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11 *Representing the United States of America*

12 **UNITED STATES DISTRICT COURT**
13 **DISTRICT OF NEVADA**

14 UNITED STATES OF AMERICA,

15 Plaintiff,

16 v.

17 ERIC J. PARKER,

18 Defendant.

2:16-CR-00046-GMN-PAL

**GOVERNMENT'S RESPONSE TO
DEFENDANT PARKER'S MOTION
FOR INCIDENT SCENE VIEWING
(ECF No. 1194, 1198, 1199, 1200, 1207,
1212 and 1219)**

19 The government timely files this Response to defendant Eric Parker's
20 ("Parker") Motion for Incident Scene Viewing (ECR No. 1194) (hereinafter the
21 "Motion"), which is joined by co-defendants Steven Stewart (ECF No. 1198), Mel
22 Bundy (ECF No. 1199), Ricky Lovelien (ECF No. 1200), Gregory Burleson (ECF No.
23 1207), Ryan Bundy (ECF No. 1212), and Micah McGuire (ECF No. 1219).
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BACKGROUND

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2 The Superseding Indictment alleges that beginning around April 5, 2014, the
3 Bureau of Land Management (“BLM”) and United States Park Service (“USPS”)
4 deployed law enforcement officers to provide security for civilian contractor cowboys
5 who were hired to impound Bundy’s cattle. From April 5 to April 12, the contractors
6 had gathered approximately 400 head of cattle which were corralled at the
7 impoundment site, located near the area where the North and Southbound Lanes
8 of Interstate 15 (hereinafter NB-15 and SB-15 respectively) traverse the Toquop
9 wash, about 10 miles from Mesquite, Nevada and the Nevada/Arizona border.

10 Between April 5 and April 12, Cliven Bundy and his conspirators had
11 recruited armed Followers, who referred to themselves as militia, to support
12 Bundy’s, and his co-conspirators’, stated goals of showing and displaying force
13 against the law enforcement officers, coercing them into releasing the impounded
14 cattle and forcing them to leave the area. Bundy’s recruiting efforts were successful.

15
16 Around noon on April 12, about 270 Bundy Followers (about 40 on horseback
17 and the remainder on foot) entered the Toquop wash from under NB-15 overpass
18 and formed a skirmish line midway between the NB-15 and SB-15 overpasses,
19 about 70 yards opposite a makeshift metal gate erected under the SB-15 overpass,
20 the gate serving as a barrier to prevent unauthorized entry into the impoundment
21 site from the wash. Behind the gate were approximately 40 officers who had formed
22 a line in depth, extending northward back from the gate.

1 The Followers presented the officers with an array of force, consisting of:
2 snipers on the NB-15 overpass, over 40 horses in the wash capable of breaching the
3 gate, gunmen in the wash carrying rifles at the low ready position, using women
4 and children as human shields to mask and protect their movements, and gunmen
5 taking tactically superior positions on elevated ground overlooking the officers'
6 positions. Out-numbered- outgunned, and out-positioned, the officers knew that if
7 shots were fired there would be an ensuing melee that would surely result in their
8 own injury or death or that of unarmed Followers. As a result, the officers
9 surrendered their position, released the cattle to Bundy and his co-conspirators, and
10 left the area.

11 The Indictment identifies Parker as one of the gunmen on that day. The
12 government anticipates that the evidence will show that he was on the NB-15
13 overpass in a sniper position, aiming his rifle at the BLM officers as part of the
14 assault force.

15 Parker's Motion seeks Court supervision of a juror inspection of the "the
16 incident scene on Interstate 15." Mot. at 2. He adds that "[i]t would also be
17 beneficial if [the jurors] had the ability to walk down into and inspect the 'wash'
18 area." *Id.*

19 The government does not disagree that an on-site inspection by the jury
20 would assist greatly in their understanding of the testimony and the video/audio
21 recordings and photographic evidence likely to be adduced at trial. It further does
22 not disagree that the images and sounds captured in the photographs and
23

1 recordings do not fully capture the spatial distances and relationships of the
2 overpasses to the wash below, nor can they fully capture the perspectives of the
3 officers.

