IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
	)	
v.	)	**Case No. 1: 21-cr-626 (PLF)**
	)	
DEREK GUNBY,	)	
Defendant.	)	
	)	

DEFENDANT GUNBY'S MOTION TO STAY PROCEEDINGS PENDING THE OUTCOME OF CONSOLIDATED APPEAL ON THE ISSUE OF THE UNITED STATES' RETALIATORY SUPERCEDING INDICTMENT(S)

COMES NOW Defendant Derek Cooper Gunby ("Gunby"), by and through undersigned counsel John Pierce, with this Motion to stay proceedings pending the outcome of a consolidated appeal on the issue of the government's practice of pursuing vindictive retaliatory superceding indictments against Jan. 6 misdemeanor defendants who choose to go to trial. This identical issue is pending appeal in the case of *United States v. Speed*, D.C. Circuit Case No. 23-3078 September Term, 2023.

AN UNCONSTITUTIONAL PATTERN OF VENGEANCE AND RETALIATION IN THE DISTRICT OF THE DISTRICT OF COLUMBIA

Gunby's counsel, John Pierce Law, has identified an unconstitutional, systematic pattern and practice in this federal court district. Counsel has identified

eleven (11) January 6 ("J6") cases fitting the precise, identical pattern of Gunby's prosecution in this case:

1. Derick Gunby (the instant case);
2. Deborah Lee;
3. Hatchet Speed;
4. Stephanie Baez;
5. Mark Sahady;
6. Joseph Irwin;[1]
7. Leo Kelly;[2]
8. Patrick Montgomery[3]
9. Richard Barnett,[4]
10. Darrell Neely,[5]
11. Anthime Joseph Gionet[6]

Each of these J6 defendant initially faced two to four "standard" misdemeanors and were offered a plea deal in which all counts but one would be dropped in

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[1] 21-cr-589 (initially charged with 2 misdemeanors, then 4 misdemeanors, then—after two years and upon rejecting plea offer—obstruction of an official proceeding, § 1512).
[2] 21cr 708 (initially charged with 2 misdemeanors, then charged with § 1512 after declining misdemeanor plea offer).
[3] Patrick Montgomery's case is slightly different from the others in this list. Montgomery's docket journey began with two misdemeanors for going inside the Capitol on Jan. 6, but now (in its 5th charging instrument) is a
major prosecution of ten charges, including one charge (18 USC § 1512) carrying a potential 20 years in prison.
[4] 21-cr-38 (initially charged with 3 misdemeanors; then superceded with § 1512 obstruction and weapon possession (taser) counts); then superceded with § 231 civil disorder count after rejecting plea offer.
[5] Case No. 21-cr-642-JDB (initially charged with 5 misdemeanors, then superceded with felony § 231 count after declining plea offer) (ultimately acquitted at trial of the felony § 231 count.).
[6] (a.k.a. "Baked Alaska,"—who said on the record he was innocent but was coerced to take the misdemeanor plea deal when prosecutors threatened to charge him with a felony if he insisted on a trial).

exchange for the defendant pleading guilty to one petty (Class B—up to 6 months) misdemeanor. In each case, after the defendant expressed his innocence and intent to exercise his or her right to trial, federal prosecutors added (or threatened to add) an additional, 20-year felony charge (obstruction of an official proceeding under 18 U.S.C. § 1512).

In Gunby's case, the superceding indictment, exposing Gunby to a potential **forty-times-greater prison sentence than the plea offer**, was dropped on Gunby's lap, after two years, just days before Gunby's misdemeanor trial was scheduled to begin.

This 40-to-1 ratio is greater than ratios considered in any previous court case which ever addressed the question of vindictive prosecutions, including all of the landmark cases in this line—some of which reversed convictions and struck down prosecutions. See *North Carolina v. Pearce*, 395 U.S. 711 (1969) (invalidating two convictions: Pearce, convicted of assault with intent to rape and sentenced to 12 years and then later given an 8-year term without credit for time served[7] after winning an appeal; and Rice, sentenced to 10 years for burglary but then given 25 years after winning his appeal). *Blackledge v. Perry*, 417 U.S. 21 (1974) (finding due process violation where defendant sentenced to 6 months for misdemeanor

[7] All parties in *Pearce* agreed that Pearce's 8-year sentence, when combined with time already served, was more harsh than Pearce's original sentence.

assault was given 5-7 years for felony assault with a deadly weapon with intent to kill (over the same facts), after appealing). *Bordenkircher v. Hayes*, 434 U.S. 357 (1978)(defendant rejected 5-year plea offer and was then indicted as career offender and sentenced to life imprisonment);[8] *United States v. Goodwin*, 457 U.S. 368 (1982) (involving an offer of petty assault (up to 1 year), which became assaulting federal officer (up to 8 years), upon rejection of the offer).

The government's practice of escalation and retaliation in Gunby's case is the most extreme example of retaliatory vindictiveness ever recorded in federal law.

