PM

Hi Ms. Slaight and Mr. Welch,

It was good to hear your concerns about the Attachement A at the status conference on Wednesday. While Judge Chutkan looks at the standard order, I wanted to address one concern to see if it helps. Regarding the issue that the Attachment A would hinder a potential subsequent sec 2255 claim, we can modify the language to better qualify that your clients are satisfied with your service in explaining the order. We could use a different phrase, so the sentence would read "I am fully satisfied with legal services provided by my attorney in explaining this Order to me." If you have other language that you think would better address the issue, please let me know what language you think would work. As well, I'm happy to talk further about this at any time.

Have a nice weekend.

Thank you,
Clayton



From: O"Connor, Clayton (CRM)
To: jslaight@att.net; "wlw wwelchattorney.com"
Subject: RE: U.S. v. Brandon and Stephanie Miller - protective order
Date: Thursday, April 15, 2021 11:08:00 AM

Ms. Slaight and Mr. Welch,

The government is open to moving forward on the protective order without your clients signing Attachment A if the court speaks with the Millers about this issue on the record. Ms. Slaight, I believe you have been in touch with Emily Miller about this. Would following through with her suggestions resolve your concerns:

I think if the court engages in a colloquy with the defendant on the record in which the defendant states that he had time to go over the order with his attorney, that he understands it in full and nothing is impeding his ability to do so, and that he is satisfied with the services of his attorney in explaining the order to him, and the potential consequences of violating it, then we could waive the signing and filing of attachment A.

I can update the court on the potential resolution. If you are in agreement on going forward this way, I can let the court know that too.

Thank you,
Clayton