

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA	:	
	:	CASE NO. 21-cr-268 (CJN)
v.	:	
	:	
JEFFREY MCKELLOP,	:	
	:	
Defendant.	:	

**GOVERNMENT’S OPPOSITION TO DEFENDANT’S
MOTION TO TRANSFER VENUE**

Defendant, Jeffrey McKellop, who is charged in connection with events at the U.S. Capitol on January 6, 2021, has moved to transfer venue in this case to the Western District of Virginia. McKellop fails to establish that he “cannot obtain a fair and impartial trial” in this district, Fed. R. Crim. P. 21(a), and this Court should deny his motion.

BACKGROUND

On January 6, 2021, a Joint Session of the United States House of Representatives and the United States Senate convened to certify the vote of the Electoral College of the 2020 U.S. Presidential Election. While the certification process was proceeding, a large crowd gathered outside the United States Capitol, entered the restricted grounds, and forced entry into the Capitol building. As a result, the Joint Session and the entire official proceeding of the Congress was halted until law enforcement was able to clear the Capitol of hundreds of unlawful occupants and ensure the safety of elected officials.

On January 6, 2021, McKellop, wearing tactical gear including a helmet, gas mask, and gloves, made a barrage of attacks on law enforcement officers who were attempting to keep the mob of rioters away from the United States Capitol, where constitutional proceedings were

underway. More specifically, McKellop, unprovoked, charged at a line of officers and assaulted Sergeant K.M. Thereafter, McKellop walked backwards, away from the officers, towards the crowd. McKellop then picked up a bottle and threw it at the officers. Moments later, McKellop, along with another rioter, lunged at Sergeant K.K. and struck Sergeant K.K. Seconds later, McKellop then grabbed Officer H.L. and shoved her to the side. Captain D.A. was alerted of McKellop's assaultive behavior and directed his pepper spray at McKellop. In response, McKellop picked up a flagpole from the ground and stabbed Captain D.A. in the face. After Captain D.A. turned away from McKellop, McKellop then hurled the flagpole at Captain D.A. Next, while en route back to the crowd, McKellop grabbed Officer H.F. from behind as he struggled to maintain the police line against the efforts of other rioters.

For this conduct, the government charged McKellop with two counts of assaulting, resisting, or impeding officers using a deadly or dangerous weapon, in violation of 18 U.S.C. § 111(a)(1) and (b) and four counts of assaulting, resisting, or impeding officers, in violation of 18 U.S.C. § 111(a)(1). Superseding Indictment, ECF No. 43. McKellop has also been charged with civil disorder, in violation of 18 U.S.C. § 231(a)(3); entering and remaining on restricted grounds with a deadly or dangerous weapon, in violation of 18 U.S.C. § 1752(a)(1) and (b)(1)(A); disorderly and disruptive conduct on restricted grounds with a deadly or dangerous weapon, in violation of 18 U.S.C. § 1752(a)(2) and (b)(1)(A); engaging in physical violence on restricted grounds with a deadly or dangerous weapon, in violation of 18 U.S.C. § 1752(a)(4) and (b)(1)(A); disorderly conduct within the Capitol Grounds, in violation of 40 U.S.C. § 5104(e)(2)(D); and engaging in physical violence within the Capitol Grounds, in violation of 40 U.S.C. § 5104(e)(2)(F). *Id.*

McKellop now moves for a change of venue. ECF No. 53. He contends that prejudice should be presumed in this district for three primary reasons: (1) the political makeup of the District of Columbia jury pool; (2) pretrial publicity surrounding the events of January 6; and (3) the impact of January 6 on Washington, D.C. Each of McKellop's arguments is without merit, and similar to denials of other motions to transfer venue by January 6 defendants, McKellop's motion should be denied. *United States v. Boche*, 21-cr-418 (D.D.C. Jan. 12, 2022) (ECF No. 31); *United States v. Fitzsimons*, 21-cr-158 (D.D.C. Dec. 14, 2021) (minute order); *United States v. Caldwell*, 21-cr-28 (D.D.C. Sept. 14, 2021) (ECF No. 415).

