**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| **UNITED STATES OF AMERICA** | : | |
| | : | |
| **v.** | : | |
| | : | **Case No.: 21-CR-508 (BAH)** |
| **LUKE WESSLEY BENDER and** | : | |
| **LANDON BRYCE MITCHELL,** | : | |
| | : | |
| **Defendants.** | : | |

**UNITED STATES' OPPOSITION TO DEFENDANT**
**MITCHELL'S MOTION TO SEVER**

Because the Court's joinder and consolidation of defendant Landon Bryce Mitchell's case with that of co-defendant Luke Wessley Bender[1] does not prejudice either defendant, the government opposes Mitchell's Motion to Sever Defendant, ECF No. 48. Mitchell fails to establish that potential prejudice stemming from the possible introduction of Bender's allegedly incriminating statements, a purported disparity in evidence of guilt between the two defendants, or irreconcilable differences between the defenses of the co-defendants require separate trials of the closely contiguous criminal conduct alleged in the Indictment.

## FACTUAL BACKGROUND

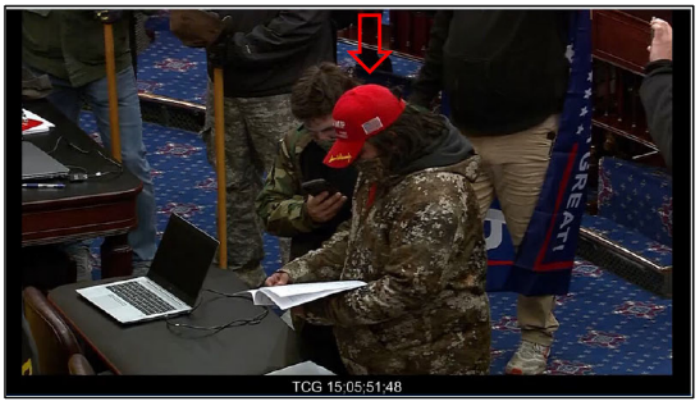
On January 6, 2021, Mitchell and Bender traveled together to the former President's "Stop the Steal" rally and together joined the group of individuals who marched to the Capitol, jointly

[1] Unlike Bender, Mitchell filed a notice of "no objection" to the government's motion to join these cases. *See United States v. Mitchell,* No. 21-cr-717 (BAH), ECF No. 27. Accordingly, the Court granted the government's motion as unopposed by Mitchell and separately rejected Bender's opposition because joinder of these co-defendants avoids "unnecessary waste of judicial, prosecutorial and civic effort, resources, and time," and found that "[u]nder the circumstances it is apparent that the indictments are . . . separate only as an accident of the timing of the relevant investigation and arrests." *See* ECF Entry, 5/24/2022 (citing cases). Thus, Mitchell's motion attempts to re-litigate issues previously decided by this Court without his objection.

made their way to the restricted Capitol grounds, and together climbed scaffolding onto the upper west terrace area. From there, Mitchell and Bender, staying together, unlawfully entered the Capitol building, went into the Rotunda, made their way down several hallways, and eventually walked into the Senate chamber and onto the Senate floor. They remained on the Senate floor together for approximately five minutes before a group of Capitol Police officers arrived and directed them to leave. While on the Senate floor, Mitchell and Bender leafed through and examined documents on the Senators' desks, went onto the Senate dais, and posed for pictures.

Although Bender was the first person to identify Mitchell in various videos and photographs from the riot, Mitchell's own Facebook messages and posts, which were lawfully obtained by law enforcement officials, also confirmed his presence and conduct in the Capitol Building on January 6, 2021. *See id.* For example, his Facebook messages on January 6, which attached photographs and videos, stated that he had "breached the Capitol today," that he was "one of the very first in," "one of the first to Breach," and "climbed the scaffolding up 3 stories, pushed back the police and breached the doors!!" *See id.* at 4-5, 10. In the days that followed, Mitchell sent Facebook messages identifying himself in media accounts of the Capitol riots and stating that he was "invincible" and "not too worried" about being arrested for his conduct because he "was masked up the whole time." *See id.* Among the photo and video attachments to Mitchell's Facebook messages were pictures that depict Mitchell (wearing a red baseball cap) taking a "selfie" on the Senate floor:

*See id.* at 12. Capitol security footage also shows Mitchell leafing through papers on the Senate floor and taking photographs of those papers.




