IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, **v.** **DONNIE WREN and THOMAS SMITH,** **Defendants.**	**Case No.: 1:21-cr-00599-RBW**

GOVERNMENT'S RESPONSE IN OPPOSITION TO WREN'S MOTION TO SEVER

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully submits its Response in Opposition to Defendant Donnie Wren's Motion to Sever (ECF No. 58). Wren contends that the charges against him were misjoined with those against his codefendant in violation of Federal Rule of Criminal Procedure 8(b) and asks the Court to sever the cases for trial under Rule 14. However, as described in greater detail below, the defendants were properly joined in this case. Additionally, a Rule 14 severance is inappropriate here when defendants have failed to show a serious risk that a joint trial would compromise a specific trial right or prevent the jury from making a reliable judgment about guilt or innocence. Therefore, the Court should deny Wren's motion.

FACTUAL BACKGROUND

The U.S. Capitol is secured 24 hours a day by the United States Capitol Police ("UCSP"). Restrictions around the U.S. Capitol include permanent and temporary security barriers and posts manned by USCP. Only authorized people with appropriate identification are allowed access inside the U.S. Capitol. On January 6, 2021, the exterior plaza of the U.S. Capitol was closed to members of the public.

On January 6, 2021, a joint session of the United States Congress convened at the U.S. Capitol. During the joint session, elected members of the United States House of Representatives

and the United States Senate were meeting in separate chambers of the U.S. Capitol to certify the vote count of the Electoral College of the 2020 Presidential Election, which had taken place on November 3, 2020 ("the Certification"). The joint session began at approximately 1:00 p.m. Shortly thereafter, by approximately 1:30 p.m., the House and Senate adjourned to separate chambers to resolve a particular objection. Vice President Michael R. Pence was present and presiding, first in the joint session, and then in the Senate chamber.

As the proceedings continued in both the House and the Senate, and with Vice President Pence present and presiding over the Senate, a large crowd gathered outside the U.S. Capitol. Temporary and permanent barricades were in place around the exterior of the U.S. Capitol building, and U.S. Capitol Police were present and attempting to keep the crowd away from the Capitol building and the proceedings underway inside.

Members of the U.S. Capitol Police attempted to maintain order and keep the crowd from entering the Capitol; however, shortly around 2:00 p.m., individuals in the crowd forced entry into the U.S. Capitol, including by breaking windows and by assaulting members of the U.S. Capitol Police, as others in the crowd encouraged and assisted those acts.

Shortly thereafter, at approximately 2:20 p.m. members of the United States House of Representatives and United States Senate, including the President of the Senate, Vice President Pence, were instructed to—and did—evacuate the chambers. Accordingly, the joint session of the United States Congress was effectively suspended until shortly after 8:00 p.m.

Defendants Thomas Smith and Donnie Wren, cousins, traveled together to Washington, D.C. to attend former President Trump's rally on January 6, 2021. After the rally, Smith and Wren walked together from the rally to the United States Capitol. They entered Capitol grounds and joined in the riot.

Defendants Wren and Smith were in the Lower West Terrace Tunnel area at around 3:00 p.m. Together, they made their way to the Tunnel entrance. Wren remained at the mouth of the Tunnel while Smith, carrying a flag attached to a flagpole, entered the Tunnel and approached the police line standing guard at the doors leading into the Capitol building. Moments later, Smith jammed the flagpole like a spear trying to stab at one of the glass windowpanes within the first set of Tunnel doors. Video footage shows that, at times, while Smith was inside the tunnel, Wren looked into the tunnel in an apparent attempt to keep an eye on Smith. Smith remained in the tunnel for approximately five minutes; after he left the tunnel, he and Wren rejoined each other outside the tunnel.

