

IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA  
CRIMINAL DIVISION

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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 MOTION IN LIMINE TO EXCLUDE  
ARGUMENT, TESTIMONY AND EVIDENCE REGARDING DEFENDANTS'  
SEXUAL HISTORIES AND TO LIMIT ARGUMENT, TESTIMONY AND  
EVIDENCE REGARDING DEFENDANTS' SEXUAL ORIENTATIONS**

Defendants Dylan M. Ward, Joseph R. Price and Victor J. Zaborsky, by and through undersigned counsel, respectfully submit this Joint Motion In Limine To Exclude Argument, Testimony and Evidence Regarding the Defendants' Sexual Histories and To Limit Argument, Testimony and Evidence Regarding the Defendants' Sexual Orientations.

**I. FACTUAL BACKGROUND**

Throughout its investigation of the August 2, 2006 death of Robert Wone, various agents of the government, including certain Metropolitan Police Department ("MPD") officers have focused on the Defendants' sexual orientation as somehow being connected to Mr. Wone's death. The following excerpts from the August 3, 2006 overnight interrogations of Messrs. Price and Ward are illustrative:

- SGT. WAGNER: I've got three homosexuals in a house -- . . . and I've got one straight guy. What's he doing over there!? What is he doing -- . . . over there!? I think we were all drinking wine. You know what's going to happen tonight, you're [referring to Wone] coming to Jesus tonight. That's what's going on.<sup>1</sup>
- SGT. WAGNER: This guy [Wone] is perfectly straight, and he is going to leave his wife for the night and come over to you-all's house?

MR. WARD: Yes, because he is --

SGT. WAGNER: He is not perfectly straight. That is not something a straight guy would do.<sup>2</sup>

- DET. NORRIS: So why is it that this dude Robert and Joe are constantly in contact with one another if Robert is straight?

MR. WARD: Because --

DET. NORRIS: Do you find that to be odd?

MR. WARD: No . . . .

DET. NORRIS: But that's just him and Rob. Is it Joe and anybody else?

MR. WARD: Yes. He has a friend [name of female].

DET. NORRIS: I'm not talking about -- I'm talking about males, not females.

MR. WARD: I don't know. He has lots of male friends.

DET. NORRIS: Straight?

MR. WARD: I don't know. I honestly don't know who's straight --

DET. NORRIS: You know the answer to that. You know the answer.

MR. WARD: I -- I'd have to think about it.

DET. NORRIS: There is no straight guy. The only straight guy that you can probably know that Joe is seeing and they are good friends is Rob. Why is that?<sup>3</sup>

<sup>1</sup> Price Tr. 54:19-22; 55:1-3.

<sup>2</sup> Ward Tr. 3:14-19.

<sup>3</sup> Ward Tr. 47:7 - 48:14.

Detective Brian Waid's October 27, 2008 Affidavit in Support of the Search Warrant of Dylan Ward ("Affidavit"), devotes a section to the Defendants' sexual orientations and histories.<sup>4</sup> The Affidavit also claimed that the "evidence was suggestive of Mr. Wone having been sexually assaulted."<sup>5</sup>

As the Court is aware, the government recently informed the Court and the Defendants that the government "do[es] not intend to introduce evidence of, or espouse theories about, paralytic agents or sexual assault in our case-in-chief."<sup>6</sup>

## II. ARGUMENT

Messrs. Price, Ward and Zaborsky's sexual orientations and histories have—and have never—had anything to do with Mr. Wone's death or with the allegations that the Defendants conspired to and obstructed justice, or tampered with evidence.

Indeed there is no credible argument that their sexual orientations or histories are in any way relevant to or probative of any fact in this case. Rather "[r]elevant 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." *Burleson v. United States*, 306 A.2d 659, 661 (D.C. 1973). Purported 'evidence' concerning the Defendants' sexual orientations and histories serves no such function in this case.

Moreover, it is readily apparent that such information would be highly prejudicial to the Defendants. Indeed the case law holding that evidence of homosexuality and homosexual relationships is legion. Our own Court of Appeals has long recognized that evidence relating to homosexual activities and relationships has enormous potential for

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<sup>4</sup> Aff. at 10-11.

<sup>5</sup> *Id.* at 6.

<sup>6</sup> Email from Leiber to defense counsel, 1 (Mar. 23, 2010); Hr'g Tr. 41:24 - 46:10 (Mar. 12, 2010).

