

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	
	:	Case No. 1:21-cr-508 (BAH)
LUKE WESSLY BENDER,	:	
	:	
Defendant.	:	
	:	

UNITED STATES OF AMERICA	:	
	:	
v.	:	Case No. 1:21-cr-717 (BAH)
	:	
LANDON BRYCE MITCHELL,	:	
	:	
Defendant.	:	

**REPLY TO DEFENDANT LUKE WESSLY BENDER’S OPPOSITION TO
UNITED STATES’ MOTION TO JOIN**

Defendant Luke Wessly Bender (“Bender”) recognizes that he faces an “uphill battle,” ECF No. 34 at 1, when opposing the United States’ Motion to Join. Indeed, a trial court has broad discretion to join two related cases in the interest of efficiency, and the D.C. Circuit, in review, “strike[s] a balance in favor of joint trials.” *United States v. Manner*, 887 F.2d 317, 324 (D.C. Cir. 1989). Bender fails to establish grounds to overcome the presumption in favor of joinder.

Bender appears to concede that he and his friend Landon Bryce Mitchell (“Mitchell”) could have been charged together under Rule 8(a) of the Federal Rules of Criminal Procedure, because they are alleged to have participated in the same criminal acts on January 6, 2021. ECF No. 34 at 4-5. Both are accused of identical crimes for unlawfully entering the U.S. Capitol Building, entering and remaining on the Senate floor and dais, and, in so doing, impeding Congress’s certification of the Electoral College. *Id.* Bender argues that a joint trial with Mitchell

– who is charged with the same offenses, for the same conduct, at the same time – would risk “prejudicial spillover” and jury confusion. *See* ECF No. 2-3. But Bender’s unsupported contention that he would be denied a fair trial does not present a “serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.” *Zafiro v. United States*, 506 U.S. 534, 539 (1993). Accordingly, he cannot justify the “unnecessary waste of judicial, prosecutorial and civic effort, resources, and time” that occurs where separate juries would be presented with the same evidence in separate trials. *United States v. Wilkins*, 538 F. Supp. 3d 49, 88 (D.D.C. 2021) (quoting *United States v. Treadwell*, 566 F. Supp. 80, 86-87 (D.D.C. 1983)).

Bender does not identify any acts committed by *Mitchell* that “erroneously could lead a jury to conclude that [*Bender*] was guilty.” ECF No. 34 at 6 (quoting *Zafiro v. United States*, 506 U.S. 534, 539 (1993)). He concedes that, “the Government alleges that both individuals were present together at all times inside and outside the United States Capitol on January 6, 2021.” *Id.* at 7. Bender also repeatedly identifies conduct for which neither he nor *Mitchell* were charged.¹ *Id.* at 3, 4, 7. Thus, there are not disparities in the “weight, quantity, or type” of evidence against Bender and *Mitchell* such that a jury could not “reasonably compartmentalize the evidence introduced against each individual defendant.” *United States v. Lewis*, No. 1:19-cr-307 (RCL), 2022 WL 1090612, at *3 (D.D.C. Apr. 11, 2022) (quoting *United States v. Halliman*, 923 F.2d 873, 884 (D.C. Cir. 1991)). Bender and *Mitchell* plainly do not “have markedly different degrees

¹ The Government does not share Bender’s solace that he is not alleged to have joined with a militia group, possessed weapons, “assaulted or threatened anyone, or stole or defaced any property” on January 6, 2021. ECF No. 34 at 3, 4, 7. He should not be credited because he “only” invaded Congress and obstructed the peaceful transfer of power.

of culpability” such that “the risk of prejudice is heightened.” *Zafiro*, 506 U.S. at 539 (citing *Kotteakos v. United States*, 328 U.S. 750, 774-75 (1946)).

Instead, Bender urges the Court to deny joinder because of the possibility that the Government would rely on Mitchell’s allegedly “highly inflammatory” social media posts and correspondence that Bender contends would “run a significant risk of prejudicial spillover” to him. ECF No. 34 at 7. To the extent that Bender believes that the evidence of Mitchell’s guilt is more compelling than that of his own, that is insufficient to justify separate trials. The Government anticipates that the Court will instruct the jury to give separate consideration to each defendant and each charge against him, and will admonish the jury that each defendant is entitled to have his guilt determined from his own conduct and from the evidence that is applicable to him. *See Zafiro*, 506 U.S. at 541. Because juries are presumed to follow the Court’s directions, such instructions would cure any possibility of prejudice. *Id.* at 540-41 (quoting *Richardson v. Marsh*, 481 U.S. 200, 211 (1987)).

To the extent that Bender justifies his opposition to joinder by his fear that the Court would permit the admission into evidence of Mitchell’s “highly inflammatory” and “prejudicial” social media posts, ECF No. 34 at 7, the Government disagrees. Should the Government decide to introduce Mitchell’s social media posts, they will be relevant to the issues in this case and will not risk unduly inflaming the passions of the jury. The items identified by Bender do not threaten undue prejudice to either defendant. He cites Mitchell’s social media posts,

which contained statements regarding the need to “fight now,” juxtaposing the urban unrest of the summer of 2020 to the protest on January 6, 2021, and the posting of an image of a flaming skull with a message expressing Mr. Mitchell’s pride of the events on January 6, 2021. Mr. Mitchell also bragged in correspondence to another individual that he would never be caught because he masked himself inside the Capitol and therefore was “invincible.”

Id. Even if introduced, these items shared or written by *Mitchell*² would not risk undue prejudice, much less deny *Bender* a fair trial.

Bender also fails to establish that any *Bruton* issue justifies denying the Government's motion for joinder. Bender asserts that his Sixth Amendment rights would be violated by the introduction of his own statements identifying Mitchell. ECF No. 34 at 8. Of course, the Sixth Amendment rights implicated here are those of Mitchell. Bender "identified Mr. Mitchell, provided Mr. Mitchell's contact information, and described the extent of his knowledge of Mr. Mitchell." *Id.* at 4-5. Regardless, Mitchell's identity no longer appears to be at issue. There is plentiful video of Mitchell and Bender traveling together inside the U.S. Capitol Building on January 6, 2021. *Id.* at 8. Bender himself argues that intent, rather than identity, is the main issue for trial. *Id.* at 7.

But even assuming that the Government wishes to rely upon Bender's confession and it raises a *Bruton* issue, his statement can be limited to prevent its improper use against Mitchell. The Government could rely upon the segments of Bender's interview in which he admits his own criminal conduct without introducing evidence that he identified Mitchell as his fellow traveler. Regardless, the hypothetical *Bruton* issue raised by Bender is not ripe for consideration. It certainly does not justify denying joinder and proceeding to separate trials in this matter.

² One of Mitchell's three Facebook posts cited by Bender, "an image of a flaming skull with a message expressing Mr. Mitchell's pride of the events on January 6, 2021," ECF No. 34 at 7, was shared by Bender on his own Facebook page just a few hours after it was posted. *See United States v. Bender*, ECF. No. 1-1 at 3.

Accordingly, the government requests that the Court join these two criminal actions.

Respectfully submitted,

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