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 – April 23, 2010

DEFENDANTS' JOINT RESPONSE TO GOVERNMENT'S NOTICE OF UNCHARGED CONDUCT II and REPLY IN SUPPORT OF CERTAIN OF DEFENDANTS' MOTIONS IN LIMINE

Defendants Dylan M. Ward ("Ward"), Joseph R. Price ("Price") and Victor J. Zaborsky ("Zaborsky") (collectively the "Defendants"), through counsel, respectfully submit this Joint Response to the Government's Notice of Uncharged Conduct II (the "Notice II") and Reply in Support of the following motions in limine:

(a) *Motion in Limine to Exclude Argument, Testimony and Evidence Regarding Alleged Restraint*;

(b) *Motion in Limine to Exclude Evidence and Argument Regarding the Burglary of 1509 Swann Street*; and

(c) *Motion in Limine to Exclude Argument, Testimony and Evidence Regarding Defendants' Sexual Histories and to Limit Argument, Testimony and Evidence Regarding Defendants' Sexual Orientations*.[1]

[1] Pursuant to the Court's Jan. 15, 2010 Scheduling Order, Defendants' replies in support of their motions *in limine* are due on or by April 26, 2010. In light of the substantive overlap of the Government's Notices of Uncharged (I and II) and these three motions *in limine*, Defendants combine their Response to the Notice of Uncharged Conduct II and their replies in support of these three motions *in limine*. The Defendants will separately file, on or before April 26, 2010, their replies in support of the Defendants' other pending motions *in limine*: (a) Defendants' Joint Motion *in Limine* to Exclude Argument and Testimony that the Crime Scene was Cleaned and to

All three of these motions *in limine* are now fully briefed and ripe for decision.

I. INTRODUCTION

The Government's original notice of uncharged conduct ("Notice I") was replete with incendiary suggestions that the Defendants are sexual predators who owned erotic accessories with which they "dominated," "tortured," and murdered Mr. Wone.[2] The Government has now abandoned most of these arguments recognizing it has no evidence to support them. The Government's Notice II argues, however, that the evidence of the Defendants' sex lives and personal relationships is proof of their propensity to conspire to commit criminal acts, and that various erotic accessories recovered from their home should be introduced into evidence because they *could* have been used to restrain Mr. Wone, despite a complete lack of evidence that Mr. Wone was restrained or that any of the items ever came into contact with Mr. Wone. The Government also seeks to introduce evidence that the Defendants allegedly failed to immediately report a burglary at their home three months after the murder, claiming that such evidence shows the Defendants' propensity to "conceal" a crime.

As we explained in the *Defendants' Response to the Government's Notice of Uncharged Conduct I*,[3] none of this evidence is relevant to any issue in this case, contested or otherwise. Moreover, it is, particularly in the selective fashion in which the

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Limit Argument and Testimony Regarding Lack of Blood Evidence (filed Mar. 29, 2010); (b) Defendants' Joint Motion *in Limine* to Exclude Argument, Testimony and Evidence Regarding Sexual Assault and Chemical Incapacitation (filed Apr. 2, 2010); (c) Defendants Joint Motion *in Limine* to Exclude Testimony of James Plant (filed Apr. 2, 2010); and (d) Defendants' Joint Motion to Exclude Experiment Evidence and Testimony (filed Apr. 9 2010).

[2] Notice I, 2-8 (Feb. 5, 2010).

[3] *See* Defendants' Joint Response to the Government's Notice of Uncharged Conduct I and Motion in Limine to Exclude Evidence of Uncharged Conduct, 11-32 (Feb. 26, 2010) (hereinafter "Defendants' Response I").

Government would like to present it, extraordinarily prejudicial. As such, it is inadmissible.

II. ARGUMENT

In its Notice II, the Government announces its intention to introduce three categories of purported evidence:

1. Evidence Concerning Access to Restraints;[4]
2. Evidence of the Late Reporting [of the burglary of 1509 Swann Street] as Proof of the Conspiracy;[5] and
3. Evidence of the Nature of the Defendants' Unique Relationship as Proof of the Conspiracy.[6]

On April 2, 2010, in advance of having received the Government's Notice II (also filed on April 2, 2010), the Defendants filed three separate motions *in limine* demonstrating why each of these three categories of evidence is inadmissible. We will not repeat those arguments here, but incorporate them by reference. We do, however, address new arguments and case law advanced by the Government in both its Notice II and its April 16, 2010 "Government's Omnibus Opposition to Defendants' Motions In Limine" (hereinafter "Omnibus Opposition").[7]

A. THERE IS NO EVIDENCE THAT MR. WONE WAS RESTRAINED AND NO EVIDENCE CONNECTING THE RESTRAINTS TO MR. WONE.

In both its Notice II and Omnibus Opposition, the Government repeats its prior arguments that because it does not appear that Mr. Wone moved or defended himself

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[4] Notice II, 9-11 (Apr. 2, 2010).

[5] *Id.* at 4-6.

[6] *Id.* at 6-8.

[7] *See supra* note 1 and accompanying text.

when he was stabbed, he must have been restrained. Consequently, the Government argues the "restraints" or erotic toys found in the Defendants' home are admissible.[8] The Government begins by stating that "the government has never 'acknowledged that here is no evidence of restraint.'" The record, however, explicitly contradicts the Government on this point. On September 11, 2009, one of the prosecutors in this case represented to the Court in no uncertain terms that there is "***no indication of restraint.***"[9]

The Government's constantly evolving theories to support their theory that Mr. Wone was restrained and could not move at the time he was stabbed are as varied as they are numerous. A brief review of the history of the Government's varied claims on this point is useful in evaluating its current claim that Mr. Wone *could* have been restrained with erotic toys.[10]

- In October 2007, the Government began by claiming that the evidence established that Mr. Wone had not been restrained and instead had been "entirely incapacitated/immobilized"[11] "by being ***injected with some type of incapacitating or paralytic drug.***"[12]

- When its extensive toxicological testing turned up nothing,[13] in February 2010, the Government next claimed that Mr. Wone was ***injected with an "undetectable" paralytic agent, "succinylcholine."***[14]

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[8] Notice II at 9; Omnibus Opp. at 26-29.

