Filed
D.C. Superior Court
05/02/2022 16:06PM
Clerk of the Court

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division—Misdemeanor Branch

UNITED STATES OF AMERICA	:	
	:	
v.	:	Case Nos.
	:	
YEVGEMYA MALIMON	:	2021 CMD 000156
VICTORIA BERGESON	:	2021 CMD 000161
ANTHONY TAMMARO	:	2021 CMD 000164
DAVID ROSS	:	2021 CMD 000167
JOHN PARKER	:	2021 CMD 000171
MAURICIO MENDEZ	:	2021 CMD 000176
JERE BROWER	:	2021 CMD 000182
DAVID FITZGERALD	:	2021 CMD 000185
EARL GLOSSER	:	2021 CMD 000187
ANDREW JOHNSON	:	2021 CMD 000191
JOSHUA KNOWLES	:	2021 CMD 000193
WILLIAM LEARY	:	2021 CMD 000194
KRISTINA MALIMON	:	2021 CMD 000195
	:	
Defendants.	:	Judge Neal Kravitz
	:	
	:	Status Hearing: May 20, 2022

STATUS REPORT ON TRIAL DIVISIONS

As of May 2, 2022, the following defendants have elected to exercise their rights to a jury trial: Jere Brower, David Fitzgerald, Andrew Johnson, William Leary, John Parker, and David Ross. The remaining seven co-defendants: Victoria Bergeson, Earl Glosser, Joshua Knowles, Kristina Malimon, Yevgemya Malimon, Mauricio Mendez, and Anthony Tammaro, have all elected bench trials. At the last hearing for these matters on April 1, 2022, the Court set forth the following schedule for discussions of trial groupings: the government was instructed to notify defense counsel of proposed groups by April 8, 2022; defense counsel had until April 19, 2022, to raise and objections; and the government was required to submit a status report to the Court by May 2, 2022, detailing the results of any succeeding discussions.

Consistent with that schedule, on April 8, 2022, the government sent defense counsel the following proposed groupings:[1]

- Jury Trial
  - Group A
    - William Leary

[1] The following is intended only to show the groupings of the defendants, not the order of the trials.

        - Jere Brower
        - David Ross
    - Group B
        - David Fitzgerald
        - Andrew Johnson
        - John Parker
- Bench trial
    - Group A
        - Anthony Tammaro
        - Mauricio Mendez
        - Victoria Bergeson
        - Kristina Malimon
    - Group B
        - Earl Glosser
        - Joshua Knowles
        - Yevgemya Malimon

This initial grouping took into account multiple factors, including the preferences of defendant's Brower and Ross that they be tried together. The government's groupings honored these requests. The government then received several objections from various defense counsel, which are summarized below.

Malimon Objections

The same day that the government sent out the proposed groupings, Mr. Castor, who serves as counsel for both of the Malimon co-defendants sent an email to the government objecting to the proposed groupings on two grounds: (1) that the government proposed to separate the two Malimons into separate trial groups; and (2) that the government intended to try the Malimons with any additional co-defendants.[2] Specifically, counsel stated that the Malimons "will corroborate each other at trial and aver they have the right to do so in a joint trial." Counsel also noted that the Malimons "object to being tried with anyone, apart from one another, not in a position to see and hear the same things as Defendants, whether or not other potential defendants *did* see or hear the same things." In essence, Mr. Castor is demanding a trial for just his clients, and no one else.

The government has considered Mr. Castor's objections and it has declined to revise its proposed trial groups. As a preliminary matter, the government believes that all of the co-defendants are properly joined as they were all arrested at the same time and in the same area. Additionally, they are all charged with the same offense based on the same conduct. However, we are not able to try them all together due to space limitations at the courthouse and the split between bench and jury trials. In the interests of judicial economy, it would also not make sense for the Malimons to have their own private trial given that, as just stated, they are properly joined with the other defendants.

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[2] A copy of the email correspondence between the parties that includes both Mr. Castor's email to the government and the government's response is attached as Exhibit 1. Unrelated messages regarding document productions have been omitted from this email chain.

Additionally, the government explained to Mr. Castor in a response to his email, the government remains concerned regarding the potential for conflict in the Malimons' defenses. In fact, at the hearing on April 29, 2022, conflict counsel for Ms. Yevgemya Malimon indicated on the record that she agrees there is a potential conflict. The government is aware that (a) the Malimons have chosen to waive any conflict and (b) they and their counsel assert that their currently planned defenses do not conflict with each other. However, the government is also aware that trial strategies and defenses can adapt over time as new evidence is produced and as the trial itself develops. The government has an interest in both assuring that the Malimons have fair trials and minimizing any appellate risk in the event they are convicted. To that end, and given that the Malimons have elected to retain the same attorney, one way to ameliorate any potential prejudice that could develop is to try them in separate trials. This seems particularly advisable given that Mr. Castor's email appears to indicate that one or both of the Malimons intends to testify.

