UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
	)	No. 21 CR 536
v.	)	
	)	
KAROL J. CHWIESIUK & AGNIESZKA CHWIESIUK	)	Hon. Kollar-Kotelly
	)	

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO TRANSFER VENUE OR GRANT EXPANDED VOIR DIRE

The defendants, Karol J. Chwiesiuk and Agnieszka Chwiesiuk, through their counsel, respectfully reply to the government's response in opposition to their motion to transfer venue. ECF Nos. 61, 62. In further support of their motion, the Chwiesiuks state:

I. Background

The defendants filed a motion to transfer venue or, in the alternative, for expanded *voir dire*. ECF No. 61. After the government filed a response (ECF No. 62), the Court ordered the defendants to reply by March 17, 2023, and requested that the reply address the Court's opinion in *United States v. Eicher*, No. 22-cr-038, 2022 WL 11737926 (D.D.C. Oct. 20, 2022). The defendants file the instant reply in accordance with that order, and in further support of their motion to transfer or allow expanded *voir dire*. ECF No. 61.

II. Argument

A motion to transfer venue must be granted where 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." Fed. R. Crim. Pro. 21(a). The factors typically considered by courts analyzing such a request are the size and characteristics of the community, the nature of the press coverage, and the time that has elapsed between prejudicial press coverage and the trial. *Skilling v. United States*, 561 U.S. 358, 382-83 (2010). Here, these factors support transfer.

A. The Instant Case is Distinguishable from *Eicher*

In *United States v. Eicher*, this Court denied another January 6 defendant's motion to transfer venue on similar grounds. *United States v. Eicher*, No. 22-cr-038, ECF No. 34, 2022 WL 11737926 (D.D.C. Oct. 20, 2022). In so ruling, the Court found that the size of the community weighed against transfer and rejected defendant's argument that the political leanings of the local community were relevant in the analysis. *Id.* at 6. Further, while the Court acknowledged that press coverage had been extensive and ongoing, the Court found it persuasive that the coverage was national and had not identified the defendant specifically. *Id.* at 6-7. The Court thus found that *voir dire* would be sufficient to root out any bias in individual jurors and denied the motion. *Id.* at 7.

This case is related to the same event and thus, is similar in terms of the size and characteristics of the community from which the jury will be drawn and the timing of the events, publicity, and trial. However, this case is distinguishable in that the press coverage does identify these specific defendants, both by name and in repeated reference to Mr. Chwiesiuk's employment as a police officer with the Chicago Police Department. The Court's opinion in *Eicher* was well-reasoned and in line with other rulings of this jurisdiction, but because the defendants here have raised more specific concerns as to the nature and extent of the press coverage, the motion should be granted.

B. The Nature of the Coverage Does Support the Motion for Transfer

The defendants' motion argues that the Court should presume prejudice based on pretrial publicity because the coverage (1) assigns collective fault to all those present at the U.S. Capitol regardless of whether they were accused of violence or property damage, (2) includes prejudicial information about police officers involved on January 6, and (3) identifies these defendants by name and in connection to Mr. Chwiesiuk's employment as a police officer. ECF No. 61 at 5-11.

In response, the government argues that it is not unusual for the news to include harsh condemnation of those accused of crimes. ECF No. 62 at 13. The issue raised by the defendants'

motion is not only that the coverage was harsh, but that it implied that police officers participating on January 6 should be held to a higher standard than civilians participating on January 6, while also claiming that they may have infiltrated the police force on behalf of white supremacist and anti-government groups. *See* ECF No. 61 at 7-9. The coverage relating to these two defendants consistently connects the case to Mr. Chwiesiuk's role as a police officer. *Id.* at 9-10. The government dismisses statements in the press that Mr. Chwiesiuk betrayed his fellow officers, attacked American democracy, and is a hateful member of the community, because the statements were made by Chicago public figures. ECF No. 62 at 13-14. However, these statements were reported in publications local to the District of Columbia.[1] Those in the District of Columbia may not have a specific familiarity with Chicago's mayor or the Chicago Police Department's Superintendent but statements from authority figures condemning the defendant both by name and because of his profession are nonetheless prejudicial. The defendants move for transfer to any district other than the Northern District of Illinois in recognition of the fact that the press coverage about these defendants has been prejudicial in both the District of Columbia and the greater Chicago area.

It is true that coverage of January 6 has been national and, as the government writes, the "news media environment and flow of information in 2023" is "a vastly different landscape," from that of the 1960's when the Court last held that prejudice should be presumed in some circumstances. ECF No. 62 at 10. However, the fact that news is more accessible to anyone today does not mean that it can never be more prolific or have more of an impact on the community living where the news occurred. This is especially true in that coverage of major events was national, even at the time of

[1] *See e.g.,* Tom Jackson, *Chicago Officer Charged in Jan. 6 Riot Wore a Police Sweatshirt to the Capitol, U.S. Alleges*, Washington Post, (June 11, 2021) available online at: https://www.washingtonpost.com/local/legal-issues/chicago-police-officerarrested-capitol-riot/2021/06/11/e2c49c6e-caef-11eb-afd0-9726f7ec0ba6_story.html

prior rulings. In *Delaney v. United States*, for example, the defendant moved for a continuance instead of a transfer because of a concern that "the countrywide publicity" of recent congressional hearings had left the defendant unable to obtain a trial free of public prejudice in any district. 19 F.2d 107, 116 (1st Cir. 1952). In rejecting an argument that this should foreclose his request for a continuance on the same basis, the Court noted that "the right to apply for a change of venue is given for the defendant's benefit and at his option." *Id.* Here, the defendant does seek a change of venue, not because it is *only* the District of Columbia that has been exposed to prejudicial information, but because such coverage has been more prolific and memorable where the events themselves occurred. Thus, a transfer to another district "not so permeated with publicity," would ensure the defendants right to a fair trial. *United States v. Delay*, 500 F.2d 1360 (8th Cir. 1974) (citing *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966)).

