UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

LUKE WESSLEY BENDER, *et al.*

Defendants.

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Criminal Action No. 21-508 (BAH)

Chief Judge Beryl A. Howell

MEMORANDUM AND ORDER

Defendants Luke Wessley Bender and Landon Bryce Mitchell face a stipulated trial on December 2, 2022, each on one felony charge and five misdemeanor charges stemming from their alleged conduct at the U.S. Capitol on January 6, 2021. Pending before the Court is Mitchell's pre-trial motion to transfer venue "outside of the District of Columbia." Def.'s Mot. Transfer Venue ("Def.'s Mot."), ECF No. 49.[1] According to Mitchell, he cannot obtain a fair and impartial jury trial related to the events of January 6, 2021 in the District of Columbia.[2] For the reasons discussed below, and consistent with this Court's previous disposition of virtually identical arguments by other January 6th defendants, which Mitchell acknowledges, *see* Def.'s Reply to Gov't's Opp'ns ("Def.'s Reply"), ECF No. 71, the motion is denied.

I. DISCUSSION

The right to an impartial jury is constitutionally enshrined by the Fifth and Sixth Amendments, but its primary safeguard is in the *voir dire* process. *See United States v.*

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[1] Co-defendant Luke Wessley Bender filed a notice that he does not object to codefendant Mitchell's motion, nor does he join it. *See* Def. Bender's Resp. to Codefendant's Mot. to Change Venue, ECF No. 64.

[2] Mitchell's motion was fully briefed before the parties agreed to a stipulated trial to take the place of a trial by jury, which will presumably moot the instant motion. Mitchell has, to date, not submitted a signed waiver of his right to trial by jury, however, and therefore this motion is not yet moot.

Haldeman, 559 F.2d 31, 63 (D.C. Cir. 1976) (en banc). In this Circuit, it is "well established procedure" to deny pre-*voir dire* requests for a change of venue; only once the *voir dire* process reveals that an impartial jury cannot be selected should a change of venue occur. *Id.* at 60–64. In extreme cases of "extraordinary local prejudice," however, juror prejudice should be presumed. *United States v. Skilling*, 561 U.S. 358, 378–81 (2010). *Skilling* guides courts to consider three factors in determining whether this presumption should attach: (1) "the size and characteristics of the community in which the crime occurred," (2) the presence of "blatantly prejudicial information" in news stories available to jurors, and (3) the time elapsed between the alleged crime and trial. *Id.* at 382. Contrary to the Mitchell's arguments, and much like in *Skilling* itself, none of these factors weighs in favor of transferring venue.

As to the first *Skilling* factor—the size and characteristics of the District of Columbia—Mitchell's arguments about the nature of D.C. residents fail to establish that a fair jury cannot be found in the District. Mitchell suggests that two polls—one involving 400 potential D.C. and Atlanta jurors, respectively, commissioned by the Federal Public Defender (FPD) for D.C., and the other commissioned by similarly positioned defendants in another criminal case, *United States v. Caldwell*, Case No. 22-cr-15, and *United States v. Meggs*, Case No. 21-cr-28—"lead to the inescapable conclusion that prejudice has attached to the D.C. jury pool." Def.'s Mot. at 5.[3] Mitchell notes, for example, that the FPD survey found that 84% of those potential D.C. jurors polled expressed "unfavorable opinions of those arrested for participating in the January 6 demonstrations," one-third "would not trust a D.C. jury to give them a fair trial if they were accused" of Mitchell's charges, and 85% of respondents believed that January 6 defendants entered the Capitol with the intent of "trying to overturn the election." *Id.* at 5–7. As other Judges on this Court have already written, however, the FPD survey's questions used "impossibly broad language," without giving

[3] Although Mitchell failed to include the surveys as attachments to his motion, the government attached the FPD survey results in opposition for the Court's benefit. *See* Gov't's Opp'n, Ex. A (FPD Letter), ECF No. 57-1.

respondents the "option to share that they had not yet formed an opinion as to the guilt of every January 6th defendant." *United States v. Brock*, Case No. 21-cr-140 (JDB), 2022 WL 3910549, *7 (D.D.C. Aug. 31, 2022). *See also United States v. Rhodes*, Case No. 22-cr-15 (APM), 2022 WL 2315554, *21 (June 28, 2022) (examining the flaws in the second survey referenced by defendant). The fact that, when confronted with the question of how the respondent was likely to vote "on a jury for a defendant charged with crimes for his or her activities on January 6th," a full one-third of respondents declined to adopt either of the two responses offered—"Guilty" or "Not Guilty"—and instead *volunteered* the answer "Depends," speaks to the survey's design discouraging fair answers. *See* Gov't's Opp'n, Ex. A (FPD Letter) at 7, ECF No. 57-1.