4 All of that said, however, there are very practical safety and security
5 considerations that would have to be addressed before undertaking such an
6 endeavor.

7 **• The Terrain.**

8 Entering the wash itself is physically demanding and may prove too difficult,
9 depending upon the physical abilities of each juror. To reach the “bottom” of the
10 wash, the area under the SB-15 where the law enforcement officers were positioned
11 against Bundy’s armed followers, would require the jurors to travel more than .25
12 miles from the entrance to the wash and down a narrow unimproved pathway.
13 While the slope is fairly moderate, the terrain is treacherous, characterized by
14 uneven ground, rocks, ravines, and sand, making it highly likely that someone
15 would trip or fall when hiking the area. Further, since there is no road or hardened
16 surface leading to the bottom, it is not possible for a multi-passenger vehicle to
17 travel there without becoming mired in sand or stuck in a ravine. Lastly, there is
18 no area of stable footing once at the bottom, assuming jurors could be transported
19 there safely.
20

21 With these considerations in mind, transporting jurors to the bottom of the
22 Wash would require that either a road be graded/poured to accommodate a multi-
23 passenger vehicle or that all-terrain vehicles of some sort be used to shuttle
24

1 individual jurors back and forth from the entrance to the bottom. And, lastly, some
2 form of hardened surface would need to be graded or installed at the bottom to
3 accommodate the safe movement of the jurors across otherwise soft and uneven
4 terrain.

5 • **The Traffic.**

6 The entrance to the Wash area is a dirt drive, located off north side of the SB-
7 15 lanes, that appears abruptly following a downhill slope where SB traffic is
8 moving very rapidly (the speed limit is 75 mph). There is no shoulder or
9 deceleration lane before the entrance, making access from the SB-15 lanes unsafe.

10 There is a maintenance road that can be accessed from the NB-15 that
11 traverses the median to the SB-15, directly across from the entrance to the site.
12 Gaining entrance from this direction, however, requires slowing a vehicle to almost
13 a stop while in fast-moving traffic, making a left turn onto the maintenance road,
14 and then crossing two lanes of the SB-15 when there is a break in the otherwise
15 fast-moving southbound traffic.

16
17 Further, and as noted in the Motion, the NB-15 overpass (the position of five
18 of the six defendants) is narrow and there is no sidewalk or pedestrian path on the
19 overpass itself. Even reducing traffic to one lane on the overpass (assuming it could
20 be done) would not adequately ensure the safety of the jurors. The volume of traffic
21 in that area during normal business hours is fair to moderate and fast-moving.
22 There is nothing about traffic cones, or even patrolmen slowing and re-directing

1 traffic, that can completely safeguard against an accident on the overpass as traffic
2 is slowed and re-directed at that point.

3 • **Personal Security of the Jurors and Court Staff.**

4 As already observed by the Court when issuing the protective order in this
5 case, there are Bundy supporters who use social media to “out” law enforcement
6 officers in order to harass and intimidate them, capturing their images and
7 transmitting them in cyberspace. The overpass and the Wash are in the open and,
8 given the media interest in this case, there is the strong possibility that others will
9 learn of the visit, show up at the site to protest within the sight and hearing of the
10 jury and/or capture their (or Court staff) images in order to circulate them and
11 determine their identities.