*Id.* at 5. As the Court determined when joining and consolidating these cases,

> The government's allegations against Bender and Landon Bryce Mitchell, at a minimum, arise from "the same series of acts," given that the two defendants knew each other, came to the former President's rally together, allegedly "climbed scaffolding and unlawfully entered" the Capitol together, navigated the building together, entered the Senate Chamber together, and stood on the Senate Dais together. Due to the closely contiguous conduct engaged in by these two defendants, the evidence presented against each will be overlapping[.]

ECF Entry, 5/24/2022. There is abundant video evidence that establishes this "closely contiguous conduct" by Mitchell and his co-defendant on January 6, 2021.

**OPPOSITION**

To the extent that the Court is inclined to reconsider its order joining and consolidating these cases – relief that was unopposed by Mitchell – his motion should be denied because there still is no convincing reason to believe that joinder is prejudicial to him or Bender. *Id.*

**I. Joinder was Proper Regardless of Whether a Conspiracy was Charged.**

Mitchell first suggests he was improperly joined with Bender because he and Bender "are not charged with conspiring with one another or with anyone else." ECF 48 at 2. However, joinder under Rule 8(b) is proper when two cases "could have been joined in a single indictment or information, which is the case when multiple defendants 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." *Id.* (cleaned up). Here, as the Court observed when granting joinder, the government alleges that Mitchell and Bender attend the "Stop the Steal" rally together, marched to and breached the Capitol together, entered and remained on the Senate floor together, and stood on the Senate dais together. *Id.* At minimum, then, the government's allegations against Bender and Mitchell arise from "the same series of acts." *Id.* Moreover, in establishing its case in chief, the government will establish that the co-defendants were motivated by the same goal: to disrupt the Congressional certification of the 2020 Presidential Electoral College vote.

In addition, contrary to Mitchell's suggestion that Rule 8(b) requires a conspiracy charge, nothing in the text of Rule 8(b) requires a "common scheme or plan," and neither *United States v. Perry*, 731 F.2d 985, 990 (D.C. Cir. 1984), nor any other decision from the D.C. Circuit has imposed such an atextual requirement. Judge McFadden came to that precise result in another

January 6 case. *United States v. McCaughey*, No. 21-cr-40 (TNM), 2022 WL 1604655, at *2 n.3 (D.D.C. May 20, 2022) (denying severance of charges against defendants who attacked police officers in the Lower West Terrace tunnel within a limited period of time; "the lack of a conspiracy charge does not automatically make joinder improper.") (citing *United States v. Gbemisola*, 225 F.3d 753, 760 (D.C. Cir. 2000) (no abuse of discretion to grant severance after dismissing conspiracy count mid-trial).

In *Perry*, the D.C. Circuit affirmed the district court's denial of a severance motion. 731 F.2d at 932. There, defendant Lynch claimed he was improperly joined with Perry because he was not involved in both of the drug transactions charged in the indictment. Specifically, the evidence proved that Lynch was not clearly involved in the first transaction between Perry and an undercover police officer on September 28 but was clearly involved in the second transaction between Perry and the undercover officer on October 12. The court concluded that Lynch was properly joined in the indictment because the government "made an adequate showing of commonality between the two transactions," where both "involve[ed] the same purchaser, the same intermediary (Perry), and [were] conducted at the same place in the same manner." *Id.* at 991.

Although the D.C. Circuit also stated that the government "sufficiently demonstrated the existence of a common scheme or plan spanning both transactions and both defendants," *id.*, it did not hold that Rule 8(b) required such a scheme or plan. Rather, it stated that Rule 8(b) required "'two or more acts or transactions connected together *or* constituting parts of a common scheme or plan,'" *id.* at 990 (emphasis added), meaning the rule could be satisfied by *either* a sufficient "connection of acts or transactions" *or* "a common scheme or plan."