The second, more fatal flaw in Mitchell's argument is that this Court has previously "declined to use surveys and polls as a reason to *ex ante* presume prejudice that voir dire cannot repair." *See* Pre-Trial Conference Tr. at 65, *United States v. Williams*, Case No. 21-cr-377 (BAH), ECF No. 118 (citing *United States v. Haldeman*, 559 F.2d 31, 64 n.43 (D.C. Cir. 1976)); *Haldeman*, 559 F.2d at n.43 (holding that the trial court was entitled to rely "less heavily on a poll taken in private by private pollsters and paid for by one side than on a recorded, comprehensive voir dire examination conducted by the judge in the presence of all parties and their counsel pursuant to procedures, practices and principles developed by the common law since the reign of Henry II"). This Court joins with previous decisions issued by Judges of this Court to hold that community-attitude surveys such as the ones referenced by Mitchell here do not evidence, let alone establish, a presumption of prejudice. *See, e.g., United States v. Nassif*, Case No. 21-cr-421 (JDB), 2022 WL 4130841, *9 (D.D.C. Sept. 12, 2022); *Brock,* 2022 WL 3910549 at *5; *United States v. Garcia*, Crim. A. No. 21-0129 (ABJ), 2022 WL 2904352, at *11–14 (D.D.C. July 22, 2022).

Mitchell's other arguments about the purported "unique characteristics" of D.C. residents are also unavailing. Def.'s Mot. at 12–15. Here, Mitchell primarily argues that too many D.C.

residents are "closely connected to the federal government" because they work for the federal government or law enforcement groups, or because they know someone who does. Def.'s Mot. at 12–14. Federal employees, the motion contends, were uniquely affected by the attack on the Capitol because "much of the media have characterized the events of January 6 . . . as an attack on our elections, government institutions, and democracy as a whole," rendering federal employees "more likely to view themselves as the direct victims." Def.'s Mot. at 14. Under this logic, however, virtually no district would satisfy Mitchell: the direct victims of an attack on "democracy as a whole" comprises the entire American polity. *See United States v. Haldeman*, 559 F.2d 31, 64 n. 43 ("Scandal at the highest levels of federal government is simply not a local crime of peculiar interest to the residents of the District of Columbia.").[4]

Mitchell next argues that District of Columbia residents were "deeply traumatized" by the attack on the Capitol and its aftermath, including the city-wide curfew, enhanced law enforcement presence, and state of emergency. Def.'s Mot. at 14. To be sure, the immediate local impact on the residents of D.C. was undoubtedly substantial—but this fact alone is insufficient to necessitate transfer. Courts have declined to transfer venue in cases involving far more visceral local effects. *See, e.g., In re Tsarnaev*, 780 F.3d 14, 16 (1st Cir. 2015) (upholding district court's denial of venue transfer in prosecution of Boston Marathon bomber, whose actions killed three, injured hundreds, and resulted in a shelter-in-place order); *United States v. Yousef*, 327 F.3d 56, 155 (2d Cir. 2003) (upholding denial of venue transfer in prosecution of 1993 World Trade Center bomber, whose actions killed six and injured thousands). Moreover, only limited areas of D.C. in the immediate vicinity of the U.S. Capitol were subjected to

[4] Mitchell's argument that D.C. residents who know federal employees or law enforcement officers cannot be impartial is merely a more attenuated branch of this argument, and even less convincing.

enhanced law enforcement presence and all of the most visible security steps necessitated by the January 6, 2021 attack on the Capitol have long since disappeared.

Nor do the voting patterns of D.C. residents give rise to a presumption of prejudice in this case. The D.C. Circuit, sitting *en banc*, has already rejected the argument that D.C. residents are incapable of fairness in highly politically-charged criminal prosecutions. *Haldeman*, 559 F.2d at 64, n. 43. Biden voters will constitute substantial share of any jury pool, even outside of this District—after all, President Biden prevailed in the 2020 presidential election garnering over 7 million more votes than his opponent.

