IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

UNITED STATES OF AMERICA, v. DYLAN M. WARD, JOSEPH R. PRICE, and VICTOR J. ZABORSKY, Defendants.	Criminal Nos. 2008-CF1-26996 2008-CF1-27068 2008-CF1-26997 Judge Lynn Leibovitz Status Hearing – March 12, 2010

DEFENDANTS' JOINT RESPONSE TO GOVERNMENT'S NOTICE OF UNCHARGED CONDUCT I AND MOTION TO EXCLUDE UNCHARGED CONDUCT

Defendants Dylan M. Ward ("Ward"), Joseph R. Price ("Price") and Victor J. Zaborsky ("Zaborsky") (collectively the "Defendants") by and through counsel, respectfully submit this Joint Response to the Government's Notice of Uncharged Conduct I (the "Notice") and further move this Court to exclude all argument and purported evidence of certain uncharged conduct identified in the Notice.

I. INTRODUCTION

In its Notice the government announces its intent to argue to a jury that the Defendants committed uncharged criminal acts of which the government not only has no proof, but which its own evidence proves did not occur.

As shown below, the government's evidence clearly establishes that Robert Wone ("Wone") was *not* injected with an incapacitating drug; was *not* restrained with any of the erotic accessories seized by the government; was *not* subjected to "electro-torture"; and

was *not* sexually assaulted. These incendiary claims are a fiction, invented by the government to provide motive in a case where none exists. With no evidence that the alleged uncharged crimes occurred and no legal basis for their admission, the government should be precluded from placing them before the jury.

II. LEGAL FRAMEWORK

A. LIMITS ON USE OF EVIDENCE OF UNCHARGED MISCONDUCT

It is well established that before evidence of other bad acts or uncharged criminal conduct can be admitted, the court must find: (1) that there is clear and convincing evidence that the defendant committed the offense; (2) that the other crimes evidence is directed to a genuine, material, and contested issue in the case; (3) that the evidence is logically relevant to prove this issue for a reason other than its power to demonstrate criminal propensity, and (4) that the probative value is not substantially outweighed by the danger of unfair prejudice. *See Drew v. United States*, 331 F.2d 85, 89 (D.C. 1964);*see also Johnson v. United States*, 683 A.2d 1087, 1099 (D.C. 1996)(*en banc*); *Roper v. United States*, 564 A.2d 726, 731 (D.C. 1989); *Groves v. United States*, 564 A.2d 372, 375 (D.C. 1989).

As the Court of Appeals explained in *Groves*:

> Because of the inherent prejudice of other crimes evidence, the trial judge must make a series of factual determinations before admitting the evidence to ensure that the defendant's right to a fair trial is not undermined. In *Thompson* [*v. United States*, 546 A.2d 414 (D.C. 1988)], the court also emphasized the importance of the time at which the trial judge makes these determinations. To this extent, the trial judge exerts total control over whether such evidence will be heard by the jury, when the evidence will be heard by the jury, and for what limited purpose it may be considered by the jury. The threshold inquiry of any of these determinations is whether there is clear and convincing evidence that the other crime occurred and that the defendant is connected to it. Unless the

judge as a trier-of-fact finds such clear and convincing evidence, the admissibility inquiry comes to a halt.

564 A.2d at 375 (citations omitted).

The government bears the burden of proving all four criteria, including clear and convincing proof that the Defendants committed the uncharged crimes. *Johnson*, 683 A.2d at 1099, 1101. The reason for requiring clear and convincing evidence that the defendant committed the offense is obvious: if someone else committed the uncharged offense, or no offense was committed, evidence of the other offense would not only be irrelevant, but would also seriously prejudice the accused. *See Roper*, 564 A.2d at 731; *see also Bieder v. United States*, 662 A.2d 185, 189 (D.C. 1995) (the creation of an "erroneous impression" that the accused violated the law "has no probative value whatsoever"). The government "must show the trial court that the evidence that it proposes to present during the trial would, if believed, clearly and convincingly establish that the uncharged crime occurred and the defendants were connected to it." *Daniels v. United States*, 613 A.2d 342, 347 (D.C. 1992) (citing *Groves*, 564 A.2d at 375), *quoted in Crutchfield v. United States*, 779 A.2d 307, 330 (D.C. 2001). *See also (Timothy) Robinson v. United States*, 623 A.2d 1234, 1241 (D.C. 1993) (error to admit testimony regarding another crime that "was far too ambiguous to support a finding of clear and convincing evidence").

In *Johnson*, the Court of Appeals recognized two categories of uncharged conduct not subject to the provisos of *Drew*. *See Johnson*, 683 A.2d at 1098. The first, commonly referred to as *Toliver* evidence, involves evidence that is "admissible to complete the story of the crime on trial by proving its immediate context." *Toliver v. United States*, 468 A.2d 958, 960 (D.C. 1983) (citations omitted). The second type of

"non *Drew*" evidence is evidence that is "not independent of the crime charged." *Johnson*, 683 A.2d at 1096. The government contends that all of the uncharged conduct it intends to seek to admit constitutes such non-*Drew* evidence.[1]

Non-*Drew* evidence of uncharged misconduct may be admissible if it meets the general standards for admission: it is relevant and its probative value substantially outweighs its potential prejudicial value. As the *Johnson* court held: "regarding the admission of evidence generally, this jurisdiction will follow the policy set forth in Federal Rule of Evidence 403-'evidence [otherwise relevant] may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . '" *Johnson*, 683 A.2d at 1099.

As demonstrated below, the government cannot meet its burden under *Drew*, *Johnson* or Rule 403 because there is no evidence that this uncharged conduct ever occurred, much less was perpetrated by the Defendants.

A. THE GOVERNMENT'S THEORY

In its Notice, the government identifies six categories of evidence relating to acts of uncharged misconduct:

- Evidence relating to the homicide of Robert Wone;
- Erotic restraints and related evidence;
- Items purportedly capable of being used to perpetrate a sexual assault;
- Evidence of purported dominance, enslavement, 'electro-torture,' etc.;
- Evidence of incapacitation of Robert Wone; and
- Evidence regarding Michael Price.

Bearing the burden of identifying a legal basis for the introduction of this evidence, the government's argument is essentially twofold. First, citing *Johnson*, the government suggests that the evidence relating to the homicide is admissible as "(1)

[1] Notice at 9-12.

direct and substantial evidence of the reason for the cover-up orchestrated by the defendants, (2) is closely, indeed inextricably, intertwined with the cover-up, and (3) is necessary to place the cover-up in an understandable context."[2] Second, the government alleges, the non-homicide evidence (*i.e.* the evidence relating to items purportedly capable of being used for sexual assault, dominance, enslavement, electro-torture, etc...) "does not constitute uncharged misconduct" and therefore needs only to meet the relevance threshold set forth in Rule 403 of the Federal Rules of Evidence.[3]

The Court is well aware that the Defendants are not charged with Wone's murder. As the government candidly admits, "the evidence obtained to date does not yet establish beyond a reasonable doubt who actually killed Robert Wone."[4] Instead, the Defendants are charged with conspiring to obstruct and obstructing justice and tampering with evidence in connection with that homicide. Before the Court can determine whether evidence of the homicide falls into the non-*Drew* categories outlined in *Johnson*, or whether the non-homicide evidence falls outside the scope of uncharged misconduct, it is important for the Court to understand the government's theory of the case and its intended use of this other evidence of uncharged misconduct.