Johnson & Parker Objections

On April 20, 2022, the government received an email from counsel for Mr. Johnson indicating that Mr. Johnson objects to being tried in the same group as Mr. Parker.[3] Per the email, Mr. Johnson's objection stems from Mr. Parker's behavior during several of the WebEx hearings and counsel's concern that "Mr. Parker will attempt to make a circus of the proceedings and this will have a negative spillover effect on Mr. Johnson."

Subsequently, on April 28, 2022, counsel for Mr. Parker also sent an email objecting to trial with Mr. Johnson. Mr. Parker's counsel's objection appears to be based on Mr. Johnson's behavior and statements at the scene prior to his arrest as captured on the Body Worn Cameras (BWCs) of several officers.

Specifically, on April 15, 2022, the government flagged for all defense counsel 15 BWC videos that are highly relevant to these cases. The government also provided annotations for some of these videos of critical moments captured in these recordings. Some of these videos show Mr. Parker and Mr. Johnson near each other as Mr. Johnson is making loud statements regarding the curfew. Counsel for Mr. Parker has indicated that he is "concerned that the jury will infer guilt by association. In other words, they will see the two as essentially the same, when the evidence is quite the contrary." He then suggests trying everyone together in a single jury trial to avoid this becoming an appellate issue. Counsel for Mr. Parker also made requests regarding the order in which the trials of the various groups proceed, which can be addressed when trial dates are selected.

The government has considered the requests from counsel for both Mr. Johnson and Mr. Parker and again has declined to alter its proposed trial groupings. As this Court is aware, the

[3] A redacted copy of the email correspondence between the parties that includes the email from counsel for Mr. Johnson, the government's response, and the email from counsel for Mr. Parker is attached as Exhibit 2. Exhibit 2 has been redacted to remove confidential information provided by defense counsel. An unredacted copy will be sent by email to Chambers and the relevant defense counsel.

reason the government is making these proposed divisions is because the Court is unable to accommodate a six co-defendant jury trial due to the pandemic-related spacing issues. Given that divisions must be made, the government has attempted to group individuals who were in close proximity and for whom it intends to use similar evidence in an effort to be efficient.[4] Here, Mr. Parker and Mr. Johnson appear to be physically proximate to each other in several relevant BWC videos. Additionally, the government intends to introduce Mr. Johnson's statements as captured in those videos as evidence against Mr. Parker, whether or not they are tried together, because they go to Mr. Parker's notice of the curfew.

For the foregoing reasons and any additional reasons expounded at a hearing on this issue, the government believes that its trial divisions are appropriate and fall within the general rule that the government is allowed to present its evidence as it sees fit. *See e.g.*, *Old Chief v. United States*, 519 U.S. 172 (1997) (holding that because they have the burden of proof, prosecutors are entitled to choose how to prove their case and, except in limited circumstances, cannot be forced to introduce evidence through stipulations). We are happy to respond to any motions filed by defense counsel on these issues or to argue the matter before the Court on May 20, 2022, if the Court believes further argument is necessary.

At the April 1 hearing, the Court also instructed the Government to provide information about the likely duration of the trials. At this time, the government expects to introduce an average of 20 witnesses, primarily law enforcement and custodians. We do not currently anticipate presenting any expert witnesses, though if that changes, we will certainly file the appropriate notice. The government anticipates completing its case in chief within six full days (assuming each trial day runs from 10am to 4:45 with appropriate breaks). As a caveat, however, the government does not know how defense counsel intends to handle cross-examination, and the government's estimates will be affected if, for example, each defense attorney decides to conduct a full cross examination of each of the government's witnesses. The government's case may also be shortened if we can reach agreement with defense counsel regarding certain stipulations.

Respectfully submitted,

MATTHEW M. GRAVES
United States Attorney

KIMBERLEY NIELSEN
Deputy Chief, Major Crimes Section

ANDY WANG
Assistant United States Attorney

By: */s/ Kathleen W. Gibbons*
KATHLEEN W. GIBBONS

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[4] The obvious exception to that approach is the case of the Malimons where, as discussed above, there are competing concerns of prejudice and appellate risk because they are represented by the same attorney. Those concerns do not apply to any of the other co-defendants.

