

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

v.

LANDON MITCHELL

Case No. 1:21CR508(BAH)

**MOTION TO SEVER DEFENDANTS AND
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

Landon Mitchell, through counsel, respectfully requests, pursuant to Federal Rule of Criminal Procedure 14, that this Honorable Court sever his trial from that of his co-defendant, Luke Bender. Severance is required for multiple reasons. First, severance is required based on the prejudice Mr. Mitchell will suffer should his co-defendant's statements be introduced at a joint trial; second, because of the disparity in evidence of guilt that will be presented. Finally, severance is required because Mr. Bender's defense will be irreconcilable with Mr. Mitchell's defense and therefore, Mr. Bender's counsel will act as a "second prosecutor" against Mr. Mitchell.

Factual History

Mr. Mitchell is before the Court charged with offenses arising out of his alleged participation in the events of January 6, 2021. The government alleges that he was present inside the Capitol with Luke Bender, whose case was joined to Mr. Mitchell's over Mr. Bender's objection. While both defendants—along with hundreds of other defendants—are charged with obstruction of justice and knowingly entering a

restricted building, they are not charged with conspiring with one another or with anyone else. Shortly after his arrest, Mr. Bender gave statements to law enforcement in which he “provided Mr. Mitchell’s contact information, and described the extent of his knowledge of Mr. Mitchell.” Bender Opp. to Joinder, ECF. No. 34. He also described what Mr. Mitchell did and claimed that he followed Mr. Mitchell into the Capitol building and into the Senate Chamber.

I. The government’s use of Mr. Bender’s statements requires severance because a joint trial will unfairly implicate Mr. Mitchell in violation of his Confrontation Clause rights.

In *Bruton v. United States*, 391 U.S. 123, 137 (1968), the Supreme Court held that the Confrontation Clause requires severance when the government uses a statement by a non-testifying co-defendant that implicates the defendant.¹ In addition, where, as here, the association between the co-defendant’s statements and Mr. Mitchell is “inevitable,” *Bruton* applies and “a limiting instruction would be of no avail.” *United States v. Applewhite*, 72 F.3d 140, 145 (D.C. Cir. 1995).

In the instant case, Mr. Bender implicated Mr. Mitchell by identifying him to law enforcement and describing his conduct in detail. Because of the damaging impact of such testimony and the difficulty any fact-finder would have in disregarding the statements as evidence against Mr. Bender, the Court should sever Mr. Mitchell’s

¹ Even in the absence of a Confrontation Clause problem – i.e., in situations in which the co-defendant making the out-of-court statement also testifies at trial – the extrajudicial statement of one defendant remains inadmissible hearsay against another, and the prejudice created by the presentation of such a statement still mitigates in favor of severance. *Carpenter v. United States*, 430 A.2d 496, 503 (D.C. 1981).

trial from that of his co-defendants. *See id.* at 137.

II. A joint trial will run a real risk that Mr. Mitchell will be convicted on the basis of guilt by association.

In this case, both defendants are allegedly captured on video, alongside other protestors. Mr. Bender further implicated the duo by making admissions about his own and Mr. Bender's conduct. Although severance is not required "merely because evidence against one defendant is more damaging than evidence against the other," *Johnson v. United States*, 596 A.2d 980, 987 (D.C. 1991), severance is required where the evidence against one defendant is so much more damaging than the evidence against the other that the disparity unfairly raises the specter of guilt by association. *See United States v. Mardian*, 546 F.2d 973, 979-81 (D.C. Cir.1976). Here, there is a real risk that the jury will infer guilt by association. In order to protect Mr. Mitchell's fundamental rights at trial, the Court should therefore sever his trial from that of his co-defendants.

III. Severance is required because Mr. Bender will present an irreconcilable defense and therefore act as a second prosecutor against Mr. Mitchell.

Rule 14 allows the Court to sever properly joined defendants in order to avoid prejudice to one defendant's position at trial. The presentation of "mutually antagonistic" or "irreconcilable" defenses by co-defendants often creates enough of this type of prejudice to mandate the severance of the defendants at trial. *Zafiro v. United States*, 506 U.S. 534, 538 (1993). In this case, the likely presentation of mutually antagonistic defenses in this case warrants severance of Mr. Mitchell's case from that of his co-defendant. Specifically, based on review of discovery and

conversations with co-counsel, Mr. Mitchell anticipates that Mr. Bender will argue that Mr. Mitchell influenced, encouraged, and even coerced him to enter the Capitol and engage in certain conduct, including entering sensitive areas of the building.

Federal Rule of Criminal Procedure 14 provides, *inter alia*, for relief from prejudicial joinder of defendants. While the Rule affords protection against all forms of prejudice which might arise from joinder of defendants, courts have recognized that “[p]erhaps the primary danger against which the rule is designed to guard is that of a [defendant] having to face what amounts to multiple prosecutors - the state and his co-[defendant’s counsel].” *United States v. Clark*, 744 F.2d 1124, 1126 (5th Cir. 1984) (citations omitted).

Several analyses have developed governing the assessment of prejudice arising from the antagonism of co-defendants at trial. The two principal categories of cognizable prejudice in this area are: 1) the prejudice arising from the presentation of “conflicting and irreconcilable defenses” and 2) the unfairness of exposing the defendant to a multiple attacks from both the government and the co-defendants; i.e., the “second prosecutor problem.”