[9] Hr'g Tr. 47:22-23 (Sept. 11, 2009) (emphasis added), attached at Exhibit B to Defendants' Joint Motion in Limine to Exclude Argument, Evidence and Testimony Regarding Alleged Restraint and to Exclude Expert Testimony of Mr. James Plant (Apr. 2, 2010) (hereinafter "Motion in Limine re Restraint")

[10] The erotic toys are deemed "restraints" by the government.

[11] Affidavit In Support of Search Warrant for Dylan Ward, 6 (Oct. 27, 2008) (hereinafter "Affidavit).

[12] *Id.* at 5 (emphasis added).

[13] 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. *See* Office of the Chief Medical Examiner ("OCME") Toxicology Report I (Aug. 15, 2006); OCME Toxicology Report I (Mar.

- After the Defendants pointed out that one of the Government's own designated experts, Madeline Montgomery of the FBI, had tested for, detected and testified in support of the successful conviction of a defendant accused of paralyzing his wife with succinylcholine,[15] the Government abandoned its succinylcholine theory and then contended that Mr. Wone must have been ***physically restrained with sex toys*** recovered from the Defendants' home, despite the lack of any evidence to support such a claim.[16]

- On April 14, 2010, just three weeks from trial, the Government announced a new theory, contending that toxicology testing commenced on April 7, 2010, "indicated the presence of xylene in Mr. Wone's blood. ***Xylenes are volatile organic solvents capable of inducing unconsciousness when inhaled.***"[17]

- In its April 16, 2010 Omnibus Opposition, the Government now contends that it could be that "at the beginning of the attack on Mr. Wone, and up until the actual stabbing . . . ***he was physically restrained in some manner to assist his attacker(s) in chemically incapacitating and then killing him.***"[18]

The Government's ever-changing conjecture is hardly constrained by the lack of evidence to support its preconceived theory of this case.

We will address in a separate pleading the Government's very recent claim that Mr. Wone was rendered unconscious by xylene, a ubiquitous chemical found in "many types of foods,"[19] a wide range of consumer products, and "automobile exhaust,"[20]

1, 2010). 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. *Id.* *See also* Federal Bureau of Investigation Laboratory Report of Examination, 1-2 (Nov. 6, 2009).

[14] Notice at 7-8 (emphasis added).

[15] *See* Defendants' Joint Response to the Government's Notice of Uncharged Conduct I, 14-15 (Feb. 26, 2010).

[16] Notice II at 9 (emphasis added).

[17] Letter from Kirschner to defense counsel, 1-2 (Apr. 14, 2010) (emphasis added).

[18] Omnibus Opp. at 27 (emphasis added).

[19] Agency for Toxic Substances and Disease Registry, *Public Health Statement: Xylene*, 3 §1.3 (hereinafter "Xylene Public Health Statement).

resulting in varying "exposure levels for the general population."[21] In fact, the United States Agency for Toxic Substances and Disease Registry has determined that "people are exposed to [xylene] on a daily basis"[22] from a wide range of sources and that people living in urban areas have a higher degree of exposure. Once again, the Government has leapt to an unsupported conclusion without undertaking even a cursory investigation regarding xylene simply because some ***as yet undetermined*** amount of xylene was detected, three-and-a-half years later, in Mr. Wone's blood sample. Rather than conduct a careful and prudent investigation to consider other alternatives that could explain the presence of xylene, the Government immediately concludes that Mr. Wone was incapacitated with that substance.[23]

More important, however, is the Government's continued refusal to accept that the "absence of movement is a very different thing from evidence of restraint."[24] As we set forth in our prior pleadings, there is no physical evidence, such as lacerations, bruising, scratching, chafing, friction marks, dermal hemorrhaging, that would support an allegation that Mr. Wone was physically restrained (or for that matter forcibly incapacitated with xylene).[25] There are, however, other far more compelling explanations that readily explain Mr. Wone's apparent immobility. For instance, "penetrating injuries

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[20] *Id.*

[21] U.S. Department of Health and Human Services, *ToxGuide for Xylenes* (Oct. 2007), available at http://www.atsdr.cdc.gov/toxguides/toxguide-71.pdf.

[22] Agency for Toxic Substances and Disease Registry, *Public Health Statement: Xylene*, 3 §1.5.

[23] The government has yet to receive the quantitative data demonstrating the amount of xylene in Mr. Wone's blood, something which the government represents is still being tested by the FBI Laboratory. Lacking the quantitative data, it is hardly appropriate for the government to espouse and publicize these inflammatory and vacuous theories, never mind rush to the Court seeking an emergency hearing.

[24] Hr'g Tr. 46:1-3 (Mar. 12, 2010).

[25] *See* Defendants' Response I at 19-20; Motion *in Limine* re Restraint at 1-3.

to the heart, like the type suffered by Mr. Wone, result in immediate shock followed shortly by death."[26] All three of the Defendants' expert forensic pathologists, as well as an expert emergency room physician and expert cardiac surgeon, share the opinion that the stab wounds to Mr. Wone's heart resulted in virtually immediate incapacitation and rapid death.[27]

The Government also continues to ignore the long-standing requirement of this jurisdiction that admissible evidence must have a "connection" with ***both*** the defendant and 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*, 306 A.2d 659, 661 (D.C. 1973)(emphasis added)); *See also King v. United States*, 618 A.2d 727, 729 (D.C. 1993). As we have explained in our other pleadings, there is no such connection in this case, and the Government fails to articulate any in its most recent pleadings.[28]

Completely ignoring *Burleson* and its progeny, the Government contends that the mere presence of the restraints renders them admissible.[29] The Government finds no support in the case law of this jurisdiction, so instead relies upon case law from Maryland, Connecticut and Washington. The Government contends that these cases stand for the proposition that the mere availability of a given item of evidence renders it admissible. They do not. We have fully discussed the governing case law of this

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[26] Expert Disclosure of Dr. Vincent Di Maio ¶ 8 (Feb. 26, 2010).