The government also claims that "without offering any context," the defendants argue that "a single news media personality's opinions" supports their motion because "pertinent information may exist somewhere." ECF No. 62 at 29-30. The defendants made no such argument. The recent release of security footage to Tucker Carlson was referenced within the section titled, "the timing of publicity and trial," because this is the context in which it was offered. ECF No. 61 at 12. More specifically, it was offered for the reason explicitly stated in the defendant's motion – the likelihood that "thousands of hours of newly obtained security footage will increase press coverage over the next few months, immediately before the Chwiesiuks trial." *Id.* The Court in *Skilling* noted that the timing of the publicity to the defendants' trial is a relevant factor in the analysis of whether such publicity supports a presumption of prejudice. 561 U.S. at 383 (internal citations omitted). Thus, a recent event that is increasing press coverage immediately prior to trial is relevant to the motion, but the defendants did not make the arguments to which the government responds.

In this section and throughout its memorandum, the government appears to respond to the arguments of other January 6 defendants. For example, the government argues that the televised committee hearings were not prejudicial when the defendants motion raised them again only because they increased press coverage recently, in close proximity to trial. *Compare* ECF No. 62 at 14-15 *to* ECF No. 61 at 12. The government writes that the "District of Columbia's political makeup does not support a change of venue," but the defendants made no argument to the contrary. ECF No. 62 at 5. The government argues extensively to disqualify the results of an opinion poll upon which these defendants did not rely. *Id.* at 18-22. The government responds to "some defendants" who have argued that prior guilty verdicts support a presumption of prejudice, although these defendants do not make this argument. *Id.* at 17. In sum, the government's response illustrates the very problem raised in the defendants' motion – the assignment of collective fault to each January 6 defendant for the actions of all others. If the government cannot treat these defendants individually, it is difficult to imagine that prospective jurors can.

Overall, the defendants recognize that they "a high bar in establishing the prejudice necessary to warrant the extraordinary remedy of transfer." *United States v. Eicher*, No. 22-cr-038, ECF No. 34 at 5-6. However, the "trial court is necessarily the first and best judgment of community sentiment," and thus, the Court has wide discretion to find that a change of venue is warranted. *Bishop v. Wainwright*, 511 F.2d 664, 666 (5th Cir. 1975) (citing *Irvin v. Dowd*, 366 U.S. 717, 723-24 (1961)). Here, there are unprecedented events occurring in the District of Columbia and while coverage has been national, "naturally, due to local interest, the publicity [is] intensified in the [District of Columbia] area." *Delaney*, 199 F.2d at 111. This coverage has assigned collective fault to all participants, has included prejudicial information about how potential jurors should judge police officers accused of participating, and has named these defendants specifically. Considering the

events of January 6 are the most documented crime in history,[2] and that memorable documentation has reached prospective jurors in the District of Columbia in numbers greater than other districts, this is the "extreme case," where a presumption of prejudice is warranted. *Skilling*, 561 U.S. at 381. Thus, the defendants respectfully request that the Court exercise its discretion to grant the motion for transfer and ensure the defendants receive a fair trial.

C. Expanded *Voir Dire* is Necessary if the Motion is Denied

Should the Court deny the motion, expanded *voir dire* is necessary to mitigate the concerns raised by the defendants' motion. The government argues throughout its response that a more thorough *voir dire* is the proper solution for the concerns raised by the defendants' motion and does not object to the Court granting the request for individual follow-up questions. ECF No. 62 at 27-29.

The government does object to a written questionnaire, arguing that its not necessary. *Id.* The defendants have requested a written questionnaire for the purpose of efficiency. Setting aside the issues with pretrial publicity, it may be more difficult to select a jury in this case because there are two defendants and one of them works in law enforcement, a profession against which jurors may be biased for reasons unrelated to January 6 and publicity. A written questionnaire would help to identify which jurors the parties need to ask follow-up questions. Should the Court agree, the defendants would draft the questionnaire in cooperation with the government and would submit it for the Court's approval.

[2] Vera Bergengruen & W.J. Hennigan, *The Capitol Attack was the Most Documented Crime in History. Will That Ensure Justice?,* Time, (April 9, 2021), available online at: https://time.com/5953486/january-capitol-attack-investigation/

III. Conclusion

For these reasons and those described in their originally filed motion, the defendants respectfully request that this Court grant their motion to transfer venue or, in the alternative, grant their motion for expanded *voir dire*.

Respectfully submitted,

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