The question whether severance is required by the co-defendant’s posture as a “second prosecutor” is analytically independent of the question of whether severance is required on the grounds of “conflicting and irreconcilable defenses.” Even where a court concludes that severance is not warranted under the “conflicting and irreconcilable defenses” line of authority, severance is nevertheless required where, as here, joinder of defendants deprives the defendant of a fair trial by introducing “what is in effect a

second prosecutor into a case, by turning each co-defendant into the other's most forceful adversary." *Zafiro v. United States*, 506 U.S. 534, 544, 113 S.Ct. 933, 939 (1993) (Stevens, J., concurring in the judgment) (footnote omitted) (citing *United States v. Tootick*, 952 F.2d 1078, 1082 (9th Cir.1991); *Romanello*, 726 F.2d at 179; *See United States v. Sheikh*, 654 F.2d 1057, 1066 (5th Cir. 1981) ("[T]he taking of an adversarial stance on the part of counsel for co-[defendant] may generate trial conditions so prejudicial to the co-[defendant] under attack as to deny him a fair trial.").²

In *United States v. Tootick*, the Ninth Circuit further explained the manifestations of the prejudice arising from the co-defendant's role as a "second prosecutor":

Defendants who accuse each other bring the effect of a second prosecutor into the case with respect to their co-defendant. In order to zealously represent his client, each co-defendant's counsel must do everything possible to convict the other defendant. The existence of this extra prosecutor is particularly troublesome because the defense counsel are not always held to the limitations and standards imposed on the government prosecutor. Opening statements as in this case, can become a forum in which gruesome and outlandish tales are told about the exclusive guilt of the "other" defendant. In this case, these claims were not all substantiated by the evidence at trial. Counsel can make and oppose motions that are favorable to their defendant, without objection by the government.

Cross-examination of the government's witnesses becomes an opportunity to emphasize the exclusive guilt of the other defendant or to help rehabilitate a witness that has been impeached. Cross-examination of the defendant's witnesses provides further

²In this regard, courts that have considered the "second prosecutor" problem have done so independently of their consideration of the issue of "conflicting and irreconcilable defenses." *See, e.g., Mitchell, supra; United States v. Wright*, 251 U.S. App. D.C. 276, 783 F.2d 1091 (1986); *United States v. Buena-Lopez*, 987 F.2d 657 (9th Cir. 1993); *Romanello, supra; Sheikh*, 654 F.2d at 1066.

opportunities for impeachment and the ability to undermine the defendant's case. The presentation of the co-defendant's case becomes a separate forum in which the defendant is accused and tried. Closing arguments allow a final opening for co-defendant's counsel to portray the other defendant as the sole perpetrator of the crime.

Joinder can provide the individual defendants with perverse incentives. Defendants do not simply want to demonstrate their own innocence, they want to do everything possible to convict their co-defendants. These incentives may influence the decision whether or not to take the stand, as well as the truth and content of the testimony.

The joint trial of defendants advocating mutually exclusive defenses produces fringe benefits for the prosecution. Joinder in these cases can make a complex case seem simple to the [Court]: convict them both.

The government's case becomes the only unified and consistent presentation. It presents the [Court] with a way to resolve the logical contradiction inherent in the defendants' positions. While the defendants' claims contradict each other, each claim individually acts to reinforce the government's case. The government is further benefited by the additive and profound effects of repetition. Each important point the government makes about a given defendant is echoed and reinforced by the co-defendant's counsel.

Tootick, 952 F.2d at 1082.

Counsel expects that the government may contend, *inter alia*, that Mr. Mitchell “fac[ing an] extra prosecutor in the guise of co-[defendants’] counsel,” *Romanello, supra*, at 179, does not require severance, because all of the arguments and evidence proffered by the co-defendant would in any event be presented against Mr. Mitchell by the government whether they were tried jointly with the co-defendant or alone at a separate trial. Undersigned counsel respectfully submits that any such argument would in

significant respects misconstrue the “second prosecutor” problem.³ While the prejudice engendered by the adversarial stance of the co-defendants is enhanced by the prospect that the co-defendant may offer evidence against Mr. Mitchell beyond that offered by the government, that prejudice is not dependent upon the co-defendant offering such additional evidence. Indeed, one significant feature of the “second prosecutor” problem is precisely the prejudice generated where, as here, “[T]he government is further benefitted by the additive and profound effects of repetition [as] [e]ach important point the government makes about a given defendant is echoed and reinforced by defense counsel.” *Tootick*, 952 F.2d at 1082.

In sum, counsel for the co-defendant will become the “government’s champion against [Mr. Mitchell],” creating “intolerable” prejudice and compelling the conclusion that “[a] fair trial [is] impossible under the circumstances.” *Romanello*, *supra*, at 181-82.

WHEREFORE, for the reasons cited herein and any others that may appear to the Court, Mr. Mitchell asks this Court to sever Mr. Mitchell’s trial from that of his co-defendant.

³ Unlike the standard for severance on the grounds of “conflicting and irreconcilable defenses,” the criteria for severance under the fair trial standard do not in the first instance call for an assessment of the strength of the government’s case. *See e.g.*, *Romanello*, at 181. Indeed, to a significant extent, the strength of the government’s case against Mr. Mitchell is irrelevant to the fair trial/second prosecutor analysis. Rather, that analysis is focused primarily on the strength and primacy to his defense of the co-defendants’ “case” against the defendant. *See e.g.*, *id.*

Respectfully submitted,

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