

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES of AMERICA	:	
	:	
Plaintiff	:	
	:	Criminal Case No.: 21-CR-00127
v.	:	
	:	
JOSHUA MATTHEW BLACK	:	
	:	
Defendant	:	

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DEFENDANT’S MOTION FOR CHANGE OF VENUE

The Defendant, **JOSHUA MATTHEW BLACK**, by and through his attorney, Clark U. Fleckinger II, and pursuant to F.R.Crim.P. 21(a), respectfully moves this Honorable Court to transfer the prosecution of the above referenced matter to the Northern District of Alabama. As grounds, therefore, the Defendant represents as follows:

1. That, “[t]he theory of our [trial] system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.” *Skilling v. United States*, 561 U.S. 358, 378 (2010)(quoting *Patterson v. Colorado ex rel. Attorney General of Colo.*, 205 U.S. 454, 462 (1907)(opinion for the Court by Holmes, J.)).

2. That, the emotions generated by the events of January 6, 2021 – which has been described as the “most divisive moment in modern [American] history,” Editorial, *Enflaming emotions on Jan. 6*, Washington Times (January 5, 2022), available at <https://www.washingtontimes.com/news/2022/jan/5/editorial-enflaming-emotions-on-jan-6/> – continue to run extraordinarily high,¹ and the “January 6 Cases” – including this one –

¹ See Editorial, *Enflaming emotions on Jan. 6*, Washington Times (January 5, 2022), available at <https://www.washingtontimes.com/news/2022/jan/5/editorial-enflaming-emotions-on-jan-6/> (reliving events of January 6, 2021 “remind[s] Americans of how angry and powerless they felt — regardless of which presidential candidate they supported).

have proceeded against that backdrop and in the context of an unprecedented amount of political and media commentary. In short, the scope and magnitude of the pretrial publicity and community prejudice attending these cases are unlike anything courts have addressed in the past. In these circumstances, voir dire, sequestration, and other principles of protection cannot reasonably be expected to preserve Mr. Black's right to an impartial jury, and he respectfully requests that venue be transferred to the Northern District of Alabama, where he resides.

3. That, although criminal trials are to be held "in the State where the . . . Crimes . . . have been committed," U.S. Const. Art. III, § 2, cl.3, when "extraordinary local prejudice" threatens to impede a defendant's right to an impartial jury (*i.e.*, a jury unaffected by outside influence and which will decide the case based solely on the evidence presented) – due process requires that venue be transferred to a different district. *Skilling*, 561 U.S. at 378. Upon a defendant's motion:

[T]he court must transfer the proceeding against that defendant to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there.

Federal Rule of Criminal Procedure Rule 21(a).

4. That, in some cases, a potential jury pool can be determined to be irredeemably biased when the alleged crime results in "effects . . . on [a] community [that] are so profound and pervasive that no detailed discussion of the [pretrial publicity and juror partiality] evidence is necessary." *United States v. McVeigh*, 918 F. Supp. 1467, 1470 (W.D. Okla. 1996); *see also* *Murphy v. Florida*, 421 U.S. 794, 802 (1975) ("[e]ven these indicia of impartiality [during voir dire] might be disregarded in a case where the general atmosphere in the community or courtroom is sufficiently inflammatory"). "[W]here there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the

threat abates, or transfer it to another county not so permeated with publicity.” *Sheppard v. Maxwell*, 384 U.S. 333, 362-363, 86 S. Ct. 1507, 1522, 16 L. Ed. 2d 600, 620, (1966).

5. That, in *Skilling*, the Supreme Court prescribed the following factors to be considered in determining whether prejudice is presumed and a change of venue required: (1) the size and characteristics of the community in which the crime is alleged to have occurred; (2) the nature and extent of pretrial publicity; and (3) the proximity of time between the publicity and the trial.² *Skilling*, 561 U.S. at 361. Each of these factors weighs in favor of the change in venue requested here.

6. That, in *Skilling*, the Court noted that Houston, Texas – where the alleged crime occurred and trial took place – is among the largest and most diverse cities in America. *Skilling*, 561 U.S. at 382. By contrast, Washington D.C. is a relatively small community, with a population of about 670,000,³ and a significantly smaller potential jury pool. And, the District may be the least diverse political population in the country, with more than 90% of its voters casting their ballots against Donald Trump in both the 2020 and 2016 elections.⁴ Moreover, the events of January 6, 2021, were particularly immediate and threatening to D.C. residents – the District’s Mayor declared a state of emergency and implemented a 6 p.m. curfew for weeks after January 6, 2021, Mayor Muriel Bowser, Press Release (January 6, 2021), available at <https://mayor.dc.gov/release/mayorbowserissues-mayor’s-order-extending-today’s-public-emergency-15-days-a1>, and potential jurors in the District saw National Guard troops deployed in their city for more than 4 months after January 6, 2021. FOX5 Washington DC, *National*

² The fourth factor described in *Skilling* – evidence of juror partiality, such as when the jury acquits the defendant of some of the alleged crimes, goes to the question of actual prejudice, which is determinable only after trial.