The government builds its case on the *absence* of evidence, that is, the difference between what law enforcement officers expected to find at the scene of a homicide and what they actually found. "[T]he killer," the government argues, "is someone known to the defendants," not an unknown intruder as the defendants told the police.[5] Lacking

[2] Notice at 11.

[3] Notice at 9.

[4] Notice at 1.

[5] Notice at 1-2.

any evidence that any one of the Defendants engaged in any particular act that led to the death of Wone, the government contends it will prove the Defendants' guilt with its 'negative evidence,' that is, its inability to find evidence that an intruder killed Wone. Contending that it has found no evidence of an intruder, the government argues, all three Defendants must be involved in a cover-up of the "true circumstances surrounding the homicide"[6]

In light of this theory, the Court can properly consider the evidence of uncharged misconduct offered by the government.

B. EVIDENCE RELATED TO THE HOMICIDE

From the moment Wone was discovered stabbed, the Defendants consistently and vociferously have maintained their innocence. Squarely in the crosshairs of the law enforcement investigation, the Defendants told the police that they were not involved in, nor had knowledge of the circumstances leading to, Wone's death. Now accused of conspiring to obstruct and obstructing justice in connection with the investigation into his death, they recognize that evidence that Wone was stabbed may be admissible under *Johnson, supra,* 683 A.2d at 1098. This, however, is not the end of the analysis.

The Court of Appeals in *Johnson* reaffirmed that the government bears the burden of demonstrating not only that the proffered other crimes evidence is relevant to an issue in the case, but it must also demonstrate that "its probative value is not substantially outweighed by the danger of unfair prejudice to the defendant." *Johnson, supra,* 683 A.2d at 1101 (citing *United States v. Conners*, 825 F.2d 1384, 1390 (9th Cir. 1987)). Here, although the government may introduce evidence that Wone was stabbed, what it *may not* do is argue to the jury that the Defendants actually killed Wone.

[6] Superseding Indictment, First Count.

At the January 15, 2010 status hearing the Court ruled that the Defendants were entitled to learn from the government whether it intended to argue that one or all of the defendants murdered Wone.[7] In response, the government proffered that "the killer is someone know [sic] to and being protected by the defendants."[8] Given the state of the evidence, the government's lack of specificity is not surprising. More than three years after Wone's death, the government is fundamentally unable to prove what happened to Wone and unable to prove that the Defendants – individually or in combination – took any specific action that led to Wone's death. Indeed, in denying the Defendants' Motion for a Bill of Particulars seeking specific information on which Defendant committed which alleged act, the Court was constrained to acknowledge that "if [the government] had more specificity as to individual conduct by individual defendants, you would know about it and it would be alleged."[9]

Since the government does not have specific evidence that any Defendant was responsible for any particular act that led to the death of Wone, it should not be permitted to argue that any one – or all – of the Defendants actually caused Wone's death. The prejudice that would flow from such an argument would substantially outweigh its probative value, since it would be based entirely on speculation. *See Johnson, supra*, 683 A.2d at 1087 n.8 ("In deciding whether the danger of unfair prejudice and the like substantially outweighs the incremental probative value, a variety of matters must be considered, including the strength of the evidence as to the commission of the other crime . . .").

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[7] Hr'g Tr. 36:2 – 37:6 (Jan. 15, 2010).

[8] Notice at 2.

[9] Hr'g Tr. 34:16-21 (May 22, 2009).

C. ALLEGED INCAPACITATION, SEXUAL ASSAULT AND TORTURE

The government's claim that the erotic accessories that "could have been used" to restrain, sexually assault and torture Wone, "do[] not constitute uncharged misconduct" is completely disingenuous. It is certainly true, as the government points out, that possession of "restraining equipment and devices, or sexual equipment and paraphernalia, is not illegal" and that "no laws are violated" by possessing the various books on sexual practices."[10] The government intends to argue, however, that these items are evidence that Wone was, *in fact*, sexually assaulted,[11] involuntarily restrained,[12] dominated, degraded, enslaved, subjected to electro-torture,[13] and incapacitated. Given the intended use of this evidence, it is clearly uncharged misconduct and thus it must be analyzed under *Drew* and *Johnson*. Placed in its proper context, it is readily apparent this evidence should be excluded for a number of equally compelling reasons.

First, the Defendants are not charged with sexually assaulting, restraining, incapacitating, or committing "electro-torture" on Wone. Nor are they charged with conspiring to obstruct or obstructing any investigation relating to a purported sexual assault. Not one of the overt acts alleged in the indictment relates to sexual assault, restraint, enslavement, incapacitation, or electro-torture.[14] Thus, this is very different than evidence relating to the homicide which features prominently in the indictment and

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[10] Notice at 9.

[11] "As these items provide the means by which to perpetrate a sexual assault, they are plainly relevant in this case." Notice at 6.

[12] "[F]inding said restraints, gags, hoods and other items, in a case where there is evidence that the victim had been restrained," relevant to what happened to Wone. Notice at 4.

[13] "The government contends that these books and other materials showing an interest in domination, enslaving other human beings, inflicting pain on other human beings, . . . "electro-torture" and the like are entirely relevant to the issue of what happened to Mr. Wone...." Notice at 7.

[14] Indeed, each and every one of the overt acts in Count One of the superseding indictment relate to events that allegedly occurred *after* Wone was stabbed, and presumably *after* the completion of any sexual assault.

serves as the alleged object of the conspiracy. The alleged sexual assault is not – in the words of *Johnson* – direct and substantial proof of the charged crimes, closely intertwined with the evidence" of the charged offenses, or "necessary to place the charged crime in an understandable context." *Johnson*, 683 A.2d at 1098. Thus, it is *Drew* evidence and inadmissible unless the government can prove it by clear and convincing evidence; this the government cannot do.

As discussed in greater detail below, the government's purported and sole "evidence" of sexual assault and electro-torture relies exclusively - and mistakenly - on an FBI report that Wone's own semen was found in his genital and anal regions. From that fact the government seeks to bootstrap the admissibility of the erotic accessories claiming that they "could have" been used to sexually assault and restrain Wone.[15] Putting aside the lack of support for the government's conclusion, there is no evidence that any of the three Defendants used any of these items on Wone and no evidence that any Defendant engaged in any act of sexual assault, restraint or electro-torture.

The government argues that given the circumstances of Wone's death – the obvious stabbing along with the location and condition of his body inside of their home – the Defendants must know more than they told the police about the circumstances of the homicide. But the same cannot be said of the non-homicide evidence. There is no evidence that the Defendants were, or could have been, aware of a sexual assault as alleged by the government. There were no obvious, external signs of sexual assault, restraint or electro-torture. Indeed, the government itself did not claim that Wone was sexually assaulted until after the FBI tested the forensic swabs more than two years after

[15] The government acknowledges as much in the heading of this section of its Notice: "Items Capable of Being Used to Perpetrate a Sexual Assault." Notice at 4.