[27] *See id.*; Expert Disclosure of Dr. Michael Baden ¶ 7 (Feb. 26, 2010); Expert Disclosure of Dr. Jonathan Arden ¶ 8 (Feb. 26, 2010); Expert Disclosure of Dr. Jeff Smith ¶ 4 (Feb. 26, 2010); Expert Disclosure of Dr. Farzad Najam ¶ 2 (Apr. 9, 2010).

[28] *See* Defendants' Response I; Motion in Limine re Restraint.

[29] Notice II at 10; Omnibus Opp. at 28 ("evidence that restraints were accessible to a perpetrator is often deemed admissible").

jurisdiction in our prior pleadings and will not repeat that discussion here other than to reiterate the observation of the *Burleson* court that "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*, 306 A.2d at 662 (D.C. 1973) (finding reversible error trial court's admission of gun available to the defendant, in absence of any other evidence connecting it to charged crime). The cases decided in the more than thirty years since *Burleson* confirm the same rule: there must be evidence connecting the item to the crime, and simple conjecture will not suffice. *See McConnaughey v. United States*, 804 A.2d 334, 338 n.4 (D.C. 2002) (citing *Burleson* and affirming admission of evidence of defendants' prior possession of a gun where victim was shot with a gun of the same caliber and witness testified the defendant had asked him to hide a gun of the same caliber the day after the shooting). Here, there is simply no evidence connecting the erotic toys to Mr. Wone's death. Consequently, they are inadmissible.[30]

Moreover, contrary to the Government's contention, the cases from Connecticut, Maryland and Washington upon which it relies also *support* exclusion of the erotic toys. The governing law of all three jurisdictions is substantively identical to that of the District, requiring a connection between the item and the charged crime for the item to be relevant and admissible.[31]

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[30] As fully set forth in the Defendants' Motion in Limine re Restraint, the erotic toys are also highly prejudicial and have no probative value, and therefore, are independently inadmissible on this basis. *See* Motion in Limine re Restraint at 6-8.

[31] All three jurisdictions apply the substantive equivalent of Fed. R. Evid. 403, also adopted by our Court of Appeals in *Johnson v. United States*, 683A.2d 1087, 1099 (D.C. 1996), permitting a trial court to exclude such evidence, even where relevant, if its probative value is substantially

This is quite clear in *Edwards v. State*, 71 A.2d 487, 494 (Md. 1950), cited and quoted—but misrepresented—by the government.[32] In *Edwards*, the defendant—who was accused of shooting two people to death—objected to admission of an ammunition cartridge casing found by the victims' bodies, of the same make and caliber of the ammunition for a gun owned by the defendant. Affirming admission of the casing, the Court of Appeals of Maryland found that forensic testing proving the cartridge was fired from a gun owned by the defendant supported admission of the cartridge: "[i]f this cartridge casing which was picked up nine days after the alleged murders, had not been identified [by the FBI] as having been fired from [the defendant's] gun it would not be admissible." *Id.*

The Government's reliance on *State v. Thomas*, 533 A.2d 553 (Md. 1987), is similarly misplaced. In *Thomas*, the defendant was accused of murdering his estranged girlfriend, who was discovered drowned in a river with her "hands [] bound behind her back, her legs [] bound together at the ankles, and a bucket [] attached to her feet, all with the type of rope used for clothesline." *Id.* at 555. Affirming the trial court's admission, over the defendant's objection, of testimony by the victim's sister, who, while searching

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outweighed by its potential for prejudice, which would certainly be true of the erotic toys in this case, assuming, *arguendo*, they were relevant in the first place.

[32] Notice II at 10. The portion of the opinion which the government quotes states: "[i]mplements of crime are admissible in evidence if they are so connected with the crime or the accused as to throw light upon a material inquiry in the case." In *Burleson*, the court also stated the required connection in the disjunctive, however, in *King v. United States*, 618 A.2d 727, 729 (D.C. 1993), the Court of Appeals held that "[a]lthough . . . *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*, 618 A.2d at 729.

the defendant's home for her sister, observed cut-clothesline in the basement, the *Thomas* court ruled that:

> The defendant next claims that the trial court erred in admitting testimony concerning a rope allegedly used in the crime. The victim's sister, Joanne Thompson, testified that on Friday, April 2, 1982, she helped the victim move her belongings from the apartment she had shared with the defendant. While there, Thompson observed a clothesline hung with clothes in the basement. On Monday, April 5, 1982, the day after the victim disappeared, Thompson returned to the defendant's apartment to look for the victim and noticed that the clothesline had been cut. *At trial, Thompson identified the rope which had been used to bind the victim's hands and feet as similar to the clothesline rope she had observed, first intact and later cut, in the defendant's basement.*

Id. at 556 (emphasis added). That *Thomas* contravenes, rather than supports the government's position regarding admissibility of the erotic toys is self-evident: the evidence in question was directly connected to the crime and to the defendant.

The Government next cites *State v. Winot*, 897 A.2d 115 (Conn. App. 2006), in which the defendant was charged with *attempted* kidnapping, a specific intent crime[33] requiring the state to meet the "burden of proving that the defendant intended to restrain the victim by 'using or threatening to use physical force or intimidation.'" *Id.* at 351 (quoting Conn. General Statutes § 53a-91(2)). At trial, the evidence showed that the defendant "forcibly took a twelve year old girl by the arm and attempted to pull her toward his parked vehicle." *Id.* at 334. When the defendant's car was searched, police found a rope shaped into the form of a noose in the trunk of the car. Affirming the trial court's ruling "that it had allowed the rope into evidence because it was relevant to establish the defendant's intent to restrain the victim," *id.* at 350, the Appellate Court of Connecticut held that "in light of the state's burden of proving that the defendant

[33] *See* Conn. Gen. Statutes §§ 53a-94(a) and 53a-49(a)(2).

intended to restrain the victim" the rope found in the trunk of the car into which he attempted to force the victim was relevant. *Id.* at 351. Connecticut, like the District, has long required the Government to show a connection between the item of evidence, the defendant and the crime charged. *See State v. Onofrio*, 25 A.2d 560, Conn., (Conn. App. 1979)) (holding that evidence that defendant possessed a collection of rifles and handguns was inadmissible to show "the defendant possessed the means of committing the crime" because "the state never connected the presence of the rifles in the defendant's house with the crime [shooting the victim] charged.")