(Note that Counsel is aware of dozens of other J6 cases which also exhibited the stacking of additional charges upon J6 defendants who refused to plead guilty. However, some of these defendants were initially charged with felonies, or were initially charged individually and later joined to other defendants' cases, or were explicitly charged with additional counts after prosecutors learned of new evidence. See, for example:

- Virtually all the "Oath Keeper" cases ("seditious conspiracy" and other counts added, after around a year of cases pending),[9]

[8] Doug Lieb, in his article, "Vindicating Vindictiveness: Prosecutorial Discretion and Plea Bargaining, Past and Future," 123 Yale L.J. 1014 (2014), offers the example of a twenty-four-year old defendant, "so a life sentence would likely mean about fifty years in prison." Id., n.187 " "Thus, the prosecutor imposed a trial penalty of roughly twenty-five times the prison term he had initially deemed to be a sufficient punishment." Lieb adds that "This is severe enough that a reasonable observer might suspect the prosecutor had acted in bad faith." Id.

[9] See, e.g., DOJ Press Release, August 9, 2021: "Fifth Superseding Indictment Unsealed in Oath Keeper Conspiracy Case Related to Jan. 6 Capitol Breach: Two Additional Conspirators Identified, Charges Added in Eighteen-Defendant Conspiracy Case."

- Virtually all of the "Proud Boy" cases (same),
- Christopher Alberts (new felony assault charge added after declining 3-year plea offer (ultimately sentenced to 7 years))
- Kenneth Joseph Thomas (additional assault charges added after rejecting plea offer),
- Garet Miller, 21-cr119 (multiple felony counts added upon refusal to plead guilty)
- Ryan Samsel (additional charges, including assault with dangerous weapon count added over several indictments)
- Rachael Powell (additional felony count added after turning down plea offer)
- Richard Slaughter (additional count of aggravated assault with a deadly weapon, after refusing offer).

The Hatchet Speed Appeal.

Presently before the D.C. Circuit is United States v. Hatchet Speed, Case No. 23-3078 September Term, 2023. Mr. Speed faced the identical circumstances faced by Gunby (and so many others) here: he was preparing for a misdemeanor trial on the "four standard" misdemeanors, when suddenly—days before trial—he was charged, without any newly declared or discovered facts, with obstructing an official proceeding under 18 U.S.C. Section 1512. Overnight, Hatchet (like Gunby) went from facing a maximum of one year imprisonment to a maximum of 20 years imprisonment—just for exercising his constitutional rights.

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https://www.justice.gov/usao-dc/pr/fifth-superseding-indictment-unsealed-oath-keeper-conspiracy-case-related-jan-6-capitol

Undersigned counsel represents Speed, Gunby, Baez, Lee, and Montgomery. Each face identical charging circumstances: retaliatory 1512 charges lodged after they turned down misdemeanor plea offers.

In Speed's case, Judge McFadden rejected Speed's motion to dismiss on vindictiveness grounds by holding that the superceding 1512 charge appeared to be a common practice. Although the District Court found a presumption of vindictiveness in Speed's case, the District Court ruled that the presumption was cured because the government has a systematic pattern and practice of retaliation in January 6 prosecutions:

> I think it's fair to say the Government has vigorously prosecuted Capitol rioters and, as the Government notes, it has superseded with more serious charges in many cases in a similar posture. I'm looking to *United States versus Barnett*, No. 21-CR-238; *United States versus Miller*, No. 21-CR-119; *United States versus Irwin*, No. 21-CR-589, all from this district. In other words, the Government's decision to bring an obstruction count here is in keeping with its treatment of similar January 6th-related cases. For those reasons, the Court finds that the Defendant has not shown his superseding indictment is a product of vindictive prosecution.

United States v. Speed, pre-trial hearing, Judge McFadden, presiding (emphasis added).

Judge McFadden's conclusion that there is a systematic practice in the District of D.C. to subject misdemeanor J6 defendants to extreme retaliation when they seek to go to trial has been pronounced by (then) Chief Judge Howell, who is

on record actually scolding a prosecutor who failed to retaliate against a J6 misdemeanor defendant who insisted on going to trial. This colloquy occurred in a pretrial hearing involving one of undersigned Counsel's other clients, John George Todd:

ASSISTANT U.S. ATTORNEY JAMES: With regard to the issue of a plea, it's my understanding that the defendant still wishes to go to trial, so that takes care of the first thing.

THE COURT: And this is -- so hold on just a second. So this is –

MR. JAMES: Sure.

THE COURT: This is -- he's only been charged in

an information with two Class A misdemeanors and two Class B misdemeanors; is that right?

MR. JAMES: That is correct, Your Honor.

THE COURT: And the government doesn't have an

intention of superseding with any felony charges?

MR. JAMES: Well, Judge, as I had explained to the

former counsel, we were looking at that, but I cannot say

that we're going to do that right now. It is something that

we have actively considered, and I had informed former

counsel about that, but we have not done so.

THE COURT: Well, you're running out of time.

When are you planning on doing that?

MR. JAMES: I understand that, Judge. We've

looked at potential charges that we decided not to pursue at this time.