Wone's death. Under these circumstances, the government cannot claim that the Defendants 'must have' known about a sexual assault and participated in its cover-up.

Before permitting the government to introduce the non-homicide evidence at trial, the Court must determine whether it has "some connection with the defendant or the crime with which he is charged, and should not be admitted if the connection is too remote or conjectural." *Ali v. United States*, 581 A.2d 368, 375 (D.C.1990) (quoting *Burleson v. United States, supra,* 306 A.2d at 661),*cert. denied,*502 U.S. 893, 112 S.Ct. 259, 116 L.Ed.2d 213 (1991). The Court of Appeals has always required that the evidence be connected to both the defendant and the crime charged. See *Ali v. United States, supra,* 581 A.2d at 374-75; *Swinson v. United States,* 483 A.2d 1160, 1163-64 (D.C.1984); *Lee v. United States,* 471 A.2d 683, 685 (D.C.1984); *Adams v. United States,* 379 A.2d 961, 964 (D.C.1977); *Coleman v. United States,* 379 A.2d 710, 712 (D.C.1977). Here, because the evidence has no connection to any Defendant and no connection to any crime – charged or otherwise – it must be excluded.

Second, and most importantly, the evidence must be excluded because any evidence claimed by the government to support its theory is substantially outweighed by the obvious and significant prejudicial effect of placing this explicit sexual material before the jury. It is hard to imagine any evidence more inflammatory than items used in sado-masochistic sex play. The Court of Appeals has long recognized that evidence relating to sexual acts and "proclivities" has enormous potential for "humiliation and degradation and thus poses a high risk of prejudicial impact on a jury." *Jones v. United States*, 625 A.2d 281, 284 (D.C. 1993) (reversing conviction where the trial court allowed the government to introduce excessive evidence and argument pertaining to the

defendants' homosexual relationship). Here, the nature and number of items recovered from the Swann Street house increase the potential prejudice exponentially.

In making the required balance between probative value and prejudicial effect, the Court is required to consider the nature and strength of the evidence of uncharged misconduct. *Johnson, supra,* 683 at 1095 n.8. It is axiomatic that alleged, uncharged conduct which never occurred and of which the government has no evidence is not admissible under *Drew* or *Johnson.* Independently, because it is not relevant, has no probative value, and would be seriously prejudicial were it to be admitted, such evidence must be excluded.

The burden is on the government to show – by clear and convincing evidence - that Wone was drugged, sexually assaulted and restrained before such evidence or argument is placed before the jury. This, the government cannot do. As shown in the next section the government has no evidence demonstrating that Wone was injected with an incapacitating drug, no evidence that Wone was restrained with any of the erotic accessories seized by the government, and no evidence that Wone was sexually assaulted by the Defendants or anyone else. With no evidence that any of these uncharged acts occurred, it would be grossly prejudicial to the Defendants to permit the government to argue otherwise and all such evidence should be excluded.

III. THE GOVERNMENT'S OWN EVIDENCE FAILS TO ESTABLISH THE UNCHARGED CONDUCT.

With discovery nearly complete, it is apparent that the government's allegations of uncharged conduct are both incendiary and without factual support. They are an attempt by the government to provide motive in a case where none exists. Lacking any

evidence that these acts ever occurred, the government must be precluded—entirely—from suggesting to the jury that they did.

A. THE GOVERNMENT HAS NO EVIDENCE THAT WONE WAS DRUGGED.

The government has repeatedly maintained that Wone was incapacitated "by being injected with some type of incapacitating or paralytic drug."[16] Yet, there is absolutely no evidence that Wone was injected by any such drug.

1. THE GOVERNMENT'S TOXICOLOGY TESTING DOES NOT SHOW THAT WONE WAS ADMINISTERED ANY INCAPACITATING DRUGS.

During the course of Wone's August 3, 2006 autopsy, various biological specimens were collected and subjected to toxicological testing. These specimens included femoral and heart blood, urine, bile, vitreous, liver, brain and gastric samples.[17] The specimens were extensively tested for the presence of a wide variety of incapacitating agents including: ethanol, acetone, methanol, isopropanol, amphetamines, barbiturates, benzodiazepines, cocaine, methadone, methamphetamines, opiates, phencyclidine, propoxyphene, gamma-hydroxybutyrate, and carbon monoxide, all of which were negative.[18] This testing did not consume all of Wone's blood sample.

In May 2009, the government indicated it wished to conduct further toxicological testing on the remainder of Wone's blood to examine the blood for the presence of other drugs. Accordingly, the government inquired of Defendants whether they would agree to the government's consuming all of the rest of the blood during this testing, thereby precluding the defense from conducting its own testing on the blood. Not only did

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[16] Aff. at 5.

[17] *See* Office of the Chief Medical Examiner Toxicology Report 1 (Aug. 15, 2006) (hereinafter "OCME Tox Report").

[18] *Id.*

Defendants agree to the government's additional testing, Defendants *insisted* that the government conduct full and complete toxicological testing of the remaining blood, using the most sophisticated testing technology available.[19] In exchange the government was to agree on a stipulation to be read to the jury regarding this matter.[20]

Subsequently, in November 2009, a Federal Bureau of Investigation Laboratory ("FBI Lab") chemist with extensive expertise in toxicology used "gas chromatography with mass spectrometry and liquid chromatography with tandem mass spectrometry"[21] to examine Wone's blood for the presence of a wide range of drugs, including a number of drugs specifically suggested by the government.[22] With the exception of atropine, "[n]o other drugs or drug metabolites were detected." *Id.* Regarding the atropine, the FBI Lab chemist reported that "Atropine is an alkaloid drug frequently given in medical intervention or emergency room situations. Medical records received from AUSA Pat Martin's office on July 27, 2009 indicate that atropine was administered by medical personnel to [Mr.] Wone."[23] *Id.* at 2. This additional testing of Wone's blood by the FBI Lab did not consume all of remaining blood sample.

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[19] *See* Hr'g Tr. 28:15-16 (May 22, 2009).

[20] *Id.* at 28:18-29:18. Per this agreement, on June 23, 2009, Mr. Connolly sent the government the following stipulation: "Prior to the start of this trial, the prosecution informed the Defendants that the government had tested Mr. Wone's blood for the presence of a variety of paralytic and incapacitating drugs and substances. None were found in that testing. The Defendants requested that the Government test Mr. Wone's blood again for other paralytic and incapacitating drugs, using a more sophisticated battery of tests. The government informed the Defendants that there was only a limited amount of Mr. Wone's blood left and that all of it would most likely be used up by this additional testing. None would be left for the Defendants to test themselves. Nonetheless, the Defendants encouraged the government to go forward with this new testing and they voluntarily waived any objection to the blood being used up in the process of this testing."

[21] FBI Lab Toxicology Report 1 (Nov. 6, 2009), hereinafter "FBI Lab Tox Report."

[22] *See* P2598 – P2599; P2605; P2654.