Less than an hour later, at approximately 3:50 p.m., Wren and Smith made their way to the Upper West Terrace, where they stood directly in front of the police line, walking back and forth and waving flags for approximately 10 minutes. A physical conflict began between the police and the crowd of rioters at approximately 4:21 p.m. Wren and Smith participated in this conflict, pushing back against the officers' shields. Wren leaned into one of the officer's shields, using the weight of his body and his hands to push into the shield. Smith, standing right next to Wren, faced away from the officers and leaned backward, using his body weight to push against another shield. The two can be seen together, pushing against the police line, in various videos and photographs

Following the physical confrontation with the police line, Smith charged into a crowd of rioters to kick an officer's backside, then darted out of the crowd. Moments later, Smith threw a metal stick/pole at the police line. The metal stick/pole hit an officer in the head, causing the officer to stagger backwards. Smith then retreated into the crowd of rioters. Wren was nearby when these events happened, and each time Smith retreated into the crowd, he returned to a position where he was standing near Wren.

Smith and Wren left the Upper West Terrace area at approximately 4:30 p.m. and began their departure from the Capitol grounds. During the days after January 6, 2023, Smith sent Wren links to news articles, via Facebook, in which the two of them were photographed together on Capitol grounds.

As a result of their conduct on January 6, 2021, Defendants Donnie Wren and Thomas Smith were charged with various crimes relating to the attack on the Capitol. ECF 71 (Second Superseding Indictment or "Indictment").

ARGUMENT

The cases against the defendants are properly joined. In cases with multiple defendants and multiple offenses, the "weight of authority in this circuit and elsewhere regards Rule 8(b) as providing the sole standard for determining the permissibility of joinder of offenses." *United States v. Wilson*, 26 F.3d 142, 153 n. 4 (D.C. Cir. 1994) (citations omitted); *see also United States v. Brown*, 16 F.3d 423, 427 (D.C. Cir. 1994). Rule 8(b) provides:

> JOINDER OF DEFENDANTS. The indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or *in the same series of acts* or transactions, constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.

Fed. Crim. P. 8(b) (emphasis added). "Rule 8 not only may shield a party from prejudicial joinder but also serves to protect a variety of other interests served by joint trials including the interests in 'conserv[ing] state funds, diminish[ing] inconvenience to witnesses and public authorities, and avoid[ing] delays in bringing those accused of crime to trial.'" *Brown*, 16 F.3d at 428 (internal citations omitted). "There is a preference in the federal system for joint trials." *United States v. Bikundi*, 926 F.3d 761, 780 (D.C. Cir. 2019). This Circuit construes Rule 8(b) broadly in favor of joinder. *See United States v. Nicely*, 922 F.2d 850, 853 (D.C. Cir. 1991); *United States v. Jackson*,

562 F.2d 789, 796-97 (D.C. Cir. 1977) (Rule 8 is "interpreted broadly in favor of initial joinder"). Thus, it is "difficult to prevail on a claim that there has been a misjoinder under Rule 8(b)." *Nicely*, 922 F.2d at 853.

The propriety of joinder "is determined as a legal matter by evaluating only the 'indictment [and] any *other pretrial evidence offered by the Government*.'" *United States v. Carson*, 455 F.3d 336, 372 (D.C. Cir. 2006) (emphasis added; internal citations omitted). Joinder under Rule 8(b) "is appropriate if there is a 'logical relationship between the acts or transactions' so that a joint trial produces a 'benefit to the courts.'" *United States v. Spriggs*, 102 F.3d 1245, 1255 (D.C. Cir. 1996) (quoting *United States v. Perry*, 731 F.2d 985, 990 (D.C. Cir. 1984)).

Defendants who are properly joined under Rule 8 "may seek severance under Rule 14, which provides that '[i]f the joinder of offenses or defendants . . . appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.'" *United States v. Wilson*, 605 F.3d 985, 1015 (D.C. Cir. 2010) (quoting Fed. R. Crim. P. 14(a)). Rule 14 "does not require severance even if prejudice is shown," and district courts "should grant a severance under Rule 14 only if there is 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, 538-39 (1993). Indeed, district courts retain "significant flexibility to determine how to remedy a potential risk of prejudice, including ordering lesser forms of relief such as limiting jury instructions." *Bikundi*, 926 F.3d at 780 (citing *United States v. Moore*, 651 F.3d 30, 95 (D.C. Cir. 2011)); *see United States v. Butler*, 822 F.2d 1191, 1194 (D.C. Cir. 1987) (acknowledging trial judges are given great latitude to balance interests, including to preserve judicial and prosecutorial resources, and denying defendant's motion to sever).