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Exhibit 1

Gibbons, Kathleen (USADC)

From: Wang, Andy (USADC)
Sent: Wednesday, April 20, 2022 11:28 AM
To: Bruce L. Castor Jr.
Cc: Gibbons, Kathleen (USADC)
Subject: RE: United States v. Yevgemya Malimon et al. -Trial Divisions

Hi Mr. Castor,

The government's position is that all of the co-defendants in these matters are properly joined as they were all arrested at the same time and in the same area. However, given space limitations and defendants electing between jury and bench trials, it is not possible to try everyone together. The government remains concerned about the potential for conflict in Ms. Yevgemya Malimon's and Ms. Kristina Malimon's defenses, though we understand you do not share our concern. Our primary interest is in ensuring that both of the Malimons receive a fair trial. To that end, particularly assuming that you remain counsel for both, one way to ameliorate the potential prejudice is to place them in separate trials. We have noted your objection to our proposal and are happy to flag it for the Court consistent with the schedule set forth at the last hearing, or you are free to file your own motion to address your concerns now.

Andy Wang, Assistant United States Attorney
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andy.wang@usdoj.gov

From: Bruce L. Castor Jr. <bcastor@mtvlaw.com>
Sent: Friday, April 8, 2022 1:59 PM
To: Wang, Andy (USADC) <AWang@usa.doj.gov>; sbogash@mac.com; rmccoylegal@gmail.com; clennonlegal@hotmail.com; joseph.w.fay@gmail.com; peter@odom-law.com; meganallburnlaw@gmail.com; Dorseylaw@gmail.com; serranomas@gmail.com; kskassees@comcast.net; cweletz@hotmail.com; Kevin Robertson <krobertson@bcrlawfirm.com>
Cc: Gibbons, Kathleen (USADC) <KGibbons@usa.doj.gov>
Subject: [EXTERNAL] RE: United States v. Yevgemya Malimon et al. -Trial Divisions

On behalf of both of the Malimon defendants, I object to having mother's and daughter's trials separated. They will corroborate each other at trial and aver they have the right to do so at a joint trial. The government charged them together and until recently appeared to intend to try all defendants similarly charged at the same time. Joinder of my clients was proper and the government has not good basis for separating them.

I am certainly willing to point that out greater detail in an *ex parte* showing to Judge Kravitz (without disclosing my clients' defense in any further particularity than I have to this point, and ask the judge to rule on the issue. I believe the Malimon defendants are properly joined under Rule 8(b) as participants in same series of acts which the government contends constitutes an offense. My clients feel harassed at this attempt which to them (and to me) does not make sense.

Furthermore, the Malimon defendants object to being tried with any other defendant, apart from one another, unless said additional defendant(s) are charged with engaging in identical conduct, within a reasonable radius of the activity alleged to constitute an offense, and occurring at the same time. Defendants object to being tried with anyone, apart from one another, not in a position to see and hear the same things as Defendants, whether or not other potential defendants *did* see or hear the same things. In other words, time and location must be sufficiently similar so as to make logical sense that any other defendant tried with the Malimon defendants *ought* to be so tried together to overcome the present objection.

Thus, my clients object on being split apart desiring to remain together as the government has consistently sought until recently, and they object to being tried with anyone else absent a showing by the government of a similarity in time, location, and behavior of other defendant(s) that would make trying them together reasonable.

Kindly advise how the government wishes to bring this matter to the Court's attention.

Regards,

Bruce

Bruce L. Castor Jr.

VAN DER VEEN
HARTSHORN & LEVIN
The V is For Victory

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From: Wang, Andy (USADC) <Andy.Wang@usdoj.gov>
Sent: Friday, April 8, 2022 9:18 AM
To: sbogash@mac.com; rmccoylegal@gmail.com; clennonlegal@hotmail.com; joseph.w.fay@gmail.com; peter@odom-law.com; meganailburnlaw@gmail.com; Dorseylaw@gmail.com; Bruce L. Castor Jr. <bcastor@mtvlaw.com>; serranomas@gmail.com; kskassees@comcast.net; cweletz@hotmail.com; Kevin Robertson

<krobertson@bcrlawfirm.com>
Cc: Gibbons, Kathleen (USADC) <Kathleen.Gibbons@usdoj.gov>
Subject: RE: United States v. Yevgemya Malimon et al. -Trial Divisions

Hi Counsel,

We have broken your clients into trial groups below. Per Judge Kravitz's order, please notify us of any objections by **April 19.** To the extent you want your client moved, it would be helpful if you could explain why (e.g., John Smith should not be grouped with Jane Doe because XYZ reason). Thank you.