Plainly, a "common scheme or plan" is one kind of connection or nexus, but not the only kind. An indictment need not "include a conspiracy charge or an allegation that each of the defendants aided and abetted one another in order to satisfy the joinder requirements under Rule 8(b)," even though "such allegations would likely simplify the analysis under Rule 8(b)." *United States v. Melvin*, 143 F. Supp. 3d 1354, 1364 (N.D. Ga. 2015), *aff'd*, 918 F.3d 1296 (11th Cir. 2017). *See also United States v. Butera*, 677 F.2d 1376, 1385 n.7 (11th Cir. 1982) ("The absence of a conspiracy charge in the case before us is of no significance in the Rule 8(b) analysis.").

## II. Mitchell Has Not Established that *Bruton* Requires Separate Trials.

Mitchell also contends that severance is required because the government may present at trial certain statements by Bender that incriminate Mitchell; namely, the contents of Bender's post-arrest interview with law enforcement during which he (1) identified Mitchell as the individual shown next to him in multiple photos and videos, and (2) stated that he followed Mitchell into the Capitol Building and onto the Senate Floor. *See* ECF No. 48 at 2-3. He is incorrect.

First, the government has not indicated that it intends to introduce Bender's statements, and need not do so to establish its case-in-chief. Mitchell's identity as the individual who entered the Capitol Building and breached the Senate chamber with Bender does not appear to be disputed. Second, "what Mr. Mitchell did," ECF No. 48 at 2, is clear from multiple CCTV videos that the government intends to introduce at trial; it need not rely on Bender's videotaped interview. The vast majority of the evidence against both defendants will come from videos and photographs obtained through open sources, Capitol security footage, and defendants' cell phone and social media. As the D.C. Circuit has explained, "[t]he danger of spillover prejudice is minimal when the Government presents tape recordings of individual defendants." *United States v. Celis*, 608 F.3d 818, 846 (D.C. Cir. 2010).

Third, contrary to Mitchell's suggestion, the government likely will not seek to introduce Bender's self-serving statements "that he followed Mr. Mitchell into the Capitol building and into the Senate Chamber." ECF No. 48 at 2. That (partial) confession is cumulative of the trove of video evidence of Bender and Mitchell climbing the scaffolding, entering the Capitol Building, and roaming the Senate floor. The government has little incentive to introduce a statement by a co-defendant attempting to minimize his wrongdoing or negate his *mens rea*. The government does not believe that Bender was his co-defendant's pawn, and does not intend to introduce any self-serving statements to that effect.

But even assuming that the government will rely on Bender's confession and it raises an issue under *Bruton v. United States*, 391 U.S. 123, 137 (1968), any such statement can be limited to prevent its improper use against Mitchell. Should the government seek to introduce any part of Bender's recorded interview, it intends to redact out any statement that would improperly implicate Mitchell, thereby mitigating any possible *Bruton* issue. *See, e.g., United States v. Gio*, 7 F.3d 1279, 1287 (7th Cir. 1993) (following redaction, defendant "had no basis for requesting a severance on *Bruton* grounds.").

## III. Mitchell Has Not Established A Significant Risk of Prejudicial Spillover.

Mitchell's speculative contention that a joint trial would risk his conviction on the basis of "guilt by association," ECF No. 48 at 3, does not justify severance. Mitchell does not establish that the evidence against Bender is "far more damaging" than the evidence against him. *United States v. Mardian*, 546 F.2d 973, 977 (D.C. Cir. 1976). To the contrary, Mitchell and Bender are charged with the same crimes based on conduct they undertook together. That is, the government alleges (and video evidence shows) that the two defendants knew each other, came to the former President's rally together, climbed scaffolding and unlawfully entered the Capitol together,

navigated the building together, entered the Senate Chamber together, and stood on the Senate Dais together. ECF Entry, 5/24/2022.