Finally, the Government incorrectly refers to *State v. Burkins*, 973 P.2d 15, 25 (Wash. Ct. App. 1999), for the proposition that because the location of the erotic toys was "in close proximity to the bedroom in which Mr. Wone was found" (in fact, they were in storage bins in a bedroom across the house from the room in which Mr. Wone was found), this "tends to make more probable the existence of a fact of consequence to the case, namely that Mr. Wone was unable to move at the time his injuries were inflicted." *Burkins* could not be more contrary to the Government's position. In *Burkins*, the defendant was charged with the premeditated murder of a woman whose remains, discovered after a partial confession by the defendant, consisted of "several bones, a rope, a large mass of hair, and more of [the victim's] personal belongings, including a bra that had been cut with a sharp object." *Id.* at 21. At trial, the Government introduced evidence that the defendant had been accused of previously raping another woman who testified that "she was sexually assaulted by [the defendant] . . . [who] took her to a secluded location . . . tied her hands . . . and threatened to kill her if she did not follow his

instructions."[34] *Id.* at 22. The Government also introduced forensic evidence that the rope found with the victim's remains had been used to restrain her. *Id.* at 25. Affirming the trial court's admission of the testimony of the rape victim and the rope, the *Burkins* court held that,

> The trial court admitted into evidence the rope, which was knotted and looped three times, that the police found at the crime scene. The State theorized that [the defendant] obtained the rope when he picked up his gun and planned to use it to bind [the victim's] hands like he did [the rape victim's]. It suggested that Burkins' acts of obtaining the rope and bringing it to the scene are evidence of premeditation . . . [T]he presence of the rope at the scene of the crime tends to make the State's theory that [the defendant] planned to bind [the victim's] hands as he did [the rape victim's] more probable. As a result, the trial court did not abuse its discretion in concluding that the rope was relevant evidence. . . . [A]llowing the rope into evidence was well within the trial court's discretion, given the evidence that the rope was there, and that [the rape victim's] hands had been tied.[35]

Like the other cases relied upon by the Government, *Burkins* is easily distinguished from the current case. In *Burkins*, the rope admitted into evidence was directly connected to the crime and the defendant, *i.e.*, he had used rope to restrain a prior victim under very similar circumstances and, quite significantly, the rope was admitted to establish the defendant's premeditation.

In sum, all of the foregoing cases cited and relied upon by the Government support the position of the Defendants on this issue. These cases plainly illustrate circumstances in which the given items of evidence were properly admitted into evidence because they were directly connected to the crime and the defendant. Applying the same

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[34] The defendant was tried and convicted of the rape before his trial for the murder, however the trial judge, while allowing the rape victim to testify regarding being tied up and threatened, did not allow her to testify that she was raped and did not allow the government to introduce evidence of the defendant's conviction for rape. *Burkins*, 973 P.2d at 22.

[35] *Burkins*, 973 P.2d at 25-26.

principle in the instant case would preclude admission of the evidence in question for the following reasons:

1. The erotic toys were not found on or near Mr. Wone;
2. There is no evidence that they were used on him (and the Government has undertaken no effort to test or otherwise prove that any one of the erotic toys was used on Mr. Wone); and
3. The erotic toys are no way relevant to the Defendants' intentions.

For these reasons, the erotic toys are inadmissible pursuant to *Burleson* and its progeny.[36]

B. THE BURGLARY WAS NOT REPORTED "LATE" AND EVIDENCE REGARDING THE BURGLARY IS IRRELEVANT AND INADMISSIBLE.

In its Notice II, the Government repeats its intention to seek to admit evidence regarding the allegedly "late" reporting of the burglary of 1509 Swann Street in October 2006. Prior to receiving the Government's Notice II, on April 2, 2010, the Defendants filed a *Motion in Limine to Exclude Evidence and Argument Regarding the Burglary of 1509 Swann Street* ("Motion in Limine re Burglary"), which sets forth the facts concerning the burglary and demonstrates the irrelevance and inadmissibility of evidence concerning the burglary. However, in light of new arguments made by the Government in its Notice II, and repeated in its Omnibus Opposition,[37] we review certain facts concerning the burglary in order for the Court to properly assess and determine the inadmissibility of the burglary-related evidence. In the end, there is no similarity between the circumstances surrounding the reporting of the burglary and the

[36] Defendants will file a separate Reply in Support of their Motion to Exclude the Expert Testimony of Mr. James Plant, addressing therein the arguments raised by the government in its Omnibus Opposition concerning the propriety of permitting Mr. Plant to qualify and testify as an expert witness in this matter.

[37] Omnibus Opp., 21-22 (Apr. 16, 2010).

Government's alleged crimes and, for this and other reasons, evidence related to the reporting of the burglary is not admissible.

I. THE BURGLARY

In late October 2006, approximately three months after the death of Mr. Wone, the residence at 1509 Swann Street remained vacant. On the evening of October 30, 2006, the Defendants discovered that the home had been burglarized. For several different reasons, they suspected that Joseph Price's brother, Michael Price was involved in the burglary. Defendants Ward and Zaborsky spent that evening having the locks to the residence changed before returning home to Virginia. The following morning, the Defendants contacted their counsel and reported the burglary to them. It was decided that Mr. Ward, who first discovered the burglary, would report the incident to police, but that counsel should accompany him when making the report. Accordingly, on the morning of November 2, 2006, the first opportunity on which Mr. Ward's counsel was available to accompany him, Mr. Ward and his counsel reported the burglary to the Metropolitan Police Department. A police investigation into the burglary ensued.