- Jury Trial
  - Group A
    - Leary
    - Brower
    - Ross
  - Group B
    - Fitzgerald
    - Johnson
    - Parker
- Bench trial
  - Group A
    - Tammaro
    - Mendez
    - Bergeson
    - K. Malimon
  - Group B
    - Glosser
    - Knowles
    - Y. Malimon

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[redacted]

Exhibit 2

Gibbons, Kathleen (USADC)

From: KEVIN KASSEES <kskassees@comcast.net>
Sent: Thursday, April 28, 2022 4:12 PM
To: Wang, Andy (USADC)
Cc: Gibbons, Kathleen (USADC)
Subject: RE: [EXTERNAL] Trial Group Objection

Counsel:

Sorry about the late reply. I have had some computer issues recently, and I have been viewing some of the additional discovery provided. I want to bring to you two concerns:

1. We are going to object to Mr. Parker being paired with Mr. Johnson. Mr. Johnson is seen as extremely angry in the body camera footage. He is seen ranting and raving, cursing, confessing that he will not abide by any curfew, among other comments. His voice is very loud. He is using a bullhorn to project his defiance. Mr. Parker is seen in one brief, momentary display of subdued anger. The problem is that Mr. Parker's comments are juxta positioned against Mr. Johnson's comments as they briefly pass by each other. I am concerned that the jury will infer guilt by association. In other words, they will see the two as essentially the same, when the evidence is quite the contrary. Mr. Johnson is see on most of the cams ranting and raving in the same angry manner, confessing to his knowledge. Mr. Parker is not. No confession, no statements that he is aware of a curfew and will not abide by it. In fact, he does not appear to say anything pre arrest, other than the statements as he walks by Mr. Johnson. These two do not know each other, and had no interaction on the scene, to the best of my knowledge. Neither was responding to the other.

I think this could be an appellate issue of skewing/misrepresenting the evidence to show guilt by association because of the proximity of the two men on the scene. I think you should consider trying everyone together in one jury trial to prevent this type of thing from becoming an appellate issue. I think Mr. Johnson is prejudicial to everyone, but my client the most. Add to this, Mr. Johnsons' defense counsel concerns about being linked with my client. We both don't want to be with each other. And, [redacted] which could magnify the "guilty by association" concerns I am noting.

2. Please consider placing my client in the last grouping in terms of scheduling. [redacted]

3. I do not have all the information about what Mr. Glosser would say as for being a witness for my client. However, I want to subpoena him during his trial before he leaves the jurisdiction. In this regard, I would want the bench trial for Mr. Glosser to go first, and the jury trial date set for Mr. Parker in advance of the trial concluding for Mr. Glosser, so I can subpoena him for trial prior to his departure. Mr. Glosser may have an ongoing 5th Amendment issue on appeal if he loses. I think he

waives it if he testifies, but I am not sure. He is likely to testify, so you could try to explore what he knows about Mr. Parker on cross. That would help me decide if I want to call him as a witness. Two points here: 1. we need to have Mr. Parker's trial scheduled in advance, and 2. the ongoing 5th Amendment issue for Mr. Glosser is all the more reason why Mr. Parker's jury trial grouping should go last.

I plan to file motions regarding these issues with the court once I see your status report. Again, sorry about the late notice as to these issues.

Best,

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On 04/20/2022 11:27 AM Wang, Andy (USADC) <andy.wang@usdoj.gov> wrote:

Hi Mr. Odom,

We appreciate your email. However, the government believes that keeping Mr. Johnson with Mr. Parker makes sense. The government structured the initial trial divisions due to, among other things, similarities in proof. As the government's recent BWC production shows you, Mr. Parker and Mr. Johnson were near each other prior to their arrests (see Lima DaCruz, Gonzalez, and Priebe BWCs), and their evidence will be similar in that they will draw upon the same officers' BWC. We will note your objection to the court when we file our status report.

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From: Peter Odom <peter@odom-law.com>
Sent: Wednesday, April 20, 2022 8:47 AM
To: judgekravitzchambers@dcsc.gov; Wang, Andy (USADC) <AWang@usa.doj.gov>; Kevin Kassees <kskassees@comcast.net>
Subject: [EXTERNAL] Trial Group Objection

On behalf of Mr. Andrew Johnson, we object to being in the same trial group with Mr. David Parker. Mr. Parker has appeared to be disruptive, unconnected, and mentally unbalanced during several of the previous hearings. I am concerned that Mr. Parker will attempt to make a circus of the proceedings and this wil have a negative spillover effect on Mr. Johnson.

There is nothing otherwise to connect Mr. Parker to my client.

Sincerely,

Peter O.

--

Peter Kent Odom

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