In any case, courts routinely reject requests to sever where evidence against one co-defendant 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 "was not in possession of the backpack and "the government's Rule 404(b) evidence against Douglas is far stronger" than the 404(b) evidence against Williams; "even with these disparities in evidence, Williams has failed to meet his 'heavy burden' under Rule 14"); *United States v. El-Saadi*, 549 F. Supp. 3d 148, 169 (D.D.C. 2021) (denying severance even though "the number of allegations against Khawaja, as the alleged hub of the second conspiracy, is far greater than against anyone else," where "El-Saadi's alleged participation in the second conspiracy is similar to the alleged roles of several other defendants"); *United States v. Eiland*, 406 F. Supp. 2d 46, 53 (D.D.C. 2005) (denying severance and observing that, "Disparity as to the violence alleged is generally only dispositive when it is combined with another factor, such as drastic differences in those charges.").

To the extent that there is any disparity in evidence, it is *Mitchell* who posted statements and sent messages via Facebook that Bender characterized as "highly inflammatory." ECF No. 34 at 7. In rejecting that disparity as a basis to deny joinder, the Court explained earlier this year that, "[a] jury can readily be instructed … to attribute statements only to the speaker, and nothing about the facts of these cases is so complicated as to prevent jurors from disentangling the two defendants' individual actions and statements." ECF Entry, 5/24/2022. Mitchell certainly does

not establish a "serious risk" that a jury will be unable to make a reliable judgment about each defendant's guilt or innocence such that each defendant will be unable to have a fair trial unless the cases are separated. *Wilkins*, 538 F. Supp. 3d at 87-88 (quoting *United States v. Gooch,* 665 F.3d 1318, 1336 (D.C. Cir. 2012)).

## IV. Mitchell's Rule 14 Arguments Fail Because He Has Not Shown That a Joint Trial Would "Compromise a Specific Trial Right" or Prevent the Jury From Rendering a "Reliable Judgment."

Mitchell also has not established that severance is required because his and Bender's defenses are irreconcilably contradictory or his co-defendant allegedly will improperly act as a "second prosecutor" against him. *See* ECF No. 48 at 3-7. Mitchell asserts that "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." *See id.* at 4-5. But Mitchell provides only speculation that Bender will defend himself by casting blame, and such finger-pointing simply does not constitute a basis for severance.

The Supreme Court has explicitly held that severance is not required merely because one defendant accuses another of committing the charged crime. *Zafiro v. United States*, 506 U.S. 534, 539-41 (1993). Indeed, Rule 14 "does not require severance even if prejudice is shown," and district courts "should grant 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." *Id.* at 539; *accord United States v. Bostick*, 791 F.3d 127, 152-53 (D.C. Cir. 2015) (cleaned up). Severance is required in the face of mutually contradictory defenses only where there is an "irreconcilable inconsistency" between the two defenses. *United States v. Manner*, 887 F.2d 317, 326 (D.C. Cir. 1989). The inconsistency

between two defenses must be so contradictory that a finding of guilt for one defendant would logically require an acquittal of the other. *United States v. Tarantino*, 846 F.2d 1384, 1399 (D.C. Cir. 1988) (quoting *United States v. Wright*, 783 F.2d 1091, 1095 (D.C. Cir. 1986)). For example, in *United States v. Tootick*, 952 F.2d 1078 (9th Cir. 1991), cited at length by Mitchell, each defendant contended that the other *alone* committed an assault. *Id.* at 1081-82. "Each defense theory contradicted the other in such a way that the acquittal of one necessitates the conviction of the other." *Id.*

That is not the case here. Mitchell speculates that Bender will attempt to minimize his own culpability by arguing that he was incited by Mitchell. But his speculative Rule 14 prejudice assertions fall far short of establishing a basis for severance. As Judge Easterbrook explained, "[f]inger-pointing among the defendants is not only acceptable but also a benefit of a joint trial, for it helps the jury to assess the role of each defendant." *United States v. Hoover*, 246 F.3d 1054, 1061 (7th Cir. 2001). Indeed, "hostility among defendants," "[t]he presence of conflicting or antagonistic defenses," or "the desire of one to exculpate himself by inculpating another [are] insufficient grounds to require separate trials." *United States v. Lighty*, 616 F.3d 321, 348-49 (4th Cir. 2010) (citations and quotations omitted, collecting cases).