On November 8, 2006, Joseph Price, accompanied by his counsel, was interviewed by Detectives Whalen, Swinson and Leonard regarding the burglary. The questioning was ostensibly about the burglary, but much of it focused on whether Michael Price might have had anything to do with Mr. Wone's death, as reflected in Detective Whalen's notes of the interview: "possibly relating to the R. Wone murder inv., DDW [Detective Daniel Whalen] along with Burglary Squad Detectives . . . meets with Mr. Joseph Price and his attorney . . . . While there, DDW interviews Joe (in the presence of his attorney) about the recent burglary of 1509 Swann St., NW, DC & its

possible relevance to the earlier Wone murder at this same address."[38] Mr. Price answered all of the Detectives' questions, providing information that could hardly be construed as "protecting" Michael Price.[39]

On November 10, 2006, Phelps Collins was arrested for the burglary of 1509 Swann Street[40] and was questioned by Sergeant Wagner and Detective Whalen.[41] Mr. Collins confessed to burglarizing 1509 Swann Street with Michael Price on October 30, 2006, and later pawning certain of the stolen items.[42] At least one of the stolen items was subsequently found in Mr. Collins's apartment.[43] On or about November 30, 2006, Michael Price was arrested for the burglary of 1509 Swann Street. Despite Mr. Collin's confession, neither he nor Michael Price was ever indicted. On August 15, 2007, both cases were dismissed by the Court for failure to prosecute.[44]

In August 2007, nine months after the burglary, AUSA Kirschner issued subpoenas to Defendants Ward and Zaborsky, requiring them to testify before a grand jury purportedly assembled to investigate the burglary of 1509 Swann Street. Accompanied by counsel, both men were interviewed by AUSAs Kirschner and Martin

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[38] Notes of Det. Daniel Whalen, 1 (Nov. 8, 2006), produced at P1290-1299.

[39] *Id.* at P1292-95. At the Court's request, the Defendants will produce, *in camera*, a copy of the notes which contain certain personal medical information.

[40] *See United States v. Phelps Collins*, FEL 25133-066 (Super. Ct. Dist. Colombia).

[41] *See* Preliminary Hr'g Tr. 7:9-25 (Nov. 14, 2006), attached at Exhibit A.

[42] *Id.* at 7:16-25; 22:8-17 ("[Mr. Collins] himself admitted on his videotaped statement to the detectives that he had participated in this offense at 1509 Swann Street and that he had while hesitating at first, he ultimately did admit that he was wearing gloves and that he did have knowledge that they were not supposed to be there and he acknowledged subsequently pawning those items and selling some of the items on the street. Finally, one of the those items that was taken from the home was actually recovered in the search warrant of the location where Mr. Collins was staying at the time."

[43] *Id. See also* Hr'g Tr. at 21:10-15.

[44] *See* Letters from United States Attorney's Office to Price (Aug. 21, 2007).

before testifying in the grand jury.[45] During his grand jury testimony, Mr. Zaborsky had the following exchange with AUSA Martin:

> MR. MARTIN: On October 30th was it reported your home was burglarized?
>
> MR. ZABORSKY: It was not reported on the 30th, and we wanted to talk to counsel. We wanted advice of counsel. And so that is the reason that we didn't pursue this on that night.[46]

Similarly, during Mr. Ward's grand jury testimony, the following exchanges occurred:

> MR. MARTIN: Joe [Price] was against reporting it [the burglary]? Or is that not a fair statement?
>
> MR. WARD: I would say that's not a fair statement. I think it was an ongoing discussion that wasn't solved on Monday, by the time we went to bed.[47]
>
> . . .
>
> MR MARTIN: Why didn't you report it in between the time of making a determination on the 31st that you should report it, and November 2nd when it was reported?
>
> MR. WARD: On the--I was waiting for my counsel.[48]

A complete review of the grand jury transcripts of both Defendants Ward and Zaborsky makes it quite clear that neither was "protecting" Michael Price.[49]

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[45] *See* Zaborsky Grand Jury Hr'g Tr. (Aug. 29, 2007); *See* Ward Grand Jury Hr'g Tr. (Aug. 21, 2007).

[46] Zaborsky Grand Jury Hr'g Tr. 19:15-19. Notably, this testimony is directly at odds with the government's claim in its Omnibus Opposition that the government's "proffered facts [concerning the burglary] are based on the sworn grand jury testimony of Ward and Zaborsky." Omnibus Opp. at 21.

[47] Ward's Grand Jury Hr'g Tr. 34:25 - 35:4.

[48] *Id.* at 41:4-7.

[49] *See Id.* at 32:21-24, 36:10-12, 37:24-38:2; Zaborsky Grand Jury Hr'g Tr. at 11:22 - 12:2, 14:6-20, 16:12 - 17:10.

Following the grand jury appearances, the Government took no action regarding the burglary. Nearly two years later, in April 2009, AUSA Kirschner asked Mr. Zaborsky's counsel what the Defendants' "position" was on whether they wanted the government to proceed with the prosecution of the burglary of 1509 Swann Street. On April 10, 2009, counsel for Mr. Zaborsky responded that:

> Finally, you have requested that we provide you the defendants' "position" on whether they want the U.S. Attorney's Office to proceed with the prosecution of the burglary of 1509 Swann Street on October 30, 2006. On behalf of Mr. Zaborsky, I think that it is a decision best left to the judgment of the U.S. Attorney's Office. If your office proceeds with the prosecution Mr. Zaborsky will testify if called at trial.[50]

The Government still took no action.

2. THE GOVERNMENT'S ARGUMENTS THAT THE BURGLARY EVIDENCE IS ADMISSIBLE ARE MERITLESS.

In its Notice I, the Government contends that the burglary evidence, in particular the allegedly "delayed" reporting of the burglary, was relevant because: "Defendant Price and his brother Michael Price have a very close relationship. According to witnesses, when Michael Price is in trouble, at times criminal in nature, his brother generally attempts to help him."[51] The Government further "reasons" that if the Defendants were willing to "protect" Michael Price after the burglary, they could also have been willing to protect him had he murdered Mr. Wone.

a. There circumstances surrounding the reporting of the burglary have no relevance to the crimes charged in this case and are thus inadmissible.