[23] The FBI Lab Tox Report further indicates that "[a]tropine was reported as detected because it was indicated in a single aliquot of the K17 [Wone] blood and no additional testing was performed due to the nature of the analyte and the case history."

Significantly, no "incapacitating or paralytic" drugs nor needles, syringes or other tools for administering such drugs were found at the Defendants' home during the three weeks that MPD (assisted by the FBI) possessed and searched it.

Based on the results of the government's own toxicological testing of Wone's blood and the absence from the Swann Street home of any implements for administering paralytic drugs, the government has been unable to show that Wone was administered any paralyzing or otherwise incapacitating drug by the Defendants or anyone else on the night of August 2, 2006.

2. The Government May Not Ask the Jury to Speculate that Wone was Drugged with Succinylcholine.

Having found no drugs of any kind in Wone's system—except one administered by medical personnel—the government now aims to posit an undetectable drug, which they claim to be succinylcholine.[24] In its expert disclosures, the government designates an anesthesiologist who it says will testify that succinylcholine, when "injected into the human body quickly breaks down into its component parts and is metabolized, making 'injected' succinylcholine impossible to detect in subsequent toxicology screens." Letter from Kirschner to Defense Counsel, 8 (Feb. 5, 2010).

This disclosure will no doubt come as a surprise to the FBI Laboratory which has, for years, been testing for and identifying succinylcholine injected into human bodies, as reflected in the following excerpt from the FBI Lab's 2007 Annual Report:

> **Sensitive Test Detects Toxin**
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> In July 2006 Kathy Augustine, a local politician in Nevada, died under suspicious circumstances. The local medical examiner could not determine Augustine's cause of death. Chaz Higgs—Augustine's husband and a nurse—was reported to have told a colleague that the best way to kill

[24] Notice at 7-8.

> someone was with a drug known as succinylcholine, because it was undetectable. Because the local laboratory in Nevada did not have the instrumentation needed to test for succinylcholine, the FBI Laboratory was asked to assist in the investigation. Analysis identified succinylcholine, a paralytic agent, and its metabolite in Augustine's urine. Following the release of the FBI Laboratory's toxicology report, Higgs was charged with homicide. He was tried by the State of Nevada in June 2007. The testimony of an FBI Laboratory toxicologist was the key in the presentation of the State's case. A jury of Higgs' peers found him guilty, and he was sentenced to life in prison.[25]

As it happens, one of the government's own expert designees in this case, FBI Lab forensic toxicologist Madeline Montgomery[26] conducted the testing and testified to it in the *Higgs* case.

The government is still in possession of Wone's blood, urine and other biological samples and could certainly test them for succinylcholine or any other drug. Without conducting such testing, the government may not argue or suggest to the jury that the Defendants, or anyone else, used succinylcholine to paralyze Wone. As the Court advised the parties on September 11, 2009, "I can't tell the government what to test for or what not to test for, I don't think, but I don't think I'd let them put you [the defense] in a position to say 'Well, maybe it's still out there and we didn't look for it [the alleged drug.]'"[27]

3. THE PUNCTURE MARKS ON WONE WERE MADE BY MEDICAL PERSONNEL.

Prior to the FBI Lab conducting the more extensive toxicological testing of Wone's blood, the government argued that "needle puncture marks" observed by Dr. Goslinoski during her autopsy of Wone are evidence that Wone had been injected with a

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[25] FBI Lab Annual Report (2007) (emphasis added).

[26] Letter from Kirschner to Defense Counsel, 5 (Feb. 5, 2010).

[27] Hr'g Tr. 44:24 – 45:4 (Sept. 11, 2009).

paralytic drug. Former MPD Det. Waid first made this allegation in his October 27, 2008 affidavit, in support of Ward's arrest ("the Affidavit):[28]

> [Dr. Goslinoski] observed several needle puncture marks to Mr. Wone's body. There were multiple puncture marks on the left side of his neck, three needle puncture marks present in the center of his chest, two needle punctures to the upper portion of his right foot, and one needle puncture mark on the back of his left hand. A review of the medical records, coupled with information provided during interviews with the EMS workers and medical personnel who attempted to revive Mr. Wone at George Washington University Hospital Emergency Room, indicate that these needle puncture marks were not caused by any medical treatment or intervention.[29]

AUSA Martin repeated the allegation to the Court on September 11, 2009[30]

In its Notice the government continues to argue that despite having extensively tested Wone's blood and having found nothing, the puncture marks on Wone's body "prove" that he was injected with a paralytic drug.[31] This claim, like so much of the rest of the government's theory, is directly contradicted by the government's own evidence.

Specifically, Defendants have now obtained from the government the entirety of Wone's "medical records" which consist of: (a) the Autopsy Report dated August 18, 2006, detailing results of August 3, 2006 autopsy of Wone; (b) the EMS Report; and (c) GWU Hospital ER Records ("ER Records"). These medical records make quite clear that Det. Waid was—at best—disingenuous when he stated in his sworn Affidavit to this Court that the "needle puncture marks were not caused by any medical treatment or intervention."[32]

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[28] The Affidavit is also signed by AUSA Glen Kirschner. Aff. at 13.

[29] Aff. at 5.

[30] H'rg Tr. 46:12 – 47:2 (Sept. 11, 2009).

[31] Notice at 7.

[32] *Id.*

Indeed, beginning at page two of the Autopsy Report, Dr. Goslinoski states the following:

EVIDENCE OF MEDICAL INTERVENTION

> An endotracheal tube is in place. Vascular access is established with a left subclavian central line and right femoral central line, (both with large bore catheters). Additional needle puncture marks are noted at the left side of the neck, at the left antecubital fossa, on the back of the left hand and on the front of the right ankle. Needle puncture marks are also present at the central lower chest region consistent with pericardial centesis or a direct injection into the heart. Chest tubes are inserted along the anterolateral regions of the chest at the level of the 4th intercostals space on the right and at level of the 5th intercostals space on the left. Both chest tubes are clamped. EKG leads are adherent to the front of the right shoulder and the left side of the chest. An identification band bearing the name "John Doe" and the Medical Record # 3497673 is around the decedent's right wrist.[33]

The Autopsy Report clearly contradicts Det. Waid's Affidavit and the government's repeated claims, as it expressly indicates that the puncture marks *were* made during the course of "Medical Intervention."

The GWU ER Records produced by the government[34] confirm Dr. Goslinoski's determination that the puncture marks were caused by medical intervention. Those records document that GWU medical personnel attending Wone necessarily caused a number of puncture marks while attempting to save his life. The EMS Report produced by the government[35] likewise documents that the EMS responders made puncture marks in Wone during the course of what was ultimately an unsuccessful effort to obtain intravenous ("IV") access, as denoted in the narrative section of the EMS Report: "UTO IV Access," *i.e.*, unable to obtain IV access.[36]

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[33] Autopsy Report 3 (Aug. 3, 2006) (caps and bolding in original).

[34] Produced at P226 - P227 on Dec. 19, 2008.

[35] Produced at P225.

[36] *See* EMS Report 1 (Aug. 2, 2006).