12 **DISCUSSION**

13 This Court enjoys broad discretion in determining whether (and, under what
14 circumstances) to permit jury views. *See, e.g., United States v. Gray*, 199 F.3d 547,
15 550 (1st Cir. 1999) (issue is “committed to the trial court’s informed discretion”); *see*
16 *also United States v. Gadsden*, 215 F. App’x 283, 286 (4th Cir. 2007) (unpublished)
17 (“the trial court’s decision to permit a jury to view the premises where criminal
18 activity allegedly occurred is ‘a matter resting in his sound discretion.’” (quoting
19 *Massenberg v. United States*, 19 F.2d 62, 64 (4th Cir. 1927)). Whether to permit a
20 jury viewing hinges on the presiding judge’s consideration not only of the five factors
21 collected in Parker’s motion (*see* Def. Mot. at 2), but, in addition, consideration of
22 whether adequate security can be provided during the viewing. *See, e.g., Lopez v.*
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1 *Thurmer*, 573 F.3d 484, 494-495 (7th Cir. 2009) (factors to consider include “the
2 appropriate security measures for a jury view outside the courtroom”).

3 The government agrees that a carefully-monitored jury view falls within this
4 Court’s broad discretion. Nevertheless, while the government does not necessarily
5 oppose the Motion, it respectfully suggests that any such viewing should, at a
6 minimum, be considered only after addressing the safety concerns delineated above.
7 The costs alone of mitigating these concerns may, on balance, weigh against
8 ordering a viewing. At all events, however, the government is not in a position to
9 assess the costs of mitigation or evaluate the efficacy of potential mitigation without
10 further order from the Court.

11 Further, even if the safety concerns could be practicably and adequately
12 mitigated, there are several other limitations that the Court may, and should,
13 impose if a viewing is ordered. First, only the defendants’ lawyers—not the
14 defendants themselves—should be allowed to travel to the site, and then for only a
15 brief on-site viewing. Such limitations do not infringe upon Due Process and,
16 indeed, would reduce the logistical hurdles and security considerations attendant
17 to transporting defendants who are in pretrial custody. *See Rogers v. Howes*, 64
18 Fed. Appx. 450, 453-454 (6th Cir. 2003) (“[T]he Due Process Clause . . . [is] not
19 violated by excluding a defendant from an on-site inspection by a jury where the
20 defendant’s attorney was present . . . [T]he defendant’s presence . . . is not among
21 those constitutional rights ‘conferred so explicitly as to leave no room for an inquiry
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1 whether prejudice to a defendant has been wrought through their denial.”)
2 (unpublished) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 107-108 (1934)).

3 Second, this Court should admonish the jurors that they cannot speak about
4 the case while driving to and from the site and that, while at the site, they should
5 not talk *at all*. The attorneys should be similarly barred from offering any
6 descriptive comments. This Court (which should accompany the jurors) should be
7 the only person permitted to speak, and an accurate record should be maintained.
8 *See, e.g., Gray*, 199 F.3d at 549-550 (“Precautions, of course, must be taken . . .
9 [P]roper judicial administration demands the presence and supervision of the judge
10 at the view . . . and definitive instructions to refrain from conversation and
11 independent exploration should be given the jury prior to a view. . . Of obvious
12 importance is the court’s responsibility to ensure that what transpires at the view
13 is fully and accurately recorded . . .”) (quotation omitted)).

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1 **WHEREFORE**, for the foregoing reasons, the government being unable to
2 fully assess the safety risks and costs of mitigating those risks without further
3 information, it can neither oppose nor support Parker's Motion (ECF No. 1194) at
4 this time.

5 **DATED** this 10th day of January, 2017.

6
7 Respectfully,

8 DANIEL G. BOGDEN
9 United States Attorney

10 //s//

11 _____
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CERTIFICATE OF SERVICE

I certify that I am an employee of the United States Attorney's Office. A copy of the foregoing **GOVERNMENT'S RESPONSE TO DEFENDANT PARKER'S MOTION FOR INCIDENT SCENE VIEWING (ECF No. 1194, 1198, 1199, 1200, 1207, 1212 and 1219)** was served upon counsel of record, via Electronic Case Filing (ECF).

DATED this 10th day of January, 2017.

/s/ Steven W. Myhre

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