In its Notice II, the Government argues that portions of the grand jury testimony of Messrs. Ward and Zaborsky are admissible to prove that the Defendants "intentionally

[50] Letter from Connolly to Kirschner, 2 (Apr. 10, 2009).

[51] *Id.* at 8.

delayed their report of the stabbing of Mr. Wone to the police on August 2, 2006."[52] The Government reasons that "the grand jury testimony of the defendants Ward and Zaborsky will directly inform the jury as to the nature of the defendant's relationship, and how the defendants jointly decide what action (or inaction) they will take to protect a member of their 'family,' where that person appears to have engaged in felonious criminal activity."[53] These arguments are meritless.

As we explained in our Motion in Limine re Burglary, there is no basis upon which the Government can introduce evidence or argument concerning either the burglary or Michael Price. There is simply no logical or evidentiary connection—and the Government fails to provide any - between the burglary and the cover-up alleged in the indictment.[54] In the absence of such a connection, these statements are inadmissible.

The circumstances surrounding the reporting of the burglary have no bearing on any issue raised by the crimes charged in this indictment. First, the Defendants ***reported*** the burglary. Second, it is ludicrous to try and compare a situation in which the Defendants, believing that a family member who had access to their home had taken the Defendants' possessions without their permission, discussed whether to report the incident to the police, with a situation in which a man was murdered. A burglary, in which the Defendants were the only victims, hardly compares with the murder of Mr. Wone. It strains credulity for the Government to argue that because the Defendants spent an evening discussing whether to report a burglary they thought was committed by Mr. Price's brother, before deciding the next morning with their counsel to report it, they

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[52] Notice II at 5.

[53] *Id.* at 5.

[54] Motion in Limine re Burglary at 4-5.

would be likely to cover up the murder of Mr. Wone, assuming it was committed by someone they knew. The relationship between the two allegations is untenable and thus the evidence is not relevant and not admissible.

b. The Government seeks to improperly admit the grand jury statements to prove criminal propensity.

Furthermore, the grand jury statements of Defendants Ward and Zaborsky are being offered by the Government to prove the Defendants' alleged *propensity* to have purposefully delayed reporting Mr. Wone's stabbing. In the Government's own words "it is self-evident that if the defendants delayed their report of the burglary to protect Michael Price, that delay is circumstantial evidence of the charges alleged here as well."[55] In fact, it would be proof of a *propensity* to do so, and as such it is plainly inadmissible.

Our Court of Appeals has long held, "[a]lthough the rule has been cast in many forms, fundamentally, the law in the District of Columbia is that evidence tending to prove the defendant's propensity to commit crime is not admissible for that purpose." *Wilson v. United States*, 690 A.2d 468, 471 (D.C. 1997) (Ruiz, J., concurring). Here, the Government attempts to masquerade the grand jury testimony as proof of the Defendants' intent, arguing that it serves to establish "that the defendants intentionally delayed their report of the stabbing of Mr. Wone."[56] This sleight-of-hand is impermissible: "for obvious reasons [] courts must be vigilant to ensure that poisonous predisposition evidence is not brought before the jury in more attractive wrapping and under a more enticing sobriquet." *Thompson v. United States*, 546 A.2d 414, 420-21 (1988 D.C.).

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[55] Omnibus Opp. at 22.

[56] *Id.*

The Defendants' August 2007 grand jury testimony explaining why they discussed reporting the burglary and why they chose to call their attorneys before reporting it is irrelevant to the Defendants' actions on the night of August 2, 2006. Introducing such testimony is a transparent attempt by the Government to suggest to the jury that if the Defendants purportedly delayed calling the police on October 31, 2006, they might have done the same on August 2, 2006. Admission of such "evidence" would violate the most fundamental principles underlying exclusion of propensity evidence, other crimes evidence, misleading evidence and irrelevant evidence. Consequently, the grand jury testimony would be inadmissible as propensity evidence, even assuming, *arguendo*, it was otherwise relevant.

c. The grand jury statements are inadmissible hearsay.

In addition to being irrelevant and inadmissible propensity evidence, the grand jury testimony of Defendants Ward and Zaborsky, which the Government clearly seeks to introduce for the truth of the matter, are inadmissible hearsay, at least as to their codefendants. As we explained in detail in the *Defendants' Joint Reply to the Government's Consolidated Response to Defendants' Motion to Sever*, in *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court held that the Confrontation Clause prohibits the government from introducing a "testimonial" statement at a trial against a criminal defendant to prove the truth of the matter asserted unless the government (1) calls the declarant to testify in person, or (2) the declarant is unavailable and the defendant had a prior opportunity to cross examine the declarant. *Id.* at 59, 68. Two years later, the Court emphasized that only testimonial statements fall within the ambit of the Confrontation Clause; if a hearsay statement is not testimonial in nature, then the

Confrontation Clause will not prevent its admission. *Davis v. Washington*, 547 U.S. 813, 821 (2006). Without question, the grand jury statements of Defendants Ward and Zaborsky are testimonial. In *Thomas v. United States*, 978 A.2d 1211 (D.C. 2009), the Court of Appeals for the District of Columbia concluded:

> [I]f a defendant's extrajudicial statement inculpating a co-defendant *is* testimonial, *Bruton* requires that it be redacted for use in a joint trial to protect the co-defendant's Sixth Amendment rights even if the unredacted statement would be admissible against the co-defendant under a hearsay exception.

Id. at 1224-25.

In the case of the grand jury statements of Defendants Ward and Zaborsky: (1) the statement made by each Defendant is testimonial; (2) under the government's theory each statement is 'powerfully incriminating'; and therefore (3) it would violate the Confrontation Clause for the government to admit these unredacted statements in a joint trial. Moreover, given the nature of these statements, they do not fit within any hearsay exception that would render them admissible against the other codefendants. Even assuming, *arguendo*, that there was some basis on which these statements could be admitted, the Defendants would be entitled to separate trials.