Once multiple defendants are properly joined in the same indictment under Rule 8(b), courts should only grant severance under Rule 14 "sparingly because of the 'strong interests favoring joint trials, particularly the desire to conserve the time of courts, prosecutors, witnesses, and jurors.'" *United States v. Celis*, 608 F.3d 818, 844 (D.C. Cir. 2010) (citation omitted). The relevant portion of Rule 14 reads as follows:

> If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.

Fed. R. Crim. P. 14(a). Although "the standard of 'appears to prejudice a defendant' set out in Rule 14(a) for consideration of severance, does not, on its face, provide an onerous test, the discretion afforded to district courts must be exercised with appreciation of the policy reasons favoring joinder." *United States v. Bikundi*, 14-cr-30 (BAH), 2016 WL 912169, at *42 (D.D.C. Mar. 7, 2016). In fact, the D.C. Circuit has instructed that for severance to be proper "[t]here must be 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." *United States v. Bostick*, 791 F.3d 127, 152-53 (D.C. Cir. 2015) (citation and punctuation omitted); *see also United States v. Glover*, 681 F.3d 411, 417 (D.C. Cir. 2012) (affirming district court's denial of defense motion to sever trial citing same standard). Accordingly, severance is not required simply because a defendant might have a better chance of acquittal if tried separately. *See United States v. Halliman*, 923 F.2d 873, 884 (D.C. Cir. 1991). Salient factors the Court should consider, and which militate against severance, include whether separate trials would involve (1) the presentation of the same evidence; (2) testimony from the same witnesses; and (3) the same illegal conduct. *See United States v. Manner*, 887 F.2d 317 (D.C. Cir. 1989).

I. Joinder is appropriate because the defendants participated in the same "series of acts" and the evidence against them is largely the same.

The defendants were properly joined because Wren and Smith not only participated in the attack on the U.S. Capitol but they also participated in the same "series of acts" when they traveled together to Washington D.C., traveled together from the former President's rally into the restricted Capitol grounds, traveled together to the Lower West Terrace Tunnel, traveled together to the Upper West Terrace, and finally left Capitol grounds together. Even beyond their coordinated movements, and contrary to Wren's claims, the evidence shows that the defendants acted in unison when they stood side-by-side and pushed against a police line in the Upper West Terrace. Most of the government's witnesses and evidence will be the same for both defendants. The "'strong interests favoring joint trials, particularly the desire to conserve the time of courts, prosecutors, witnesses, and jurors,'" *Celis*, 608 F.3d at 844, thus apply to this case.

That the defendants are not charged with conspiracy is of no importance. *See United States v. Gbemisola*, 225 F.3d 753, 760 (D.C. Cir. 2000); *United States v. Rittweger*, 524 F.3d 171, 177-78 (2d Cir. 2008). What matters is that the defendants' actions throughout their journey leading up to and including January 6—including their assault on officers—amounted to their "participat[ion] in the … same series of actions …, constituting an offense or offenses." Rule 8(b). The overlap in the charged conduct triggers "the presumption and common practice [that] favor trying together defendants who are charged with crimes arising out of a common core of facts." *United States v. De La Paz-Rentas*, 613 F.3d 18, 23 (1st Cir. 2010). Additionally, each defendant is charged with furthering a civil disorder, which "like a conspiracy, requires multiple people." *United States v. Patrick McCaughey et al.*, No. 1:21-CR-00040 (TNM), 2022 WL 1604655, at *2 (D.D.C. May 20, 2022). Thus, defendants traveled and worked together, and it is appropriate for them to be tried together.