Judge Lamberth recently considered – and firmly rejected – a motion to sever based on the so-called "second prosecutor" theory. *See United States v. Lewis*, No. 19-cr-307 (RCL), 2022 WL 1090612, at *4 (D.D.C. Apr. 11, 2022). There, the movant and his co-defendant each were charged with offenses related to the trafficking of two minors for commercial sex work. *Id.* at *1. Lewis argued that counsel for his co-defendant would become an "extra prosecutor," zealously arguing his guilt to the jury. *Id.* at *4. But the Court rejected that argument, observing it had found no example of a court in this Circuit granting severance based on the presence of a "second

prosecutor," and noting that the out-of-circuit cases recognizing this theory occurred post-trial and required a new, severed, trial only where the co-defendant's counsel "*actually acted* as a second prosecutor." *Id.* (emphasis in original). Judge Lamberth held that,

> Absent any evidence of the defense Jones's actually intends to bring or her theory of the case beyond placing Lewis as a "primary actor," Lewis's Mot. 5, Lewis has not fulfilled his burden of showing that he will be prejudiced based on a "second prosecutor." Before the trial itself, this argument is merely a riff of the mutually contradictory defenses argument and is rejected for the same reasons.

*Id.*

This Court also rejected the "second prosecutor" theory in *United States v. Bikundi*, No. 14-cr-030 (BAH), 2016 WL 912169 (D.D.C. Mar. 7, 2016):

> a disparity in the volume of evidence presented at trial among co-defendants simply does not suffice to warrant a severance, *even when one defendant assumes the role of "second prosecutor"* and accuses another of committing the charged crime. *See Zafiro v. United States*, 506 U.S. 534, 544 (1993) (Stevens, J., concurring); *United States v. Glover*, 736 F.3d 509, 516 (D.C. Cir. 2013). On the contrary, "when there is 'substantial and independent evidence of each [defendant's] significant involvement in the conspiracy,' severance is not required." *United States v. Moore*, 651 F.3d 30, 96 (D.C. Cir. 2011) (quoting *Tarantino*, 846 F.2d at 1399); *see also United States v. Slade*, 627 F.2d 293, 310 (D.C. Cir. 1980) (finding severance not required despite disparity in evidence because evidence against defendant was "independent and substantial"). Thus, the defendant must point to "a serious risk" of such prejudice from certain evidence presented at trial only against [a co-defendant] that may have so colored the jury's view as to "prevent the jury from making a reliable judgment about [the movant's] guilt." *Bostick*, 791 F.3d 127, 152-53 (D.C. Cir. 2015).

*Id.* at *46 (emphasis added).

## V. Mitchell Has Not Overcome the "Strong Interests" in Favor of Joint Trials.

Once multiple defendants are properly joined under Rule 8(b), as here, "[d]istrict courts should 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.'" *Celis*, 608 F.3d at 844 (quoting *Mardian*, 546 F.2d at 979). 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 (cleaned up). *See generally United States v. Tucker*, 12 F.4th 804, 825 (D.C. Cir. 2021) (a joint trial is permissible "as long as the jury can reasonably compartmentalize the substantial and independent evidence against each defendant.") (cleaned up). Salient factors that militate against severance, all of which are present here, 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 Manner*, 887 F.2d at 325.

Like Bender, Mitchell has failed to convincingly explain how a joint trial "will in fact prejudice him." ECF Entry, 5/24/2022. As Mitchell appeared to recognize just a few months ago, continued joinder will promote the interest of efficiency, *see Manner*, 887 F.2d 317 at 324, and avoid 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)).

**CONCLUSION**

For the reasons cited above, this Court should deny Mitchell's severance motion.

Respectfully submitted,

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