Defendants have also interviewed medical personnel who treated Wone. Flatly contradicting Mr. Martin's statement to Judge Weisberg on September 11, 2010, and the government's claim in its Notice, the medical personnel indicate that they tried numerous times to access Wone's veins.

The government's contention that these puncture marks were made "pre-mortem,"[37] is based on the purported testimony that Dr. Goslinoski would offer that bruising around some of the puncture marks would only have occurred had Wone been alive at the time the needle punctures were made. Assuming, *arguendo*, Dr. Goslinoski is prepared to make such a statement, it would not be admissible expert testimony (and would be subject to exclusion pursuant to *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923))[38] because such a contention has long been proven untrue, and is contrary to the general consensus of forensic pathologists today. Indeed, it is well documented in the forensic pathology literature and text books: "[o]ne of the most commonly heard statements in regard to contusions is that they indicate that the injury was incurred prior to death, because one cannot form a contusion after death. This is not absolutely correct. Contusions can be produced postmortem . . . . This phenomenon may cause confusion to a forensic pathologist who is unaware of it."[39] Assuming Dr. Goslinoski would opine as represented, she appears to indeed be confused.

Based on the Autopsy Report, ER Records and EMS Report obtained from the government—represented by the government to be all of the medical records in its

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[37] Notice at 7.

[38] Indeed, many of the opinions that the government contends Dr. Goslinoski will offer are flatly contrary to the established general consensus of forensic pathology and are therefore inadmissible as expert opinion testimony pursuant to *Frye*. The Defendants will submit appropriate *Frye* motions in due course.

[39] Dominick J. DiMaio et al., *Forensic Pathology*, 102, 108 (2d ed. 2001). *See also* Michael J. Shkrum et al., *Forensic Pathology of Trauma: Common Problems for the Pathologist*, 33-35 (2007).

possession—there is irrefutable evidence that the puncture marks on Wone were caused by medical intervention. Along with the negative results of the government's extensive toxicology testing, there is no evidence that the Defendants or anyone else administered a paralytic agent to Wone.

B. THERE IS NO EVIDENCE THAT WONE WAS PHYSICALLY RESTRAINED WITH THE ITEMS SEIZED BY THE GOVERNMENT.

The government's claim—made for the first time in its Notice—that Wone *could* have been physically restrained with various of the erotic accessories found packed in storage bins in a bedroom of Defendants' home is directly contradicted not only by the government's own evidence, but by the government's own prior statements to this Court.

Indeed, the government has long maintained that Wone was not physically restrained, that there is no evidence of any type of physical restraint having been used on Wone, and that all the other physical evidence—the absence of defensive wounds, the lack of blood on Wone's hands, the so-called "perfect" knife wounds—is inconsistent with restraint. Indeed, the government had argued that this evidence proves Wone was "entirely incapacitated/immobilized" and not physically restrained.[40] At a Sept. 11, 2009 court hearing, nearly a year after former Det. Waid's Affidavit was prepared, AUSA Martin confirmed the government's position that Wone was injected with a paralytic drug that completely incapacitated him, and that "there's no indication of restraint."[41] As AUSA Martin and Det. Waid have asserted to this Court, no lacerations, bruising, scratching, chaffing, friction marks or other such injury consistent with physical restraint

[40] Aff. at 6.

[41] Hr'g Tr. 39:10 – 50:4, 47:22-23 (Sept. 11, 2009).

were found during the August 3, 2006 autopsy performed on Wone.[42] Had any of the items described by the government been used to restrain Wone, they would have left readily identifiable marks of varying kinds on him. Accordingly, there is no factual basis to suggest that any of the erotic accessories were used on Wone.

The government's newly-minted conjecture that these erotic accessories *could* have been used to restrain Wone does not and cannot render them admissible. As our Court of Appeals has long held:

> "Relevant evidence is that which tends to make the existence or nonexistence of a fact more or less probable than would be the case without that evidence." Additionally, the evidence sought to be introduced must have "some connection with the defendant or the crime with which he is charged, and should not be admitted if the connection is too remote or conjectural." *Ali v. United States*, 581 A.2d 368, 375 (D.C.1990) (quoting *Burleson v. United States, supra*, 306 A.2d at 661),*cert. denied*,502 U.S. 893, 112 S.Ct. 259, 116 L.Ed.2d 213 (1991).
>
> Although the quoted language from *Burleson* appears to allow the evidence to be connected to either the defendant *or* the charged crime, we have always required that the evidence be connected to both. Indeed, a review of the cases following *Burleson* reveals that we have consistently addressed *both* the defendant's connection to the weapon and the weapon's connection to the crime. Thus, we view our authorities to require, as government counsel conceded at oral argument, that the weapon be linked to both the defendant and the crime in order to be admissible.

King v. United States, 618 A.2d 727, 729 (D.C. 1993) (some citations omitted)[43] (italics in original). *See also Davis v. United States*, 700 A.2d 229, 231-32 (D.C. 1997);

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[42] *See* Autopsy Report 2 (Aug. 18, 2006).

[43] Citing *Ali v. United States, supra*, 581 A.2d at 374-75; *Swinson v. United States*, 483 A.2d 1160, 1163-64 (D.C.1984); *Lee v. United States*, 471 A.2d 683, 685 (D.C.1984); *Adams v. United States*, 379 A.2d 961, 964 (D.C.1977); *Coleman v. United States*, 379 A.2d 710, 712 (D.C.1977).

Here, there is no evidence that Wone was restrained in any fashion and absolutely no evidence that any one of the erotic accessories was used on Wone for any purpose, never mind in connection with his death. This is the glaring distinction between this case and the example posited by the government:

> A victim dies as a result of perforating gunshot wound leaving no projectile in the body or otherwise on the scene, and no cartridge casing is recovered from the scene. A firearm is found in the possession of a suspect apprehended not 40 feet away from where the victim's body is discovered. Under such facts, no plausible argument could be made that said firearm would not be admissible, as a minimum, evidence that the defendant had the means to commit the crime.[44]

In the government's hypothetical, the victim is found with obvious gunshot wounds and the gun is observed being held by the suspect some forty feet from the victim. Plainly, there is the requisite connection to the victim, *e.g.*, he has gunshot wounds, and the suspect who has the gun in his possession when it is recovered.