THE COURT: Okay. Well, I mean, I've had trials

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A PRACTICE OF PUNISHING THE EXERCISE OF RIGHTS IS MORE ONEROUS THAN A ONE-TIME INCIDENT—NOT LESS ONEROUS.

In the Speed appeal, counsel will argue that this systematic practice of retaliation in the District is far more violative of due process than a single stand-alone incident of vindictiveness. Such a practice is intended and designed to chill the exercise of rights by others who may come after.

And, in fact, there is evidence that this pattern and practice in the District is, in fact, chilling the exercise of trial rights. Moreover, there is evidence that this pattern and practice is likely contributing to wrongful convictions of Jan. 6 defendants for crimes they did not commit.

"I believe I'm innocent ... but they're saying if I go to trial they're going to hit me with a felony."

That this retaliatory tactic by the government in J6 cases has chilled the exercise of constitutional rights is a matter of public record. In at least one reported case, a J6 defendant named Anthime Joseph Gionet stated during his change-of-plea hearing that he was pleading guilty to a crime he did not commit due to

prosecutors' threats to charge him with a felony if he exercised his constitutional right to jury trial. See Ryan J. Reilly "Judge nixes Jan. 6 plea deal after right-wing streamer 'Baked Alaska' declares himself 'innocent,'" *NBC News*, May 11, 2022, https://www.nbcnews.com/politics/justice-department/judge-nixes-jan-6-plea-right-wing-streamer-baked-alaska-declares-innoc-rcna28245 (accessed 9/28/2023) ("Anthime Joseph Gionet, otherwise known as "Baked Alaska," said he had agreed to take the deal only because he was worried he'd be charged with a felony"). Gionet's "plea deal went up in smoke after he declared himself innocent."

Just like Hatchet Speed, Gunby, Baez, and Deborah Lee, Gionet was charged with the four standard misdemeanors. And just like Speed, Gunby, Baez, and Deborah Lee, Gionet was offered a dismissal of all counts but one if Gionet would plead guilty to picketing and parading in the Capitol. Most significantly, Gionet stated at his change-of-plea colloquy "I believe I'm innocent ... but they're saying if I go to trial they're going to hit me with a felony." Id. (Note that Gionet's plea deal was ultimately accepted by Judge Sullivan.)

A systematic practice of punishing those who insist on their innocence is the most egregious due process violation of all.

Significantly, the landmark *Pearce* case—the case that launched the issue of vindictiveness as a due process violation—mentioned that a *practice* of lengthier

sentences upon exercise of rights (the very thing that Judge McFadden found excused the government's conduct) would be the most egregious violation of all.

Even the case of *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), the case most cited by the government to support a notion that anything goes during plea negotiations, pronounced that prosecutors abuse their power where the accused is not realistically "free to accept or reject the prosecution's offer." 434 U. S. 363. Counsel submits that no J6er is realistically "free to accept or reject the prosecution's offer" where rejection means almost certain destruction of his life.

Moreover, the District of D.C.'s systematic practice of punishing the exercise of rights leaves little room for defense lawyers to recommend going to trial, where such advice is almost certainly ineffective assistance of counsel.

Given the extreme disparities between outcomes of J6 defendants who immediately accept the government's misdemeanor plea offers and defendants who opt for a trial, it is virtually ineffective assistance of counsel to advise J6 misdemeanor clients to do anything other than immediately plead guilty. the Supreme Court's rulings in *Missouri v. Frye*, 566 U.S. 134 (2012) and *Lafler v. Cooper*, 566 U.S. 156 (2012) suggests that defense lawyers are almost certainly straying toward ineffective assistance if they counsel against immediate pleas of

guilty.[10] *Lafler v. Cooper*, 566 U.S. 156 (2012) ruled that ineffective assistance of counsel during plea negotiations can constitute grounds for relief if there is a fair probability that defense counsel's ineffective assistance resulted in a harsher sentence or conviction.

The Remedy: A Stay of Proceedings Pending the Outcome of the Speed Appeal.

For all the foregoing reasons, Gunby prays for an order staying proceedings in this case pending the outcome of the Hatchet Speed case in the D.C. Circuit. Gunby intends to seek a collateral order in the Speed appeal to join the cases of Gunby, Baez, Montgomery, and Lee for proper determination of this issue.

Dated: October 02, 2023

Respectfully Submitted,

/s/ *John M. Pierce*
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[10] Missouri v. Frye :: 566 U.S. 134 (2012) suggested a defense lawyer committed ineffective assistance where prosecutors would have let Frye plead guilty to a misdemeanor and serve 90 days in prison for driving without a license but, after the offer expired, Frye was sentenced to three years. In the *Cooper* case, a defense lawyer was found to have provided ineffective assistance where Cooper rejected a plea bargain that called for a sentence of four to seven years, and consequently was sentenced to 15 to 30 years.

CERTIFICATE OF SERVICE

I, John M. Pierce, hereby certify that on this day, October 2, 2023, I caused a copy of the foregoing document to be served on all counsel through the Court's CM/ECF case filing system.

/s/ John M. Pierce
John M. Pierce