³ United States Census Bureau, *QuickFacts, District of Columbia*, (July 1, 2021), available at <https://www.census.gov/quickfacts/DC>.

⁴ See Election Results: The 2020 presidential race, Politico.com (2021); <https://www.politico.com/2020election/results/president>; New York Times, *District of Columbia Results*(Feb. 2017); available at <https://www.nytimes.com/elections/2016/results/district-of-columbia>.

Guard troops leave US Capitol more than 4 months after January 6th riot, available at <https://www.fox5dc.com/news/national-guard-troops-leave-us-capitolmorethan-4-months-after-january-6th-riot>. Potential D.C. jurors have been bombarded with information and misinformation regarding those events, by local, in addition to national, media and politicians. The effect of this pretrial barrage is apparent and devastating. Mr. Black respectfully submits that the nature and characteristics of the District of Columbia make it extraordinarily unlikely that Mr. Black can be tried in this district by a jury that is not influenced by extra-judicial information and prejudice.

7. That, in support thereof, Mr. Black submits that public discussion of the events of January 6, 2021, has been overwhelmingly negative. In the days following the incident, media described it as a “riot,” “breach,” “siege,” “attack,” “insurrection,” “assault,” “rampage,” and “invasion.” Govind Bhutada, *How News Media is Describing the Incident at the U.S. Capitol*, Visual Capitalist (January 16, 2021), available at <https://www.visualcapitalist.com/how-news-media-is-describing-the-incident-at-the-u-s-capitol/>. Participants in those events have been described as “a mob,” “rioters,” “insurrectionists,” and “extremists.” *Id.* President Biden has called the people involved “a group of thugs, insurrectionists, political extremists, and white supremacists” who “violently attack[ed] the Capitol of our democracy.” Remarks by President Biden at Signing of an Executive Order on Racial Equity, The White House (2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/01/26/remarks-by-president-biden-at-signingof-an-executive-order-on-racial-equity/>. Vice-President Harris compared it to Pearl Harbor. Vice President Kamala Harris Remarks on January 6 anniversary (January 6, 2022), available at <https://www.cnn.com/2022/01/06/politics/transcript-kamala-harris-january-6-anniversary-speech/index.html>. Attorney General Garland has characterized January 6 as a “heinous attack that sought to disrupt a cornerstone of our democracy,” and has

compared it to the 1995 Oklahoma City bombing – in which 168 people, including small children, were killed. Hearing before the U.S. Senate Committee on the Judiciary, Testimony of Merrick Brian Garland (Nominee for Attorney General), February 22, 2021 (2021), available at <https://judiciary.senate.gov/imo/media/doc/SJC%20Testimony.final.pdf>. Negative coverage in the media has been constant, and ubiquitous. At least 20 million people – “in the ballpark of big television events like a ‘Sunday Night Football’ game, watched the House Select Committee’s hearings, John Koblin, *At Least 20 Million Watched Jan. 6 Hearing*, The New York Times (Oct. 13, 2022), available at <https://www.nytimes.com/2022/06/10/business/media/jan-6-hearing-ratings.html>. And it is likely that D.C. residents – an extraordinarily large proportion of whom are employed or otherwise involved in politics and government, and in whose hometown the events of January 6, 2021, unfolded – pay particular attention to this tsunami of pretrial publicity.

8. That, the *Skilling* Court recognized that “vivid, unforgettable” extrajudicial information is “particularly likely to produce prejudice. 561 U.S. at 361. In *Estes v. Texas*, 381 U.S. 532, 538 (1965), the Supreme Court held that a defendant was denied an impartial jury when jurors were “bombarded” with media coverage, which “led to considerable disruption” and denied the “judicial serenity and calm to which [the defendant] was entitled.”

9. That, as a final submission, the time between the events of January 6 and the trial in the above referenced matter has been a short two (2) years. Given the pretrial publicity which remains at a heightened level in the District of Columbia, there has been little to no time for the emotions of the community from which the jurors are to be drawn in this District has abated.

WHEREFORE, for these and such other reasons as may appear to this Honorable Court, the Defendant respectfully requests that the Court grant his motion to change the

venue for the trial of the above captioned matter and to transfer the matter to the Northern District of Alabama.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Defendant's Motion to Change Venue, has been served, by ECF, upon AUSA Seth Adam Meinero and all other counsel of record, at the United States Attorney's Office, located at 555 4th Street, NW, Washington, D.C. 20530, this 19th day of December, 2022.

_____/S/_____
Clark U. Fleckinger II