“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). The same has been recognized in hundreds of other cases all across the country. *See, e.g., People of the Territory of Guam v. Shymanovitz*, 157 F.3d 1154, 1161 (9<sup>th</sup> Cir. 1998) (“in our society homosexuality--and indeed any other sort of deviation from the norm of heterosexual procreative sex--is often equated with indecency, perversion, and immorality”); *United States v. Ham*, 998 F.2d 1247, 1252 (4<sup>th</sup> Cir.1993) (reversible error where unduly prejudicial evidence including homosexuality was admitted); *United States v. Gillespie*, 852 F.2d 475, 479 (9<sup>th</sup> Cir.1988) (evidence that the defendant had a homosexual relationship prejudicial and reversible error); *Cohn v. Papke*, 655 F.2d 191, 194 (9<sup>th</sup> Cir.1981) (reversible error to introduce evidence concerning the plaintiff’s prior homosexual experiences and sexual preferences); *United States v. Provo*, 215 F.2d 531, 534 (2<sup>nd</sup> Cir.1954) (evidence that a defendant on trial for committing treason while he was a prisoner of war had been suspected of being a homosexual was “utterly irrelevant,” “highly inflammatory,” and “so prejudicial as to constitute reversible error”); *Commonwealth v. Baran*, Nos. 1804251, 181001, 2006 WL 2560317, at \*26 (Mass. Super. June 16, 2006) (“evidence of homosexuality is extremely prejudicial”); *State v. Woodard*, 146 N.H. 221, 225, 769 A.2d 379 (2001) (reversible error to introduce prejudicial evidence of adult lesbian relationship); *State v. Bates*, 507 N.W.2d 847, 852 (Minn.App.1993) (evidence of the defendant’s homosexual orientation irrelevant and prejudicial); *Commonwealth v. Clary*, 447 N.E.2d 1217 (Mass. 1983) (“prosecutor's insinuations regarding the defendant's

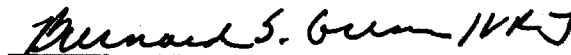
sexual preference clearly were likely to instigate prejudice against her error”); *Killie v. State*, 287 A.2d 310, 314 (Md. App. 1972) (“The introduction of the notion of homosexuality . . . was an irrelevancy replete with strong potential for unfair prejudice. This was error.”).

Given its complete absence or relevance, and high potential for prejudice, all argument, testimony and evidence of the Defendants’ sexual histories should be excluded. Any mention of the Defendants’ sexual orientations should be strictly limited to actual facts and only those facts necessary to put the case in context. The government should be precluded from repeatedly referencing or emphasizing the Defendants’ sexual orientation.

### III. CONCLUSION

For the foregoing reasons, Defendants respectfully submit that the Court should exclude argument, testimony and evidence regarding the Defendants’ Sexual Histories and limit argument, testimony and evidence regarding the Defendants’ sexual orientations.

Respectfully submitted,



Bernard S. Grimm (DC Bar # 378171)

COZEN O’CONNOR

1627 I Street, N.W., Suite 1100

Washington, D.C. 20006-4007

Telephone: 202-912-4835

Facsimile: 877-260-9435

Email: bgrimm@cozen.com

*Counsel for Defendant Joseph R. Price*

David Schertler/VKJ

David Schertler (DC Bar # 367203)  
Robert Spagnoletti (DC Bar # 446462)

**SCHERTLER & ONORATO LLP**

601 Pennsylvania Ave., N.W.

North Building, 9<sup>th</sup> Floor

Washington, D.C. 20004

Telephone: 202-628-4199

Facsimile: 202-628-4177

Email: dschertler@schertlerlaw.com

rspagnoletti@schertlerlaw.com

*Counsel for Defendant Dylan M. Ward*

Thomas G. Connolly/VKJ

Thomas G. Connolly, Esq. (DC Bar # 420416)

Amy Richardson, Esq. (DC Bar # 472284)

**WILTSHIRE & GRANNIS, LLP**

1200 18<sup>th</sup> St., N.W., 12<sup>th</sup> Floor

Washington, D.C. 20036

Telephone: 202-730-1339

Facsimile: 202-730-1301

Email: tconnolly@wiltshiregrannis.com

*Counsel for Defendant Victor J. Zaborsky*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Defendants' Joint Motion In Limine To Exclude Argument, Testimony and Evidence Regarding the Defendants' Sexual Histories and To Limit Argument, Testimony and Evidence Regarding the Defendants' Sexual Orientations, was served email and first class mail, this 2<sup>nd</sup> day of April, 2010, upon:

Glenn Kirschner, Esq.  
T. Patrick Martin, Esq.  
Rachel Carson-Lieber, Esq.  
Assistant United States Attorney  
Office of the United States Attorney  
for the District of Columbia  
555 Fourth Street, N.W.  
Washington, D.C. 20001

  
\_\_\_\_\_  
Veronica Jennings

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**PROPOSED ORDER**

Upon consideration of Defendants' Joint Motion In Limine To Exclude Argument, Testimony and Evidence Regarding the Defendants' Sexual Histories and To Limit Argument, Testimony and Evidence Regarding the Defendants' Sexual Orientations, and in consideration of the entire record herein, it is hereby

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

\_\_\_\_\_  
JUDGE LYNN LEIBOVITZ



Copies to:

Glenn L. Kirschner  
T. Patrick Martin  
Office of the United States Attorney  
555 4<sup>th</sup> Street, NW  
Washington, DC 20530

Bernard Grimm  
Cozen O'Connor  
1627 I Street, NW, Suite 1100  
Washington, DC 20006-4007

David Schertler  
Schertler & Onorato LLP  
601 Pennsylvania Avenue, NW, North Building, 9<sup>th</sup> Floor  
Washington, DC 20004

Thomas G. Connolly  
Wiltshire & Grannis, LLP  
1200 18<sup>th</sup> Street, NW, 12<sup>th</sup> Floor  
Washington, DC 20036