As to the second *Skilling* factor—pretrial publicity—the extensive nature of local media coverage of the events of January 6, 2021 and their aftermath does not necessitate transfer. Mitchell portrays District of Columbia residents as "exposed to constant coverage of January 6 and more coverage than residents of a comparable district." Def.'s Mot. at 20. The mere fact of extensive and even hostile coverage is not sufficient to presume prejudice: "In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case," and presuming these jurors' prejudice would create an "impossible standard." *Haldeman*, 559 F.2d at 60 (quoting *Irvin v. Dowd*, 366 U.S. 717, 722–23 (1961)). *Accord Murphy v. Florida*, 421 U.S. 794, 800 (1975) (holding that extensive press coverage about a defendant's previous trials and convictions did not corrupt the fairness of the jurors).

More importantly, Mitchell acknowledges that "[m]ost, if not all, of this [publicized] evidence has nothing to do with Mr. Mitchell or this prosecution." Def's Mot. at 19. There is no indication that jurors would recognize Mitchell from coverage of January 6, 2021, and *voir dire* will draw out whether jurors have seen any media reports about him specifically. Mitchell's

absence from recent publicity stands in stark contrast with the "foundation precedent" for this question, *Rideau v. Louisiana*, 373 U.S. 723 (1963), which involved news stories with "blatantly prejudicial information," namely, a televised in-custody confession by the defendant to the crimes for which he would be tried. *Skilling*, 561 U.S. at 379, 382. The Supreme Court held that the broadcast "in a very real sense was Rideau's trial—at which he pleaded guilty to murder." *Rideau*, 373 U.S. at 726. Here, by contrast, the public is unlikely to even recognize Mitchell. Indeed, recent media coverage of the attack on the Capitol may even be *helpful* to Mitchell. The U.S. House of Representatives' Select Committee to Investigate the January 6th Attack on the United States Capitol has held several hearings over this course of this past year. These hearings and ensuing media coverage have shifted media focus from the rioters to the actions of high-level officials. Rather than containing a "confession or other blatantly prejudicial information" about Mitchell, *Skilling*, 561 U.S. at 382, recent local and national news coverage about the attack on the Capitol has concerned the responsibility of persons other than this defendant.

The final *Skilling* factor—the elapsed time between the charged conduct and the trial—also weighs against Mitchell. Nearly two years after the attack on the Capitol, the curfew and state of emergency have long since lifted; residents have resumed their daily lives, if they ever paused them; the National Mall has returned to its role as the host of kickball league competitions rather than barricades and police. The First Circuit held that two years after the Boston Marathon Bombings was sufficient for the "decibel level of publicity about the crimes themselves to drop and community passions to diminish." *Tsarnaev*, 780 F.3d at 22. So too here: any jurors who carry the memory of January 6 particularly heavily such that he or she cannot be fair to the Mitchell can be ferreted out in *voir dire*.

Judges on this Court have consistently rejected arguments similar to that of Mitchell. *See, e.g., United States v. Ballenger*, 2022 WL 16533872 (D.D.C. Oct. 28, 2022) (Boasberg, J.);

United States v. Eicher, 2022 WL 11737926 (D.D.C. Oct. 20, 2022) (Kollar-Kotelly, J.); *United States v. Nassif*, 2022 WL 4130841, *8–11 (D.D.C. Sept. 12, 2022) (Bates, J.); *United States v. Herrera,* 21-cr-619, Mem & Order, ECF No. 54 (Aug. 4, 2022) (denying Def.'s Mot. to Change Venue, ECF No. 36) (Howell, C.J.); *United States v. Bledsoe,* 21-cr-204-1, Min. Order (July 15, 2022) (denying Def.'s Mot. to Change Venue, ECF No. 190) (Howell, C.J.); *United States v. Bochene,* 2022 WL 123893 (D.D.C. Jan. 12, 2022) (Moss, J.); *United States v. Garcia*, 2022 WL 2904352 (D.D.C. July 22, 2022) (Berman Jackson, J.); *United States v. Rhodes*, 2022 WL 2315554 (D.D.C. June 28, 2022) (Mehta, J.); *United States v. Williams,* 21-cr-377, Min. Order (June 10, 2022) (denying Def.'s Mot. to Change Venue, ECF No. 40) (Howell, C.J.). Mitchell acknowledges that a brick wall of decisions by this Court has already rejected his arguments, *see* Def.'s Reply, ECF No. 71, and makes no effort whatsoever to address or show any deficiency in the reasoning in any of the other decisions issued by this Judge and every other Judge on this Court denying venue transfer motions. This Court finds those decisions to remain persuasive.

II. ORDER

For the foregoing reasons, it is hereby

ORDERED that Mitchell's Motion to Change Venue, ECF No. 49, is **DENIED.**

SO ORDERED.

Date: November 22, 2022

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BERYL A. HOWELL
Chief Judge