3. THE MARCH 20, 2007 EMAIL FROM MICHAEL PRICE IS INADMISSIBLE.

The Government also states its intent "to introduce evidence that Defendant Zaborsky received an email from Michael Price on March 20, 2007, in which Michael Price admits to and apologizes for burglarizing 1509 Swann Street . . . and yet defendant Zaborsky did not provide this direct evidence of Michael Price's involvement in the crime to the government until August 29, 2007."[57] The Government argues that this

[57] Notice II at 6.

"evidence" is admissible because it "constitutes yet another example of how the Defendants knowingly and willingly delayed providing information to the police that was material to a pending criminal investigation." The email is inadmissible for the same reasons the grand jury statements are inadmissible: it is irrelevant; it is inadmissible propensity evidence; and it is hearsay.

Moreover, we are compelled to note that the Government's contention that Mr. Zaborsky purposefully delayed providing the email to withhold "material" evidence is false. AUSA Martin, who signed and presumably wrote the Notice II, is the same assistant who interviewed Mr. Zaborsky on August 27, 2007, and questioned him in the grand jury on that same date. AUSA Martin is therefore well aware that by the time Mr. Zaborsky received the email, it had already become moot: Phelps Collins had confessed six months earlier that he and Michael Price had committed the burglary; Michael Price had quickly been identified by Messrs. Ward and Price as a suspect in the burglary; and the Government had had every opportunity to indict and prosecute the case long before Mr. Zaborsky either received the email or was subpoenaed to testify before the grand jury. AUSA Martin is also directly aware of why Mr. Zaborsky did not think to provide the email to MPD, because Mr. Martin asked Mr. Zaborsky that very question during Mr. Zaborsky's grand jury testimony:

> MR. MARTIN: Let me ask you one more question about grand jury Exhibit 1 [the email]. Is it why didn't you give this to the police when you first got it?
>
> MR. ZABORSKY: I - to be honest with you, I never even thought of it as being relevant. I mean . . . the police very quickly determined that Michael was involved, and . . . it wasn't like that was an admission that would . . . help the case.

> And honestly, I literally read that and I didn't delete it but I just put it in a folder and never read it again.[58]

Finally, it bears noting that should the burglary evidence be admitted, it will serve only to create trial-within-a-trial, requiring the production and examination of numerous witnesses regarding issues and matters wholly unrelated to this case, invariably confusing and misleading the jury while needlessly wasting time and judicial resources. As such, even had it been relevant, it is properly excluded. *See Johnson v. United* States, 683 A.2d 1087, 1099 (D.C. 1996) ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

C. EVIDENCE OF THE DEFENDANTS' PERSONAL AND SEXUAL RELATIONSHIPS IS IRRELEVANT, PREJUDICIAL AND INADMISSIBLE.

"Evidence of the Nature of the Defendants' Unique Relationship as Proof of the Conspiracy" is the final category of so-called evidence that the Government contends it will seek to admit.[59] Specifically, the Government argues that it should be allowed to introduce the Defendants' birthday cards, anniversary cards and other such personal correspondence—***all of which predates August 2, 2006*** in order to establish the purpose and function of each of the Defendants' relationships, including how their relationships purportedly met their "need for an emotionally-stable relationship" and a "sexually-satisfying relationship," as well as what "tensions" existed in the relationships and how the Defendants "managed to maintain" their relationships.[60]

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[58] Zaborsky Grand Jury Hr'g Tr. 29:24 - 30:10.

[59] Notice II at 7-9.

[60] *Id.* at 7.

The Government's contention that the "relationship among the Defendants . . . is extremely probative of the power of their common bonds that allowed them to engage in a concerted effort to cover up a crime" is disingenuous.[61] While the government may rightfully put on evidence of the factual circumstances germane to the jury's determination of the charges, it does not have *carte blanche* to introduce irrelevant, personal communications that serve no function other than to unfairly prejudice the Defendants.

In its Notice II and its Omnibus Opposition the Government misconstrues the Court's decision in *Jones v. United States*, 625 A.2d 281, 284 (D.C. 1993)[62] as support for the proposition that it may introduce the intimate details of the relationship of the "homosexual defendants." To the contrary, in *Jones* the Court *reversed* the defendants' convictions precisely because the Government went beyond simply stating the defendants were "lovers" by telling the jury "that the evidence would show that the appellants were 'intimate homosexual friends' who called each other 'husband' and 'wife baby'" and by repeatedly soliciting from various witnesses personal and intimate details of the defendants' relationship. *Id.287-88.* What the Government proposes to do here, by introducing the personal, intimate correspondence of the Defendants, goes well beyond what the *Jones* court found objectionable and grounds for reversal. In reaching its decision, the Court expressly observed that:

> Evidence of homosexuality has an enormous proclivity for humiliation and degradation and, thus, poses a high risk of prejudicial impact on a jury. This is especially true where evidence of homosexuality is introduced against a criminal defendant who has a constitutional right to a fair trial. *See United States v. Provoo*, 215 F.2d 531, 537 (2d Cir.1954)

[61] *Id.* (underscoring in the original).

[62] Notice II at 8; Omnibus Opp. at 24-26.

> (evidence of defendant's homosexuality elicited by government during cross-examination was inadmissible, because "[t]he sole purpose and effect of this examination was to humiliate and degrade the defendant, and increase the probability that he would be convicted not for the crime charged, but for his ... unsavory character").

Jones, 625 A.2d at 284.[63] The *Jones* court also noted that what starts out as seemingly relevant and admissible evidence can easily turn irrelevant and prejudicial:

> We recognize that the conscientious trial judge attempted to strike a delicate balance early in the trial between probative and prejudicial evidence by allowing limited relevant testimony about appellants' homosexual relationship and effeminate tendencies to prove their unique association and to prove the identification of [the victim's] assailant. ***We also recognize that in attempting to strike that balance, a trial judge will often not appreciate at the outset how prejudicial the evidence can become as the trial progresses; in other words, the probative value of the evidence can dissipate as a result of abusive efforts by one party to elicit and embellish repetitious, prejudicial testimony and to reinforce that prejudice through legal argument, all of which inures to the detriment of another party.***

Id. at 285 (emphasis added) (citations omitted).