ARGUMENT

The Constitution provides that “[t]he trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed.” U.S. Const. Art. III, § 2, cl. 3. The Sixth Amendment similarly guarantees the right to be tried “by an impartial jury of the State and district wherein the crime shall have been committed.” U.S. Const. amend. VI. These provisions provide “a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place.” *United States v. Cores*, 356 U.S. 405, 407 (1958). Transfer to another venue is constitutionally required only where “extraordinary local prejudice will prevent a fair trial.” *Skilling v. United States*, 561 U.S. 358, 378 (2010); *see* Fed. R. Crim. P. 21(a) (requiring transfer to another district if “so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there”).

The primary safeguard of the right to an impartial jury is “an adequate voir dire to identify unqualified jurors.” *Morgan v. Illinois*, 504 U.S. 719, 729 (1992) (*italics omitted*). Thus, the best course when faced with a pretrial publicity claim is ordinarily “to proceed to voir dire to ascertain whether the prospective jurors have, in fact, been influenced by pretrial publicity.” *United States*

v. Campa, 459 F.3d 1121, 1146 (11th Cir. 2006) (en banc). “[I]f an impartial jury actually cannot be selected, that fact should become evident at the voir dire.” *United States v. Haldeman*, 559 F.2d 31, 63 (D.C. Cir. 1976) (en banc) (per curiam). And, after voir dire, “it may be found that, despite earlier prognostications, removal of the trial is unnecessary.” *Jones v. Gasch*, 404 F.2d 1231, 1238 (D.C. Cir. 1967).

I. The District of Columbia’s Political Makeup Does Not Support a Presumption of Prejudice.

McKellop contends that he cannot obtain a fair trial in the District of Columbia because approximately 93% of its voters voted against then President Donald Trump in the 2020 Presidential Election. ECF No. 53, at 2. The en banc D.C. Circuit rejected a nearly identical claim in *Haldeman*, where the dissent concluded that a venue change was required because “Washington, D.C. is unique in its overwhelming concentration of supporters of the Democratic Party” and the Democratic candidate received 81.8% and 78.1% of the vote when Nixon ran for President in 1968 and 1972, respectively. *Haldeman*, 559 F.2d at 160 (MacKinnon, J., concurring in part and dissenting in part). The majority rejected the relevance of this fact, observing that authority cited by the dissent gave no “intimation that a community’s voting patterns are at all pertinent to venue.” *Id.* at 64 n.43; *see also United States v. Chapin*, 515 F.2d 1274, 1286 (D.C. Cir. 1975) (rejecting the argument that “because of [the defendant’s] connection with the Nixon administration and his participation in a ‘dirty tricks’ campaign aimed at Democratic candidates and with racial overtones, a truly fair and impartial jury could not have been drawn from the District’s heavily black, and overwhelmingly Democratic, population”).

If “the District of Columbia’s voting record in the past two presidential elections” is not “at all pertinent to venue” in a case involving high-ranking members of a presidential administration, *Haldeman*, 559 F.2d at 64 n.43, it cannot justify a change of venue here. To be

sure, *some* potential jurors might be unable to be impartial in January 6 cases based on disagreement with the defendants' political aims. But whether individual prospective jurors have such disqualifying biases can be assessed during voir dire. This Court should not presume that every member of a particular political party is biased simply because this case has a political connection. Indeed, the Supreme Court has stated in the context of an election-fraud trial, that "[t]he law assumes that every citizen is equally interested in the enforcement of the statute enacted to guard the integrity of national elections, and that his political opinions or affiliations will not stand in the way of an honest discharge of his duty as a juror in cases arising under that statute." *Connors v. United States*, 158 U.S. 408, 414 (1895). The same is true here. The District's voting record does not establish that this Court will be unable to select "an unbiased jury capable of basing its verdict solely on the evidence introduced at trial." *Haldeman*, 559 F.2d at 70.

To the contrary, as the nation's capital and seat of the federal government, the District has been home to its fair share of trials in politically charged cases. High-profile individuals strongly associated with a particular party, such as Marion Barry, John Poindexter, Oliver North, Scooter Libby, and Roger Stone, have all been tried in the District. *See United States v. Barry*, 938 F.2d 1327 (D.C. Cir. 1991); *United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991); *United States v. North*, 910 F.2d 843 (D.C. Cir. 1990) (per curiam); *United States v. Libby*, 498 F. Supp. 2d 1 (D.D.C. 2007); *United States v. Stone*, No. 19-CR-0018 (ABJ), 2020 WL 1892360 (D.D.C. Apr. 16, 2020). Indeed, the Court in *Stone* rejected the argument that jurors "could not possibly view [Roger Stone] independently from the President" because of his role in the presidential campaign or that "if you do not like Donald Trump, you must not like Roger Stone." 2020 WL 1892360, at *30-31. Similarly here, the fact that most District residents voted against Donald Trump does not mean those residents could not impartially consider the evidence against those charged in

connection with the events on January 6.

