Jason Patrick, Pro Se
c/o Andrew M. Kohlmetz, OSB #955418
Kohlmetz Steen & Hanrahan PC
741 SW Lincoln Street
Portland, OR 97201
Tel: (503) 224-1104
Fax: (503) 224-9417
Email: andy@kshlawyers.com

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

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| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>vs.<br><br>JASON PATRICK,<br><br>Defendant | Case No. 3:16-CR-00051-BR-09<br><br>MEMORANDUM IN SUPORT OF DEFENDANT'S MOTION TO DISMISS SUPERSEDING INDICTMENT: PROSECUTORIAL MISCONDUCT – PREJUDICIAL EXTRAJUDICIAL STATEMENTS |

"While we had hoped for a different outcome, we respect the verdict of the jury and thank them for their dedicated service during this long and difficult trial." *United States Attorney for the District of Oregon, Billy J. Williams, October 27, 2016.*

"For many weeks, hundreds of law enforcement officers – federal, state, and local – worked around-the-clock to resolve the armed occupation at the Malheur National Wildlife Refuge peacefully. We believe now – as we did then – that protecting and defending this nation through rigorous obedience to the U.S. Constitution is our most important responsibility,… Although we are extremely disappointed in the verdict, we respect the court and the role of the

jury in the American judicial system." *Greg Bretzing, Special Agent in Charge of the FBI in Oregon, October 27, 2016.*

"Respect the court, but deeply disappointed in Malheur verdicts. Safety of employees remains the top priority.SJ #Oregonstandoff". *Tweet from U.S. Secretary of the Interior Sally Jewell (@SecretaryJewell), October 28, 2016.*

These official statements from Oregon's lead federal prosecutor, the FBI Special Agent in charge of the FBI in Oregon, as well as other federal expressions of disappointment in the verdict are egregious violations of these defendants' right to a fair trial. This is particularly so in the unique circumstances in this case. The extensive pre-trial media coverage has already been well documented in earlier litigation and funding requests filed on behalf of Mr. Patrick and others herein. After the verdicts of Not Guilty were received on October 27, 2016, traditional and social media virtually exploded with public and official reaction to the verdicts. Most of this coverage was devoted to expressing disbelief, confusion, disappointment, and outrage at the verdicts. Added to this cacophony of public expression, protected by the First Amendment's guarantee of free speech were the public expressions of disappointment in the outcome noted above. Knowing full well that a second group of these defendants would soon be facing their own trial, the prosecution and its agents cavalierly made public statements disparaging the prior verdict. Their "disappointment" is nothing less than a thinly veiled accusation that the first jury came, either through conscious desire or unfortunate mistake, to the incorrect conclusion. These public expressions of disagreement with the verdict serve no legitimate prosecutorial purpose and can only serve to infect any future jury pool with the belief that the first jury erred in its determination that the government had utterly failed to prove its case beyond a reasonable doubt. Such staements not only violate the Sixth Amendment's guarantee of a fair trail but also



Kohlmetz Steen & Hanrahan PC
741 SW Lincoln Street
Portland, OR 97201
(503) 224-1104

transgress Department of Justice Policy as well as all known model rules governing the prosecution's duty to take care in making extrajudicial statements to avoid potential prejudice to defendants who have yet to be tried.

## I. The Sixth Amendment's guarantee of a fair trial extends to proscribing the prosecution's extrajudicial public statements.

The Sixth Amendment to the United States Constitution states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a …. trial, by an impartial jury." A criminal defendant's right to a fair trial is a fundamental and essential component of our criminal justice system. *Nebraska Press Association v. Stuart*, 427 U.S. 539, 551, 96S.Ct 2791, 49 Led.2d 683 (1976). The Supreme Court has stated that the attorneys in a criminal trial, as officers of the court have a duty to "…not engage in a public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice." *Id., at 601 n. 27.* This is because the extrajudicial statements of attorneys are likely to be perceived by the public as authoritative and based on access to non-public information.

> Because lawyers have special access to information through discovery and client communications, their extrajudicial statements pose a threat to the fairness of a pending proceeding since lawyers' statements are likely to be received as especially authoritative.

*Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1074 , 111 S.Ct. 2720, 2744-5, 115 L.Ed.2d 888 (1991). The Sixth Amendment is a limitation on the government and does not give the prosecution the right to a fair trial. *Levine v. U.S. Dist. Court for Cent. Dist. of California,* 764 F.2d 590, 596 (9th Cir. 1985), *citing CBS Broadcasting Systems Inc. v. U.S. Dist. Court for Cent. Dist. of California,* 729 F.2d 1174 at 1184 (Goodwin, J., concurring). Thus, the defense is given somewhat more latitude in its public relations and in its effort to secure a jury pool free of pro-



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prosecution bias. *Id. at 597*., The Supreme Court has noted that the federal courts have the authority to take steps necessary to protect the integrity of the judicial process from outside influence. *Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966)., *See also Farr v. Pritchess*, 522 F.2d 464, 468-9 (9th Cir. 1975). As detailed in Mr. Patrick's previous Motions and Memoranda regarding his request for a change of venue, pre-trial publicity even without official contamination, can in certain circumstances rise to denial of a fair trial. These concerns are only exacerbated by official comments that can have no other effect than tainting the potential jury pool.

## II. The Government's official Expressions of Disappointment violate federal regulations, DOJ policy and both Oregon state and ABA model rules of ethical behavior.

Federal regulations, Department of Justice policy, as well as American Bar Association Model Rules all speak to the inappropriateness of the expressions of disappointment in the jury verdict that emanated from the US Attorney's Office, the Federal Bureau of Investigation, and the Interior Department. Federal Regulations concerning the release of information by personnel of the Department of Justice relating to criminal proceedings provide in pertinent part that public disclosures of information

> should include only incontrovertible, factual matters, and should not include subjective observations. In addition, where background information or information relating to the circumstances of an arrest or investigation would be highly prejudicial or where the release thereof would serve no law enforcement function, such information should not be made public.

*28 C.F.R. § 50.2 (3)*. The regulations stress the particular importance of guarding against prejudicial disclosures in the period leading up to trial.

Because of the particular danger of prejudice resulting from statements in the



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Portland, OR 97201
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> period approaching and during trial, they ought strenuously to be avoided during that period. Any such statement or release shall be made only on the infrequent occasion when circumstances absolutely demand a disclosure of information and shall include only information which is clearly not prejudicial.

*28 C.F.R. § 50.2 (5).* Furthermore the regulations recognize that some forms of public information serve little legitimate purpose and are inherently prejudicial, providing;

> The release of certain types of information generally tends to create dangers of prejudice without serving a significant law enforcement function. Therefore, personnel of the Department should refrain from making available the following: ….(v) Statements concerning evidence or argument in the case, whether or not it is anticipated that such evidence or argument will be used at trial.
> (vi) Any opinion as to the accused's guilt, or the possibility of a plea of guilty to the offense charged, or the possibility of a plea to a lesser offense.

*28 C.F.R. § 50.2 (6)(v-vi).* These regulations are mirrored in the Department of Justice's own United States Attorney Manual which states in part:

> At no time shall any component or personnel of the Department of Justice furnish any statement or information that he or she knows or reasonably should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

United States Attorneys Manual 1-7.500. That manual goes on to list specific concerns of prejudice involving the following types of information and directs that DOJ personnel should refrain from making available to the media the following:

> E. Statements concerning evidence or argument in the case, whether or not it is anticipated that such evidence or argument will be used at trial;
> F. Any opinion as to the defendant's guilt, or the possibility of a plea of guilty to the offense charged, or the possibility of a plea of a lesser offense.

*United States Attorneys Manual 1-7.550(E)(F) - Concerns of Prejudice.* Furthermore, a news release concerning a pending case "should contain a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty." *United States Attorneys Manual 1-7.600*



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Oregon Rule of Professional Conduct 3.6 provides that no lawyer involved in a judicial proceeding shall make any public statement that he or she "knows or reasonably should know" would have a "substantial likelihood of materially prejudicing" a future trial like the own currently pending. *Oregon Rule of Professional Conduct 3.6(a).* Such statements are also proscribed by the American Bara Association model rules. ABA Model Rule of Professional Conduct 3.6(a), applicable to defense and prosecution lawyers provides:

> A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

Heightened standards apply to media disclosures made by prosecutors. The commentary to ABA Model Rule of Professional Conduct Rule 3.8 notes the prosecutor's special responsibility as a "minister of justice" and not "simply that of an advocate." The prosecutor's duty is to " see that the defendant is accorded procedural justice," and that "guilt is decided upon the basis of sufficient evidence." *ABA Model Rule of Professional Conduct Rule 3.8 commentary note 1.*

ABA Model Rule of Professional Conduct 3.8(f), applicable only to the prosecution states:

> except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

These ethical standards are mirrored in the ABA's recently adopted Fourth Edition of Criminal Justice Standards for the Prosecution Function which counsel that the prosecution should "not



Kohlmetz Steen & Hanrahan PC
741 SW Lincoln Street
Portland, OR 97201
(503) 224-1104

make, cause to be made, or authorize or condone the making," of any public statement which the prosecutor "knows or should reasonably know" will either have a "substantial likelihood of materially prejudicing a criminal procedding," or "heightening public condemnation of the accused." *ABA Criminal Justice Standards for the Prosecution Function Fourth Edition, Standard 3-1.10(b)*. The ABA standards also call for the prosecution to take "reasonable care" to ensure that other persons "assisting or associated with the prosecution" do not make any such statements. *ABA Criminal Justice Standards for the Prosecution Function Fourth Edition, Standard 3-1.10(e).*

**III. Dismissal of the Indictment is the appropriate remedy.**

The United States Supreme Court has established an obligation on the part of district courts to take whatever affirmative steps may be necessary to protect a criminal defendant's right to a fair trial untainted by prejudicial comments in the media. *See Sheppard v. Maxwell,* 384 U.S. 333, 363, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966)("The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences."). The Court of Appeals for the Ninth Circuit has recognized that "the *Sheppard* court unequivocally imposed a duty upon trial courts to take affirmative steps to insure the fairness of a criminal proceeding in the face of excessive publicity." *Levine v. U.S. Dist. Court for Cent. Dist. of California,* 764 F.2d 590, 596 (9th Cir.1985)(*citing Farr v. Pitchess,* 522 F.2d 464, 468 (9th Cir.1975)). The *Farr* court noted that "

> [t]he most practical and recommended procedure to insure against dissemination of prejudicial information is the entry of an order directing that attorneys, court personnel, enforcement officers and witnesses refrain from releasing any information which might interfere with the right of the defendant to a fair trial.



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(503) 224-1104

522 F.2d at 468 (citing *Sheppard*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600).

Here however, the damage has been done. No remedy short of dismissal can undo the taint of these comments. The official statements of disappointment were made and extensively reported and commented upon in both social and traditional media. Dismissal of the Indictment as either a remedy for the Sixth Amendment violation or as an exercise of the court's supervisory powers is now appropriate. Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered. *United States v. Morrison*, 449 U.S. 361, 364, 101 S. Ct. 665, 667–68, 66 L. Ed. 2d 564 (1981). The prosecution's comments on the verdict have created "demonstrable prejudice" or a "substantial threat thereof" to this trial groups' ability to secure a fair trial. *Id.*, 449 U.S. at 365, 101 S. Ct. at 668. The statements at issue in this case should never have been made, nor can they now be unmade. As discussed above they amount to prosecutorial misconduct. Under its inherent supervisory powers, a federal court is empowered to dismiss an indictment on the basis of such misconduct. *U.S. v. Owen*, 580 F.2d 365, 367 (9th Cir. 1978)*(further citation omitted.)* In such circumstances the dismissal serves not only as a vindication of the defendant's rights, but as a " a prophylactic tool for discouraging future deliberate governmental impropriety of a similar nature." *Id., citing Elkins v. United States*, 364 U.S. 206, 217, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960); *United States v. Houghton*, 554 F.2d 1219, 1224 (1st Cir. 1977), *Cert. den.*, 434 U.S. 851, 98 S.Ct. 164, 54 L.Ed.2d 120 (1977).

RESPECTFULLY SUBMITTED This 6th day of December, 2016

Jason Patrick

Jason Patrick, Pro Se



Kohlmetz Steen & Hanrahan PC
741 SW Lincoln Street
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(503) 224-1104