Wren argues that the facts proving a "common scheme or plan" are so minimal that "these attenuated links could apply to most, if not all, of the nearly 1,000 January 6 defendants" and that joiner yields "few, if any, efficiencies." ECF 58 at 8. But the government's argument that joinder is proper does not rely solely on the fact that of their participation in the riot at the U.S. Capitol. These defendants—who are cousins—traveled to Washington, D.C., together and throughout the Capitol grounds together; they worked together at the same time and place to interfere with and assault officers trying to clear the Upper West Terrace so that the Certification could resume. *See e.g.*, *McCaughey*, 2022 WL 1604655, at *2 (denying motion to sever in a January 6 case and finding that a "clear logical relationship" existed between the defendants' acts when "defendants allegedly battled police officers in the same location and at the same time.").

The efficiency interest for the Court and witnesses and the interest in speedy trials are significant in this case. There is substantial overlapping evidence, namely: (1) the footage of the defendants' crimes from CCTV, body-worn camera, and third parties; (2) communications and photos concerning Wren and Smith's trip to Washington for the rally; and (3) testimony from common "overview" witnesses including witnesses from the U.S. Capitol Police and U.S. Secret Service.

II. Severance is unnecessary because Wren is unlikely to suffer prejudice.

Wren's vague contention that a joint trial would unfairly risk the jury associating him with "collective conduct," ECF 58 at 12, does not justify severance. In fact, the majority of Wren and Smith's conduct is "collective" in that they traveled together before and during the January 6, stayed in close proximity throughout the riot; and, in a critical moment, stood side-by-side and pushed against the police shield wall.

Courts routinely reject requests to sever where evidence against one codefendant is much stronger than evidence against another. *See, e.g., United States v. Williams*, 507 F. Supp. 3d 181, 196 (D.D.C. 2020) (denying Williams' motion for severance in prosecution for unlawful possession of a firearm, even though codefendant Douglas "was caught, on police body camera, wearing a backpack containing a gun and ammunition" and admitted he "had some idea about the contents of the backpack," whereas Williams did not possess the backpack and "the government's Rule 404(b) evidence against Douglas is far stronger" than that against Williams; "even with these disparities in evidence, Williams has failed to meet his 'heavy burden' under Rule 14").

Despite Wren's suggestion that much of the evidence of Smith's additional violent conduct is irrelevant to his case, a large amount of this video and photo evidence includes both Smith and Wren in the frame. While Smith was committing additional felonies in the foreground, Wren was often watching him in the background. Thus, this is relevant evidence to Wren's knowledge and state of mind.

Wren's comparison to *Kotteakos* is misplaced. 328 U.S. 750 (1946). That was a complex conspiracy case involving thirty-two codefendants and at least eight distinct conspiracies. In holding that the case should have been severed, the Supreme Court cautioned:

> as the charges are broadened to include more and more in varying degrees of attachment to the confederation so that possibilities for miscarriage of justice to particular individuals become greater and greater, extraordinary precaution is required, not only that instructions shall not mislead, but that they shall scrupulously safeguard each defendant individually

Id. at 776. Smith and Wren are cousins who traveled to Washington, D.C., together, trespassed together on Capitol grounds, and assaulted and resisted law enforcement together. The risk of the jury transferring Smith's culpability onto Wren is negligible and could be mitigated through instruction, if necessary. This Court should follow the others in this district who denied motions

to sever in January 6 cases, including those without charged conspiracy. *See, e.g., United States v. Luke Wessley Bender and Landon Bryce Mitchell*, 21-CR-508 (BAH), Minute Order 11/11/22.

It is unlikely that Wren will suffer any prejudice if tried together with Smith, much less a "serious risk" that a specific trial right would be compromised by a joint trial or that the jury would be confused by a joint trial. *Zafiro*, 506 U.S. at 538-39. If anything, Wren's defense may be strengthened by allowing him to distinguish his conduct to Smith's more egregious behavior. Given the strong interest in judicial efficiency presented by a joint trial and the lack of showing of prejudice, the defendants should be tried together.

CONCLUSION

For the foregoing reasons, the Government respectfully requests that the Court deny Wren's motion to sever.

Respectfully submitted,

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