II. The Pretrial Publicity Related to January 6 Does Not Support a Presumption of Prejudice in This District.

McKellop also contends that prejudice should be presumed based on pretrial publicity. ECF No. 53, at 3-5. “The mere existence of intense pretrial publicity is not enough to make a trial unfair, nor is the fact that potential jurors have been exposed to this publicity.” *United States v. Childress*, 58 F.3d 693, 706 (D.C. Cir. 1995); *see Murphy v. Florida*, 421 U.S. 794, 799 (1975) (juror exposure to “news accounts of the crime with which [a defendant] is charged” does not “alone presumptively deprive[] the defendant of due process”). Indeed, “every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits.” *Reynolds v. United States*, 98 U.S. 145, 155-56 (1878). Thus, the “mere existence of any preconceived notion as to the guilt or innocence of an accused, without more,” is insufficient to establish prejudice. *Irvin*, 366 U.S. at 723. “It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.” *Id.*

The Supreme Court has recognized only a narrow category of cases in which prejudice is presumed to exist without regard to prospective jurors’ answers during voir dire. *See Rideau v. Louisiana*, 373 U.S. 723 (1963). In *Rideau*, the defendant’s confession—obtained while he was in jail and without an attorney present—was broadcast three times shortly before trial on a local television station to audiences ranging from 24,000 to 53,000 individuals in a parish of approximately 150,000 people. *Id.* at 724 (majority opinion), 728-29 (Clark, J., dissenting). The Court concluded that, “to the tens of thousands of people who saw and heard it,” the televised confession “in a very real sense *was* Rideau’s trial—at which he pleaded guilty to murder.”

Rideau, 373 U.S. at 726. Thus, the Court “d[id] not hesitate to hold, without pausing to examine a particularized transcript of the voir dire,” that these “kangaroo court proceedings” violated due process. *Id.* at 726-27.

Since *Rideau*, the Supreme Court has emphasized that a “presumption of prejudice . . . attends only the extreme case,” *Skilling*, 561 U.S. at 381, and the Court has repeatedly “held in other cases that trials have been fair in spite of widespread publicity,” *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 554 (1976). In the half century since *Rideau*, the Supreme Court has never presumed prejudice based on pretrial publicity. *But see Estes v. Texas*, 381 U.S. 532 (1965) (presuming prejudice based on media interference with courtroom proceedings); *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (same). In fact, courts have declined to transfer venue in some of the most high-profile prosecutions in recent American history. *See In re Tsarnaev*, 780 F.3d 14, 15 (1st Cir. 2015) (per curiam) (capital prosecution of Boston Marathon bomber); *Skilling*, 561 U.S. at 399 (fraud trial of CEO of Enron Corporation); *United States v. Yousef*, 327 F.3d 56, 155 (2d Cir. 2003) (trial of participant in 1993 World Trade Center bombing); *United States v. Moussaoui*, 43 F. App’x 612, 613 (4th Cir. 2002) (per curiam) (unpublished) (terrorism prosecution for conspirator in September 11, 2001 attacks); *Haldeman*, 559 F.2d at 70 (Watergate prosecution of former Attorney General John Mitchell and other Nixon aides).

In *Skilling*, the Supreme Court considered several factors in determining that prejudice should not be presumed where former Enron executive Jeffrey Skilling was tried in Houston, where Enron was based. *Skilling*, 561 U.S. at 382-83. First, the Court considered the “size and characteristics of the community.” *Id.* at 382. Unlike *Rideau*, where the murder “was committed in a parish of only 150,000 residents,” Houston was home to more than 4.5 million people eligible for jury service. *Id.* at 382. Second, “although news stories about Skilling were not kind, they

contained no confession or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight.” *Id.* Third, “over four years elapsed between Enron’s bankruptcy and Skilling’s trial,” and “the decibel level of media attention diminished somewhat in the years following Enron’s collapse.” *Id.* at 383. “Finally, and of prime significance, Skilling’s jury acquitted him of nine insider-trading counts,” which undermined any “supposition of juror bias.” *Id.*

Although these *Skilling* factors are not exhaustive, courts have found them useful when considering claims of presumptive prejudice based on pretrial publicity. *See, e.g., In re Tsarnaev*, 780 F.3d at 21-22; *United States v. Petters*, 663 F.3d 375, 385 (8th Cir. 2011). And contrary to McKellop’s contention, those factors do not support a presumption of prejudice in this case.