The government's example typifies the usual circumstances under which the government seeks to admit a weapon or other item allegedly used on a victim: "in many, if not all, of the cases where the gun or other weapon is admitted, there is no dispute that a crime was committed and that a weapon was used in committing the crime. The question in those cases is not whether a weapon was used but whether the accused used it." *Burleson v. United States*, 306 A.2d 659, 662 (D.C. 1973). By contrast, here Wone has no bruises, wounds, injuries, abrasions, chaffing, ligature marks or the like anywhere on his body consistent with his having been restrained with anything, never mind one of the more than fifteen erotic accessories the government contends it should be allowed to

[44] Notice at 4.

introduce.[45] Nor can there be any doubt that the items described by the government, had they been used to restrain Wone, would have left readily identifiable marks of varying kinds on him. Moreover, as Det. Waid put it, had Wone been restrained, instead of "entirely incapacitated," he would "have indications of defensive wounds, blood on his hands, defects to the three slit-like [stab] wounds to his torso, etc."[46]

None of the erotic accessories seized by the government has been forensically tested. Thus, in addition to the lack of wounds consistent with the use of the items, there is also no forensic evidence connecting the items to Wone. The government's decision not to test any of the erotic accessories not only belies its conjecture that the items were used on Wone; it makes apparent the government's real purpose in seeking admission of the erotic accessories. The government is not concerned with proving the items were used; it simply wants to present the items to the jury for their sensational, prejudicial effect.[47]

[45] Nor, of course, were any of the erotic accessories found anywhere near Wone; rather they were recovered from sealed storage bins in a cabinet and under a bed. Even so, the physical distance of these items from Wone, who was found in the second floor office on a pull out sofa, is hardly relevant to their admissibility. They would be made no more inadmissible had they been stored in a closet in the basement or in cabinet on the third floor.

[46] Aff. at 6.

[47] That this is the government's intent is hardly debatable. Indeed, in the very room in which Wone was found, just a few feet away from him, was a utility closet containing extension cords, phone line, a length of television cable, numerous bungee cords and utility straps—any of which could be used to restrain someone. Yet, there is no conjecture by the government that any of these items *might* have been used on Wone. The big difference being, of course, that unlike the erotic accessories, such everyday items have zero prejudicial value.

C. THERE IS NO EVIDENCE THAT WONE WAS SEXUALLY ASSAULTED.

As previously noted, the government first claimed Wone had been sexually assaulted in its October 27, 2008 Affidavit.[48] Though this was the first time sexual assault had been publicly alleged, it was not the first time that the government suggested that the Defendants' sexual orientation played a role in Wone's death.[49]

Having publicly accused, though not charged, the Defendants with sexually assaulting Wone, the government sets forth in its Notice its sole basis for having made such an incendiary claim:

> Items Capable of Being Used to Perpetrate a Sexual Assault
>
> The evidence has revealed that all six swabs [collected during Wone's autopsy] taken from victim's [sic] thighs, genitals, rectum and anal cavity, disclosed the presence of sperm. The quantities were very small and had to be combined by the FBI analysts to develop a DNA profile. Once combined and tested, there was no DNA found other than that of the victim. The medical examiner opined that such evidence is suggestive of sexual assault.[FN] Accordingly, the government may seek to introduce other items recovered from 1509 Swann Street that provide the means to commit a sexual assault. . . . [A laundry list of sex-toys follows.] As these items provide the means by which to perpetrate a sexual assault, they are plainly relevant in this case.
>
> [FN]Of course the government does not suggest that said findings are exclusively consistent with a sexual assault, and the defense is certainly free to offer other explanations for the evidence.[50]

Assuming, arguendo, that the FBI Lab's testing had in fact disclosed the presence of "sperm"—which, as explained below, it *did not*—the government's proposition would

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[48] This states that the evidence "demonstrated" that Wone was "incapacitated, sexually assaulted, and murdered inside 1509 Swann Street, N.W." Aff. at 12. The government has repeated this claim often and publicly many times since. *See*, e.g., H'rg Tr. 30:24 – 31:15 (Dec. 19, 2008).

[49] See Defendants' Motions to Suppress Statements.

[50] Notice at 5-6, 5 n.3.

nevertheless be an astounding one. It contends that in this obstruction of justice and tampering case, it should be permitted: (a) to argue to the jury that the Defendants sexually assaulted Wone on the basis that minute amounts of Wone's *own* "sperm" found on and around his genitals and in his anus; and (b) in order to bolster its specious claim, the government should be allowed to introduce a variety of erotic accessories that are "capable of being used to perpetrate a sexual assault." In other words, the government seeks to introduce highly prejudicial and irrelevant erotic accessories to support a claim that the Defendants sexually assaulted Wone. As shown below, the government's own evidence plainly establishes that Wone was not sexually assaulted; the government should be precluded from arguing otherwise.

1. THE AUTOPSY REVEALED NO EVIDENCE OF SEXUAL ASSAULT.

As previously noted, Deputy Medical Examiner Goslinoski performed an autopsy on Wone on August 3, 2006. Following the autopsy Dr. Goslinoski prepared her "Autopsy Report," a written narrative of her findings which included not only a precise description of any injury suffered by Wone, but also extremely detailed observations of the condition of his body.

As part of the autopsy, Dr. Goslinoski conducted a sexual assault exam which included a thorough physical examination of, and use of a "sexual assault kit" for the purpose of collecting forensic samples from, each of these areas: (a) in and around Wone's mouth; (b) his external genitalia (penis and scrotum) and his thighs; (c) the perianal area (the area between the scrotum and anus); and (d) inside the anus.[51]

In her Autopsy Report, Dr. Goslinoski reported the following findings:

[51] *Id.*

- "There are no obvious signs of injury to the genitalia of perineum."
- "External examination of the neck and posterior torso reveals no injuries."
- "The extremities show no developmental abnormalities, no edema, and no evidence of long bone fractures or acute soft tissue trauma."
- "The scalp is free of lesions and scars."[52]

Tellingly, there were no lacerations, abrasions, bruising, or soft tissue injury which would be consistent with Wone having been sexually assaulted. Likewise, there was no redness, scratching or chaffing around Wone's mouth. Nor was Wone's rectum or anal tissue swollen, torn, irritated or dilated as it would have been had he experienced forced anal penetration with a foreign object. Dr. Goslinoski's sexual assault exam revealed no physical signs of or consistent with sexual assault.

As the government's Notice reflects, it does not contend any such injuries were found. Indeed, the government has *never* pointed to a single piece of physical evidence indicative of or consistent with a sexual assault having occurred. Rather it purports that Dr. Goslinoski will opine that a finding of Wone's *own* "sperm" on and around his genitalia and in his anus is the basis of her opinion that such evidence is "*suggestive* of sexual assault."[53] Putting aside the issue of whether such an expert opinion would even be admissible, the matter is moot: no "sperm" were found anywhere on or in Wone's body.

2. THERE IS NO FORENSIC EVIDENCE OF SEXUAL ASSAULT.

The sexual assault kit specimens collected by Dr. Goslinoski during Wone's autopsy were not sent to the FBI Laboratory for testing until September 4, 2008, a full

[52] *Id.*

[53] Notice at 4.

two years after Wone's death.[54] The FBI Lab processed the specimens and communicated the results to the government in September or October 2008, before issuing its official "Report of Examination" on November 24, 2008 (hereinafter "FBI Lab Report").

The FBI Lab Report states the following regarding the sexual assault kit specimens and their examination:

- "The specimens listed below were received in the DNA Analysis Unit . . .

