# SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

**Criminal Division—Felony Branch**

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| **UNITED STATES**  **v.** | **:**  **:**  **:**  **:**  **:**  **:**  **:** | **Docket No. 2013 CF2 16801**  **Hon. Judge Ryan Trial: August 13, 2014** |

**RESPONSE TO GOVERNMENT’S REPLY TO DEFENSE’S OPPOSITION TO GOVERNMENT’S MOTION FOR PROTECTIVE ORDER**

, by and through his counsel, respectfully submits this Response to the Government’s Reply to Defense’s Opposition to Government’s Motion for Protective Order.

Specifically, the government’s Reply (1) fails to articulate any specific harm the government would suffer as a result of disclosure of the compelled materials and (2) ignores the multiple ways (outlined by the defense in its Opposition) in which the proposed order would jeopardize Mr.

’s constitutional rights.

The government’s Reply is unresponsive to the defense’s opposition. It begins by reciting the Drug Enforcement Administration’s internal disclosure protocols, which are irrelevant to the legal determination that this Court must make of whether the government has made a “sufficient showing” that would justify the issuance of a protective order. See D.C. Sup. Ct. R. Crim. Pro. 16(d). Such a showing must allege “specific facts” and “specific harms” that would result absent such an order; yet, in its Motion and Reply, the government fails to make a showing of a single “specific fac[t],” Alexander v. FBI, 186 F.R.D. 71, 75 (D.D.C. 1998), or “specific har[m],” Mokhiber v. Davis,

537 A.2d 1100, 1115 (D.C. 1988), that it would suffer should its request for a protective order be denied. Even following an email from chambers inquiring “whether the government anticipates

relying with any further articulation of the sensitive/trade secret/work product interests in jeopardy,” and even after expressly “conferring with DEA counsel” about this very issue, the government was unable to do so. See Exhibit A. The government’s subsequent Reply merely

reiterates its conclusory assertion that “[d]isclosure of DEA sensitive information without a protective order, such that the information can be freely provided to other defense attorneys, defendants, jurisdictions, and the like undermines the DEA’s ability to pursue its core executive function in enforcing the Controlled Substances Act by utilizing sensitive, new, or lab-specific techniques.” Contrast with 8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2035, at

264-65 (1970) (“A finding of good cause must be based on a particular factual demonstration of potential harm, not on conclusory statements.” ). Nowhere in its Reply or Motion does the government actually articulate how disclosure of the compelled materials “undermines the DEA’s ability to pursue its core executive function.” Gov. Reply at 1. Revealingly, the

government’s Reply does not cite a single case or other legal authority justifying its request for a protective order.[1](#_bookmark0)

Nor does the government address the defense’s argument that the disclosure issue would be moot should the defense file a Motion appending the materials (e.g., through a Frye challenge,

given the government’s representation that the materials may pertain to “new, or lab-specific techniques,” Gov. Reply at 1) or even by cross-examining the DEA analyst about the “sensitive”

information, which this Court has already found is not simply relevant, but material, to the trial. If either of those scenarios occurred, the purportedly sensitive information would be made part of

1 Moreover, the government states, “To date, the government is unaware of any other Superior Court judge denying such a protective order.” Gov. Reply at 2. Although such opinions, even if they existed, would not be binding on this Court, the government has itself failed to cite to any analogous case in which a judge issued the order the government proposes.

the public record through the trial proceedings and corresponding transcripts, and so the protective order, governing pretrial actions by the defense team, would be moot.

In attempting to shift its own burden (of showing why a protective order is necessary) to the defense (to show why such a protective order is constitutionally prejudicial), the government incorrectly states that “the defense cannot put forth any reason why such a protective order undermines any constitutional right or any ability to put forth an effective defense.” Gov. Reply at 2. Indeed, Part

II of the defense’s Opposition lays out three discrete ways in which the proposed order would jeopardize Mr. ’s Fifth and Sixth Amendment Rights. See

Defense Opposition at 9 (“The government’s proposed order would jeopardize Mr.

’s right to a fair trial in multiple ways. First, by precluding counsel from discussing any of the materials with Mr. , the government would interfere with communication between Mr. and his attorney about the trial and would therefore undermine Mr. ’s ability to participate in his own defense.”), 10 (“Secondly, the government’s proposed order would jeopardize Mr.

’s right to a fair trial by requiring Mr. not only to disclose—but to seek express authorization from the USAO to engage in—the steps counsel takes for trial preparation.”), 11 (“If the proposed order were adopted, the defense would be prohibited from consulting experts other than Heather Harris without first identifying the expert and obtaining authorization from the government. Such a requirement is untenable and infringes on Mr. ’s Fifth and Sixth Amendment rights to a fair trial.”).

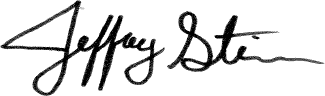
The government then attributes to the defense an argument for denying the protective order that the defense has never submitted: “The defendant’s desire, no matter how strong, to fully inform his colleagues of the DEA’s techniques is not a legal justification to deny the

government’s request for a protective order.” Gov. Reply at 2. Nowhere in its Opposition does

the defense reference such a “desire” as the basis for denying the proposed order, and the government’s creation and dismissal of such a straw-man argument is puzzling.

Thus, the government’s Motion for Protective Order should be denied because the government yet to articulate any actual harm it would suffer if the compelled materials were disclosed and has failed to address the multiple, concrete ways in which such an order would infringe upon Mr. ’s Fifth and Sixth Amendment rights.

Respectfully submitted,



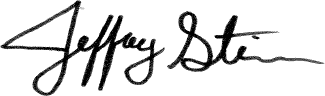
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# CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been served by email to the Office of the United States Attorney, Attn: L’Shauntee Robertson, Esq., 555 Fourth Street, N.W., Washington, D.C., 20530, on this 29th day of May, 2014.



Jeffrey D. Stein

**EXHIBIT A: EMAIL EXHANGE BETWEEN COURT AND GOVERNMENT**