A. Size and characteristics of the community

McKellop suggests (ECF No. 53, at 2) that an impartial jury cannot be found in Washington, D.C., despite the District’s population of approximately 700,000. Although this District may be smaller than most other federal judicial districts, it has a larger population than two states (Wyoming and Vermont), and more than four times as many people as the parish in *Rideau*. The relevant question is not whether the District of Columbia is as populous as the Southern District of Texas in *Skilling*, but whether it is large enough that an impartial jury can be found. In *Mu’Min v. Virginia*, 500 U.S. 415, 429 (1991), the Court cited a county population of 182,537 as supporting the view that an impartial jury could be selected. And *Skilling* 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.” *Skilling*, 561 U.S. at 382 (quoting *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1044 (1991)). There is simply no reason to believe that, out of an eligible jury pool of nearly half a million, “12 impartial individuals could not be empaneled.” *Id.*

B. Nature of the pretrial publicity

McKellop argues that prejudice should be presumed based on statements by the democratic political leaders, including the President.¹ (ECF No. 53, at 5) But harsh condemnation of a defendant's actions is not uncommon in high-profile criminal cases, and it does not suffice to establish prejudice. In *Skilling*, the news stories about the defendant's involvement in Enron's collapse "were not kind," but they "contained no confession or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight." *Skilling*, 561 U.S. at 382. And in *Haldeman*, although some of the coverage of the Watergate scandal was "hostile in tone and accusatory in content," the bulk of the coverage "consist[ed] of straightforward, unemotional factual accounts of events and of the progress of official and unofficial investigations." *Haldeman*, 559 F.2d at 61. The D.C. Circuit concluded that the coverage "was neither as inherently prejudicial nor as unforgettable as the spectacle of Rideau's dramatically staged and broadcast confession." *Id.* The same is true here, where news coverage has not reported on any confession or other blatantly prejudicial information about McKellop. And, again, statements by political leaders are ordinarily reported across the entire country, and exposure to these statements is hardly unique to Washington, D.C.

McKellop asserts that a fair trial cannot be had in D.C. because of the volume of news coverage of January 6. ECF No. 53, at 3-4. But even "massive" news coverage of a crime does not require prejudice to be presumed. *Haldeman*, 559 F.2d at 61. And, while McKellop does not cite to any specific news story about himself, a comparatively small percentage of the news coverage of January 6 has focused on McKellop. Unlike most cases involving pretrial publicity,

¹ Notably, McKellop claims these statements include a reference to the January 6th rioters as "insurrectionists" and "white supremacists" without specifying who made these statements and in what context.

where the news coverage focuses on the responsibility of a single defendant (as in *Rideau* or *Tsarnaev*) or small number of co-defendants (as in *Skilling* and *Haldeman*), the events of January 6 involved thousands of participants and have so far resulted in charges against more than 775 people. The Court can guard against any spillover prejudice from the broader coverage of January 6 by conducting a careful voir dire and properly instructing the jury about the need to determine a defendant's individual guilt.

And, in any event, any threat of such spillover prejudice is not limited to Washington, D.C. because much of the news coverage of January 6 has been national in scope. *See Haldeman*, 559 F.2d at 64 n.43 (observing that “a change of venue would have been of only doubtful value” where much of the news coverage was “national in [its] reach” and the crime was of national interest). Thus, the nature and extent of the pretrial publicity do not support a presumption of prejudice.