Q219-220[55]	Lip/lip area swabs (Item 24)[56]
Q221-222	Lip/lip area smears (Item 24)
Q223-224	Thigh/external genitalia swabs (Item 29)
Q225-226	Thigh/external genitalia smears (Item 29)
Q227-228	Perianal buttocks swabs (Item 30)
Q229-230	Perianal buttocks smears (Item 30)
Q231-232	Anorectal swabs (Item 31)
Q235-236	Anorectal smears (Item 31)"[57]

- "Semen was identified on specimens Q223, Q224, Q227, Q228, Q231 and Q232. Specimens Q219 through Q222 were examined for the presence of semen; however, none was found."[58]

- "It is noted that specimens Q223, Q224, Q227, Q228, Q231 and Q232 were combined for analysis and are referenced as specimen Q223."[59]

- "No STR[DNA] typing results unlike specimen K1 (Wone) were obtained from specimen Q223"[60]

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[54] *See* FBI Lab Report of Examination, 2 (Nov. 24, 2008).

[55] The "Q" number is the number assigned to the item when it is received at the FBI Lab. The "Q" prefix indicates an unknown source, whereas as a "K" prefix is used for an item with a known source, for example, K1 is a DNA sample known to have been taken from Robert Wone.

[56] The "Item" number assigned to the item by MPD.

[57] FBI Lab Report at 2.

[58] FBI Lab Report at 5 (emphasis added).

[59] *Id.*

[60] *Id.* at 6.

The FBI Lab Report contains no other information related to these items or the FBI Lab analysis of them. The "smears" referred to in the report refer to microscope slides on which one of the swabs was smeared, creating a specimen sample that can be examined under a microscope.

After receiving the FBI Lab Report the defense sought, and the government was ultimately required to produce, the underlying FBI Lab documentation pertaining to the analysis of the specimens.[61] The testing documentation reflects the tests that were performed on the specimens and the results of those tests. The following chart recreates and quotes exactly the pertinent portions of the chart in the testing documentation:

	Semen		
Specimen	**Acid Phos**	**Sperm Cells**	**p30**
Q219 Lip/lip area swab			NEG
Q220 Lip/lip area swab			NEG
Q223 Thigh/external genitalia swab			POS
Q224 Thigh/external genitalia swab			POS
Q227 Perianal buttocks swab			POS
Q228 Perianal buttocks swab			POS
Q231 Anorectal swab			POS
Q232 Anorectal swab			POS
Q221 Lip/lip area smear		NEG	
Q222 Lip/lip area smear		NEG	

[61] *See* Serological Examination, 1-2 (Sept. 23, 2008) (hereinafter "testing documentation").

As the chart reflects, the FBI Lab has three forensic tests it employs in the forensic detection of the presence of human semen: (a) "Acid Phos"; (b) "Sperm Cells"; and (c) "p30."

"Semen is a fluid of complex composition . . . . There is a cellular component, spermatozoa [also known as sperm cells], and a fluid component, seminal plasma [also known as seminal fluid]."[62] Seminal fluid itself is comprised of several different components "that originate from several sources including seminal vesicles and the prostate gland. The prostate is the source of the enzyme acid phosphatase and the protein Prostate Specific Antigen, or p30 protein."[63] As explained below, each of the tests employed by the FBI detects one of the components of semen.

"Acid Phos": "Acid phosphatase is an enzyme secreted by the prostate gland that is present in large amounts in seminal fluid. It, like PSA (prostate specific antigen) [also known as "p30"], is not unique to the prostate and can be found in other biological fluids including vaginal secretions. It is therefore considered a presumptive chemical test for the presence of semen and semen must be confirmed by other means (sperm detection . . .)."[64] In addition to seminal fluid and vaginal secretions, acid phosphatase is also contained in "perspiration, feces, urine, or any combination of these fluids," and can and does produce a positive "Acid Phos" result. As the chart reflects, no acid phosphatase testing was done on any of the specimens in this case.

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[62] Department of Justice, "President's DNA Initiative – DNA Analyst Training," available at http://www.nfstc.org/pdi/Subject02/pdi_s02_m02_04.htm

[63] *Id.*

[64] *Dale L. Laux*, Ohio Bureau of Criminal Deification "Forensic Detection of Semen I" at 1 (hereinafter "*Laux I*") (emphasis added).

"Sperm Cells": "[H]uman semen is conclusively identified on evidentiary items through the visual observation of human spermatozoa."[65] Spermatozoa, plural for spermatozoon, are also commonly known as sperm cells.[66] "Sperm are the male reproductive cells. Each consists of a head, tail and mid-piece."[67] Male semen generally consists of "3 to 4 milliliters containing 70 to 150 million sperm."[68] Each spermatozoa head is packed with thousands of strands of DNA material.[69] "The observation of at least a single, intact human spermatozoon is confirmation of the presence of human semen and is recorded in the case notes as a positive result (or POS)."[70]

As the chart reflects, in direct contradiction to the government's claim in its Notice that "all six swabs taken from victim's thighs, genitals, rectum and anal cavity, disclosed the presence of sperm," in fact, none of those swabs was ever examined by the FBI Lab for the presence of sperm. Moreover, the smears corresponding to those six swabs were not examined for the presence of sperm cells either. The only two smears—those from the "lip/lip area"—that were examined for the presence of sperm cells were "NEG," *i.e.*, negative for the presence of sperm cells.

"p30": p30, also commonly referred to as "Prostate Specific Antigen," is a glycoprotein known to occur in a variety of fluids and tissues from both men and

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[65] FBI Lab Serology Procedure Manual, "Procedure for the Microscopic Identification of Spermatozoa," 1 (Dec. 3, 2007).

[66] *Id.* at 1.

[67] Department of Justice, "President's DNA Initiative DNA Analyst Training," available at http://www.nfstc.org/pdi/Subject02/pdi_s02_m02_04.htm

[68] *Id.*

[69] Stuart M. James et al., *Forensic Science*, 265 (2d Ed. 2005).

[70] FBI Lab Serology Procedure Manual, "Procedure for the Microscopic Identification of Spermatozoa," 10 (Dec. 3, 2007).

women.[71] The term prostatic specific antigen is universally used in the clinical and forensic fields but a more appropriate name may be p30, referring to its molecular weight. p30 is present and detectable in seminal fluid, blood and urine,[72] and the tissue and cells of the prostate, urethra, urinary bladder and anal gland.[73] There are primarily two companies that make test kits for detecting p30, one being "Seratec," a German company which manufactures the "Seratec PSA Semiquant" (hereinafter "Seratec p30 test kit") The "Seratec PSA test was developed for the determination of PSA in blood serum to allow the detection of elevated levels of PSA that might be an indication of prostatic cancer."[74]

The Seratec p30 test kit was used to test all eight of the swab-specimens in this case.[75] Two of the swabs—from the lip/lip-area—were negative for presence of p30. The other six swabs were positive. Given when and where the swabs were used to collect samples, it would be surprising if the specimens had been negative. Blood, urine and seminal fluid were all likely present in and around Wone's genitalia and anus. Indeed, it is well-documented in forensic pathology literature that seminal fluid and urine are commonly secreted by men as part of the postmortem process: "muscle relaxation immediately after death explains the finding of leaking out of urine or seminal fluid from the orificium of the urethra owing to flaccidity of the urinary bladder and the pelvic

[71] Seratec PSA Semiquant Instructions for Use, 1 (June 2009).