The same potential for abuse and prejudice exists here, particularly in light of the Government's long standing fixation on the Defendants' relationships, sexuality and earlier false allegations of sexual assault. For that reason, early and vigilant regulation of how and to what degree the Government may argue and admit evidence concerning the Defendants' relationships is paramount. In this respect, *Jones* provides useful guidance. To the extent it is admitted, the Government's evidence concerning the Defendants'

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[63] Citing William H. Danne, Jr., Annotation, *Prejudicial Effect of Prosecutor's Reference In Argument to Homosexual Acts or Tendencies of Accused Which Are Not Material To His Commission of Offense Charged*, 54 A.L.R.3d 897, 900 (1974 and 1992 Supp.) (courts generally have recognized that imputation of homosexuality to a criminal defendant tends to disparage him or her in the eyes of the jurors) (some citations omitted). *See also People of the Territory of Guam v. Shymanovitz*, 157 F.3d 1154, 1161 (9th 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"); *Commonwealth v. Baran*, Nos. 1804251, 181001, 2006 WL 2560317, at *26 (Mass. Super. June 16, 2006) ("evidence of homosexuality is extremely prejudicial").

relationships should be "brief, to the point, and narrowly tailored to the purposes for which the evidence [is] elicited," which in this case can only properly be that the Defendants lived together and had intimate relationships. *Id.* at 286. Anything beyond this would be "superfluous" and prejudicial.[64]

The Government's reliance on *United States v. Mermelstein*, 487 F. Supp. 2d 242, 262 (E.D.N.Y. 2007) (Johnson, J., adopting Mag. J. Report and Recommendation) is also misplaced. In *Mermelstein*, the defendant, a physician, was charged with conspiracy to make false statements in connection with a scheme to defraud health care benefit programs. *Id.* at 248. The defendant's former office manager was charged as a co-conspirator, entered a plea of guilty and was expected to testify for the Government at trial. *Id.* at 261. The Government alleged that the defendant and co-conspirator, while both married, had an affair with each other throughout the course of the conspiracy. *Id.* at 261-62. The Government further alleged that ***the defendant secured the coconspirator's continued participation in the conspiracy by threatening to tell the coconspirator's husband about the affair***. *Id.* at 262 (emphasis added).

The defendant argued that evidence of the affair was highly prejudicial and should be excluded pursuant to Fed. R. of Evid. 403. The court disagreed, finding that "prior bad acts committed together by co-conspirators may be admitted at trial as proof of their relationship and corroboration of one's claim to know about the criminal acts of the other." The court further held that "evidence of the affair between [the defendant] and [co-conspirator] is particularly relevant in this case because the government contends that

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[64] *See* 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, 3-5 (Apr. 2, 2010).

[the defendant] used the fact of the affair in furtherance of the charged conspiracy." *Id.* Significantly, the court also found that "***Not all facts relating to the alleged affair between [co-conspirator] and [the defendant] are more probative than prejudicial. For example, that [the defendant] was married at the time of his affair with [co-conspirator] does not seem relevant and might properly be excluded at trial.***" *Id.* at 262 n.8 (emphasis added).

The prosecutors in *Mermelstein* never tried to introduce the intimate correspondence of the coconspirators. Moreover, even the fact that they were married at the time of their affair was judged more prejudicial than probative and, for that reason, inadmissible. Again, what the Government proposes to introduce here goes well beyond the type of irrelevant details of the relationship that the *Mermelstein* court found objectionable.

Independent of exceeding the permissible scope of such "relationship" evidence, the specific evidence the government intends to introduce, *i.e.*, the existence and contents of the Defendants' anniversary cards, birthday cards and other such personal correspondence, is irrelevant because it does not "tend[] to make the existence or nonexistence of [any fact in this case] more or less probable than would be the case without that evidence." *Burleson v. United States*, 306 A.2d 659, 661 (D.C. 1973). What legal relevance could a birthday card written before (or, for that matter, after) Mr. Wone's death have for the jury's determination of whether the Defendants did or did not conspire to or obstruct justice or tamper with evidence on or after August 2, 2006? Moreover, the Government provides no authority, and we are aware of none, opining that being in any sort of domestic relationship, whether "complex," "steadfast," "emotionally-

stable" or "sexually-satisfying,"[65] tends to make it more or less likely that one would engage in a criminal conspiracy. Having no relevance to the charges in this case, the Defendants' personal correspondence and other intimate details of their relationships should be excluded.

Finally, the Defendants' personal correspondence is also inadmissible under *Butler v. United States*, 481 A.2d 431, 439 (D.C. 1984). The Government offers the correspondence for the truth of its content, *i.e.*, the "nature of the Defendants' relationships." It is axiomatic that because all of the correspondence pre-dates August 2, 2006, it cannot have been made by a coconspirator during the course of the alleged conspiracy in furtherance of the alleged conspiracy, as the conspiracy is not alleged to have commenced until August 2, 2006. Consequently, none of the personal correspondence is admissible.

III. CONCLUSION

For the foregoing reasons, Defendants respectfully submit that the Court should grant the Defendants' April 2, 2010 motions in limine to exclude argument, testimony and evidence regarding: (a) the alleged use of restraint on Mr. Wone; (b) the burglary of 1509 Swann Street; and (c) the sexual histories, personal correspondence and details of the Defendants' relationships. In addition, we ask the Court, based upon the motions in limine filed by the Defendants, to preclude the Government from introducing any argument or evidence delineated in the Government's Notice of Uncharged Conduct II.

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[65] *Id.* at 7.

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 the Government's Notice of Uncharged Conduct II and Reply in Support of Certain of the Defendants' Motions in Limine, was served by electronic mail and first class mail, this 20th day of April, 2010, upon:

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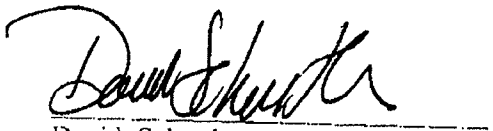

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