C. Passage of time before trial

In *Skilling*, the Court considered the fact that “over four years elapsed between Enron’s bankruptcy and Skilling’s trial.” *Skilling*, 561 U.S. at 383. In this case, almost 15 months have already elapsed since the events of January 6, and more time will elapse before trial. This is far more than in *Rideau*, where the defendant’s trial came two months after his televised confession. *Rideau*, 373 U.S. at 724. Although January 6 continues to be in the news, the “decibel level of media attention [has] diminished somewhat,” *Skilling*, 561 U.S. at 383. Moreover, a Google search on March 30, 2022 for “Jeffrey McKellop” only resulted in one article, within the first three pages of search results, being published in this calendar year regarding McKellop. *See* <https://www.jurist.org/commentary/2022/01/cunningham-alan-military-veterans-pleas-2021-capitol-attacks/>. Accordingly, only a relatively small percentage, at best, of the recent stories have mentioned McKellop himself, and much of the reporting has been national in scope, rather than

limited to Washington, D.C.

D. The jury verdict

Because McKellop has not yet gone to trial, the final *Skilling* factor—whether the “jury’s verdict . . . undermine[s] in any way the supposition of juror bias,” *Skilling*, 561 U.S. at 383—does not directly apply. But the fact that *Skilling* considered this factor to be “of prime significance,” *id.*, underscores how unusual it is to presume prejudice before trial. Ordinarily, a case should proceed to trial in the district where the crime was committed, and courts can examine after trial whether the record supports a finding of actual or presumed prejudice. In short, none of the *Skilling* factors support McKellop’s contention that the Court should presume prejudice and order a transfer of venue without even conducting voir dire.

III. The Impact of January 6 on Washington D.C. Does Not Support a Presumption of Prejudice.

McKellop contends that unlike a jury in the Western District of Virginia, a D.C. jury could not be impartial because D.C. residents have been particularly affected by events surrounding January 6, including the deployment of the National Guard, the mayor’s declaration of a state of emergency, road closures, and a curfew.² ECF No. 53, at 3-7. But January 6 is now more than a year in the past. Many D.C. residents do not live or work near the Capitol where the roads were closed and the National Guard was deployed. There is no reason to believe that the District’s entire population of 700,000 people was so affected by these events that the Court cannot seat an

² McKellop incorrectly stated that the curfew imposed by Mayor Bowser lasted for weeks. However, the 6 P.M. curfew ended the following day, January 7, 2021. See [https://mayor.dc.gov/release/mayor-bowser-orders-citywide-curfew-beginning-6pm-today#:~:text=\(Washington%2C%20DC\)%20%E2%80%93%20Today,am%20on%20Thursday%2C%20January%207](https://mayor.dc.gov/release/mayor-bowser-orders-citywide-curfew-beginning-6pm-today#:~:text=(Washington%2C%20DC)%20%E2%80%93%20Today,am%20on%20Thursday%2C%20January%207). The Mayor, however, did extend the public emergency for fifteen days. See https://www.business-standard.com/article/international/washington-dc-mayor-extends-public-emergency-for-15-days-after-capitol-riot-121010700456_1.html.

impartial jury here.

Indeed, courts routinely conclude that defendants can receive a fair trial in the location where they committed their crimes, despite the fact that some members of the community were victimized. *See In re Tsarnaev*, 780 F.3d 14, 15 (1st Cir. 2015) (Boston Marathon bombing); *Skilling*, 561 U.S. at 399 (Enron collapse); *United States v. Yousef*, 327 F.3d 56, 155 (2d Cir. 2003) (1993 World Trade Center bombing); *United States v. Moussaoui*, 43 F. App'x 612, 613 (4th Cir. 2002) (per curiam) (unpublished) (September 11, 2001 attacks, including on the Pentagon). In *Skilling*, the Supreme Court rejected the contention that Enron's "sheer number of victims" in the Houston area "trigger[ed] a presumption of prejudice." *Skilling*, 561 U.S. at 384 (quotation omitted). "Although the widespread community impact necessitated careful identification and inspection of prospective jurors' connections to Enron," the voir dire was "well suited to that task." *Id.* In this case too, voir dire can adequately identify those D.C. residents who were so affected by January 6 that they cannot impartially serve as jurors. There is no reason to presume prejudice.

CONCLUSION

Similar to *Bochene*, *Fitzsimons*, and *Caldwell*, McKellop fails to establish that he "cannot obtain a fair and impartial trial" in this district, Fed. R. Crim. P. 21(a). Therefore, the McKellop's motion to transfer venue should be denied.

Respectfully submitted,

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