

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA)	
)	
v.)	Case No. 21-cr-00116
)	
WILLIAM MCCALL CALHOUN, JR)	
Defendant.)	

DEFENDANT’S REPLY TO THE GOVERNMENT’S RESPONSE IN
OPPOSITION TO DEFENDANT’S MOTION TO TRANSFER VENUE AND

COMES NOW, Defendant, William McCall Calhoun, Jr., by and through counsel, Jessica N. Sherman-Stoltz, Esq., and replies to the Government’s response to Defendant’s Motion to Transfer Venue.

REPLY ARGUMENT

I. The Pretrial Publicity Related to January 6, 2021 Does Support a
Presumption of Prejudice in this District.

Although many defendants request a transfer of venue citing pretrial publicity, the Sixth Amendment is concerned with whether jurors’ conclusions will be induced by “any outside influence” rather than “only by evidence and argument in open court[.]” *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.)) (emphasis added). That outside influence can be public print or “private talk.” *Id.* (quoting *Patterson*, 205 U.S. at 462). It can be “the sheer number of victims.” *See Id.* at

437-38 (Sotomayor, J., concurring in part and dissenting in part) (quoting with approval the Fifth Circuit’s statement that the district court overseeing Skilling’s trial “seemed to overlook that the prejudice came from more than just pretrial media publicity, but also from the sheer number of victims”); *Id.* at 437 (quoting with approval the Fifth Circuit’s statement that district court lost sight of the proposition that “[t]he evaluation of the volume and nature of reporting is merely a proxy for the real inquiry: whether there could be a fair trial by an impartial jury that was not influenced by outside, irrelevant sources”). Or the improper outside influence may be the nature of the media to which jurors have been exposed, or its prevalence close to the time to trial, or its tendency to provoke identification with those directly affected by the conduct at issue that the jurors feel a personal stake in the outcome.” *Skilling*, 561 U.S. at 383 (discussing broadcast of confession in small town in *Rideau v. Louisiana*, 373 U.S. 723 (1963)); *see also United States v. McVeigh*, 918 F. Supp. 1467, 1473 (W.D. OK 1996). The outside influence may also be “such identification with a community point of view that jurors feel a sense of obligation to reach a result which will find general acceptance in the relevant audience.” *McVeigh*, 918 F. Supp. at 1473.

Like the pretrial publicity on which the Court focused in *Rideau*, in which the Supreme Court ruled that the district court should have transferred the case to a new venue, the pretrial publicity about January 6 cases has been unforgettable and unprecedented, it has “invited prejudgment of . . . culpability,” and it has been of the

“smoking gun variety.” *Skilling*, 561 U.S. at 383.¹ In *Rideau*, the Court concluded that no voir dire could cleanse the taint of a video of the defendant’s uncounseled interrogation and “interview,” which had been broadcast in a small town several times before trial. *Rideau*, 373 U.S. at 727. Here, potential jurors have been exposed to hours and hours of videos of the events of January 6, and hundreds of pictures of those events. Even digital newspapers include video footage embedded in articles.

Whereas the single recording at issue in *Rideau* captured a “dramatically staged confession of guilt,” *Skilling*, 561 U.S. at 382, the hundreds of January 6 videos and photos circulated over the last 13 months capture the scene of the alleged January 6 crimes, and many of the alleged crimes themselves, including potential crimes committed by many other people easily confused with Mr. Calhoun. Vivid images splashed across DC papers and television for the last thirteen months show people scaling the Capitol walls, hoisting a hangman’s gallows and noose, waving Confederate flags, putting their feet on the desks in the Capitol, rifling through papers on desks in the Capitol, milling about and hanging from the balconies in the Senate Chamber, and

¹ In *Skilling*, although the Court established no bright line rules about when media can contribute to a constitutional need to transfer venue, Justice Ginsberg noted that, when the Court has ruled that a case should have been transferred to a new venue in order to preserve defendants’ constitutional right to trial by an impartial jury, it has emphasized (1) “the size and characteristics of” the district with venue, (2) the extent to which news stories about the defendant contained confessions “or other blatantly prejudicial information of the type readers or viewers” in that venue “could not reasonably be expected to shut from sight,” and (3) the time that has passed between periods of significant publicity and the trial (if any has). *Skilling*, 561 U.S. at 382-83; *id.* at 381 (“[P]resumption of prejudice . . . attends only the extreme case.”).

appearing to try to break into the House chamber, among hundreds of other scenes.²

Many of the images – and the general impression that arises from viewing many of them – are “likely imprinted indelibly in the mind of anyone who [viewed them],” just like the recorded interrogation in *Rideau* would have been. *See Skilling*, 561 U.S. at 382-83. Much of this evidence has nothing to do with Mr. Calhoun, but because DC jurors have been inundated with these videos, they cannot be expected to know that, or to “shut [them] from sight” during trial. *Id.* at 382.