[72] *Id.*

[73] S. Kamoshida, et al., "Extraprostatic localization of prostatic acid phosphatase and prostate-specific antigen; distribution in cloacogenic glandular epithelium and sex-dependent expression in human anal gland," 21 *Human Pathology*, 1108-01 (1990); Gaves HCB, "Nonprostatic sources of protein-specific antigen: a steroid hormone-dependent phenomenon?," 41 *Clinical Chemistry*, 7-9 (1995).

[74] Seratec PSA Semiquant Instructions for Use, 1 (June 2009).

[75] Serological Examination, 1-2 (Sept. 23, 2008)

diaphragm."[76] Seminal fluid is also discharged as "the result of contraction due to the postmortem rigidity of the layer of muscle in the wall of the seminal vesicles."[77]

p30 in the seminal fluid alone (or collectively from the seminal fluid, blood and urine, and, in the case of the anal swabs, from the anal tissue and glands) would invariably produce positive p30 results. Such findings are in no way indicative of sexual activity, never mind sexual assault. Indeed, in one study of the Seratec PSA Semiquant test kit, 64% of the samples taken from the rectum of male corpses—all of which were known not to have been sexually assaulted—produce a positive p30 result.[78]

The specimens taken from the six swabs used to collect specimens from Wone were all combined and subjected to DNA testing and no DNA results unlike those of Wone were found.[79] In other words no genetic material from any of the Defendants or anyone else was detected. Significantly, as previously noted, according to FBI Lab DNA analyst Tamyra Morretti, who conducted the DNA testing of the biological material from the swabs, during her DNA analysis, she identified no sperm cells present in any of the biological material collected from the swabs.[80]

3. THE FBI LAB'S TRACE EVIDENCE EXAMINATION PRODUCED NO EVIDENCE CONSISTENT WITH A SEXUAL ASSAULT.

In addition to the eight swabs and eight smears that the government sent to the FBI Lab, the government also sent the t-shirt (Q178), shorts (Q179) and underwear

[76] Michael Tsokos, 3 Forensic Pathology Reviews, 205 (2005). *See also* Michael S. Shkrum et al., *The Forensic Pathology of Trauma: Common Problems for the Pathologist* 24 (2007).

[77] *See also* Werner M. Spitz et al., *Medicolegal Investigation of Death*, 28 (3rd ed. 1993).

[78] Phillippe Lunetta, Helmuth Sippel et al., "Positive prostate-specific antigen (PSA) reaction in post-mortem rectal swabs: A cautionary note," 16 *Journal of Forensic and Legal Medicine*, 397-399 (2009).

[79] FBI Lab Report at 5 ("No STR[DNA] typing results unlike specimen K1 (Wone) were obtained from specimen Q223 [the specimen created from combination of the six swabs].").

[80] Ms. Morretti met with the government and defense counsel to discuss her work in this case. The government has refused to produce all of Ms. Morretti's testing case files.

(Q180), which Wone was wearing at the time he was found stabbed, to the FBI Lab.[81] The government also sent fingernail clippings (Q217, Q218) from Wone to the FBI Lab.[82] Such items are regularly collected from victims of suspected sexual assault and subjected to a variety of forensic testing. The items of Wone's clothing were examined for hairs. Pubic hairs consistent with those of Wone were found on his shorts and underwear.[83] No other hairs were found on any of these items.[84]

In sum, the government found no physical injuries consistent with sexual assault of any kind, found no sperm cells or other such evidence of sexual activity, found no DNA but Wone's own, and found no trace evidence consistent with the Defendants—or anyone else—having sexually assaulted Wone. In light of this complete lack of evidence, the government's unsubstantiated, highly prejudicial, utterly non-probative claim that Wone was sexually assaulted cannot be admitted.

IV. THE EROTIC MATERIALS AND ACCESSORIES ARE IRRELEVANT AND INADMISSIBLE PROPENSITY EVIDENCE.

Under a heading titled "Evidence of Dominance, Degradation, Enslavement, Electro-torture, etc."[85] the government lists various adult books and internet materials with sexual content (collectively "the erotic material") that it intends to seek to admit. This erotic material, like the erotic accessories, is neither relevant to nor probative of any contested issue in this case, and is extraordinarily prejudicial. Given the lack of relevance, the prejudicial effect appears to be the singular reason the government seeks its admission, hoping to paint a picture of the Defendants as sexual deviants who are

[81] FBI Lab Report at 2 (Jan. 21, 2007) (P167).

[82] FBI Lab Report at 2.

[83] FBI Lab Report at 4-5 (Jan. 21, 2007) (P167).

[84] FBI Lab Report at 4-5 (Jan. 21, 2007) (P167).

[85] Notice at 6.

capable of committing atrocious acts and participating in a "sophisticated" cover-up.[86] The Defendants will move *in limine* at the appropriate time to exclude this irrelevant, highly prejudicial material.

V. DEFENDANT PRICE'S BROTHER AND THE OCT. 2006 BURGLARY OF 1509 SWANN STREET ARE IRRELEVANT.

The government seeks to introduce evidence concerning Defendant Joseph Price's brother, Michael Price, and a burglary of 1509 Swann Street which occurred after Wone's death, while the home was vacant. This information is neither relevant to, nor probative of, any issue in this case and the Defendants will move *in limine* to exclude it at the appropriate time.

VI. REQUEST FOR AN EVIDENTIARY HEARING.

The government's own evidence establishes not only the lack of any evidence of the uncharged conduct, but more to the point, that the uncharged conduct did not occur at all. However, should the Court deem it appropriate, the Defendants are prepared to call their own experts in a pretrial, evidentiary hearing. There, these experts would testify that, based on the government's own evidence, in their expert opinions: (a) the government's evidence establishes that Wone was not drugged with an incapacitating drug (b) that Wone was not physically restrained; and (c) that Wone was not sexually assaulted. In the event that the Court deems a hearing necessary, the Defendants respectfully submit that the hearing should be conducted as soon as reasonably practicable.

[86] This is particularly true in Zaborsky's case, who the government has not alleged—nor could it in good faith—had any connection to, or even knowledge of the erotic accessories and erotic materials

VII. CONCLUSION

For the foregoing reasons, Defendants respectfully move the Court to exclude any argument and evidence of uncharged criminal conduct or bad acts.

Dated: February 26, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendants' Joint Response to Government's Notice of Uncharged Conduct I and Motion to Exclude Uncharged Conduct was served buy hand, this 26th day of February, 2010, upon:

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

UNITED STATES OF AMERICA, v. DYLAN M. WARD, JOSEPH R. PRICE, and VICTOR J. ZABORSKY, Defendants.	Criminal Nos. 2008-CF1-26996 2008-CF1-27068 2008-CF1-26997 Judge Lynn Leibovitz

ORDER

Upon consideration of Defendants' Joint Response to Government's Notice of Uncharged Conduct I and Motion to Exclude Uncharged Conduct, and in consideration of the entire record herein, it is hereby

ORDERED this _____ day of _____, 2010 that Defendants' Motion is GRANTED.

JUDGE LYNN LEIBOVITZ

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