As such, the pretrial publicity about January 6 has been “blatantly prejudicial,” and distinguishable from the type of press coverage that failed to convince the majority of the Supreme Court that prejudice should be presumed in *Skilling*. *Id.* at 383 (distinguishing publicity in that case from the publicity in *Rideau* because it contained “[n]o evidence of the smoking-gun variety” and was not so shocking that it could not be shut from jurors’ minds during trial).

II. The Select Litigation Poll Does Support a Presumption of Prejudice.

Select Litigation’s survey of potential jurors in the District of Columbia clearly

² See, e.g. Staff, “No pictures, no pictures’: The enduring images from Jan. 6,” *The Washington Post* (Jan. 4, 2022), at <https://www.washingtonpost.com/nation/interactive/2022/photos-jan-6-capitol/> (last visited 3/15/22); “Chilling images from the Capitol riot: Jan. 6 insurrection in photos,” *USA Today* (Jan 5. 2022), at <https://www.usatoday.com/picture-gallery/news/politics/2022/01/03/jan-6-insurrection-photos-capitol-riot/9052798002/> last visited 3/15/22); D. Bennett, et al., “41 minutes of fear: A video timeline from inside the Capitol siege,” *The Washington Post* (Jan. 16, 2021), at <https://www.washingtonpost.com/investigations/2021/01/16/video-timeline-capitol-siege/> (last visited 3/15/22).

show that a significant majority of these potential jurors have unfavorable impressions of January 6, 2021 defendants, have concluded their guilt, and have already concluded that they had the specific intent to obstruct. *See* Exhibit A.

Defendant's Exhibit A summarizes Select Litigation's findings, and the results show that most of the jurors will be predisposed against the January 6, 2021 defendants, will likely view them as guilty of conduct other than that which they are charged, and will likely consider them as posing a danger to the community broadly, notwithstanding the strength or weakness of the evidence that they committed the crimes charged. Additionally, significant majorities would characterize these defendants as "criminals" (62%), and have already formed the opinion that the defendants are "guilty" of the charges brought against them (71%). *Id.* at p. 14 (p. 2/4 of Select Litigation Results). Further, the assessment of those respondents who claim that they believe the January 6, 2021 defendants can receive a fair trial is suspect. Of those who profess to believe that January 6, 2021 defendants can get a fair trial in this city, 76% have already decided that these defendants are guilty. *Id.* Further, 52% of this group confess that they would be more likely to vote "guilty" if they were on a jury. *Id.*

Select Litigation's survey data shows that an overwhelming percentage of District residents have already made up their minds about an element essential to proof of several of the counts in the Indictment. To prove that Mr. Calhoun "corruptly" obstructed an official proceeding under 18 U.S.C. § 1512(c)(2) as charged, the

government must at least prove that a defendant acted with the specific intent to obstruct a Congressional proceeding (the counting of electoral votes, in the government's theory). *See* Count One, Superseding Indictment, January 12, 2022, ECF Document Number 83. The survey data reveals that overwhelming majorities of potential DC jurors have already reached the conclusion that at least those who entered the Capitol on January 6 were acting with precisely that intent. They have concluded that these defendants were:

- trying to overturn the election and keep Donald Trump in power (85%)
- insurrectionists (76%); and/or
- trying to overthrow the United States government (72%).

Id. Not only have most DC residents reached the broader conclusion that these individuals are "guilty," but the vast majority have prejudged an element essential to several charges in the case.

III. A Jury Questionnaire is Necessary in this Case.

Mr. Calhoun understands that the practice of the use of a jury questionnaire is not common in the District, but respectfully asks this Court to consider the decision and ruling to allow a jury questionnaire in *United States v. Alford*, 1:21-cr-263, ECF Document Number 46, April 18, 2022.

CONCLUSION

Based on the foregoing, Mr. Calhoun renews his showing to this Court that he will not receive a fair and impartial jury as he is guaranteed by the Fifth and Sixth Amendments to the United States Constitution. He will face significant bias and prejudice if his case proceeds to trial in the District of Columbia.

WHEREFORE, for the foregoing reasons, he once again respectfully requests that the Court transfer his case to the United States District Court for the Middle District of Georgia, Macon Division, pursuant to Fed. R. Crim. P. 21(a), and that this Court order the use of a jury questionnaire to ensure an impartial jury.

Dated: May 9, 2022.

Respectfully Submitted,

WILLIAM MCCALL CALHOUN, JR.

/s/ Jessica N. Sherman-Stoltz

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CERTIFICATE OF SERVICE

I hereby CERTIFY that on this the 9th day of May 2022, a true and correct copy of the foregoing *Defendant's Reply to the Government's Response in Opposition to Defendant's Motion to Transfer Venue* with the Clerk of Court via the CM/ECF system, which will automatically send an email notification of such filing to all counsel of record.

/s/ Jessica N. Sherman-Stoltz

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