

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION B FELONY BRANCH**

UNITED STATES OF AMERICA

Case Number: 2017 CMD 1468
2017 CMD 1469
2017 CMD 1089

v.

Calendar: Chief Judge Morin

**TIGHE BARRY; LENNY BIANCHI;
AND DESIREE ALI-FAIROOZ**

Trial Date: April 27, 2017

GOVERNMENT'S MOTION TO JOIN CASES FOR TRIAL

The United States, by and through its attorney, the United States Attorney for the District of Columbia, respectfully moves this Court, pursuant to Super. Ct. Crim. R. 8(b), to join the above-captioned matters for trial. In support of this motion, the government relies on the following points and authorities, and such other points and authorities as may be cited at a hearing on the matter.

I. PROCEDURAL HISTORY

Defendants Tighe Barry and Lenny Bianchi are each charged as co-defendants before this Court on the following three counts related to their conduct disrupting the confirmation hearing of then Senator Jeff Sessions on January 10, 2017: Count 1 – Disorderly and Disruptive Conduct on United States Capitol Grounds; Count 2 – Obstructing and Impeding Passage on United States Capitol Grounds; and Count 3 – Parades, Assemblages, and Displays Forbidden. Defendant Desiree Ali-Fairooz is also before this Court on two counts related to her conduct disrupting the confirmation hearing of then Senator Jeff Sessions on January 10, 2017: Count 1 – Disorderly and Disruptive Conduct on United States Capitol Grounds; Count 2 – Obstructing and Impeding Passage on United States Capitol Grounds.

On February 17, 2017, these matters were before the court for an initial status hearing. At that time, prior defense counsel for all three Defendants, Mark Goldstone, orally moved the Court to consolidate all three of these cases for purposes of proceeding to trial. The Court took that motion under advisement and set all three matters for trial on the same date, April 27, 2017.

II. FACTUAL BACKGROUND

Based upon the current state of investigation in this case, the government expects the evidence to show that on January 10, 2017, members of the protest group, Code Pink, arrived early at the Senate Russell Building to stand in line for an opportunity to be seated in the Kennedy Caucus Room, where the Senate Judiciary Committee would hold a hearing on the confirmation of then Senator Jeff Sessions to the position of Attorney General of the United States. This group included Defendant Ali-Fairooz, who was wearing a pink shirt and a pink hat, with the words Code Pink written on it. Standing in line with Defendant Ali-Fairooz and several other individuals wearing the same pink outfits, were Defendants Barry and Bianchi who have appeared at other hearings and protests with Code Pink. Once the Kennedy Caucus room was opened, the Code Pink members, including Defendant Ali-Fairooz, were seated near the rear of the room. Defendants Barry and Bianchi were seated amidst the Code Pink group.

At approximately 9:28 a.m. as then Senator Jeff Sessions entered the room with Senate Judiciary Committee Chairman Chuck Grassley, Defendants Barry and Bianchi put on what appeared to be white robes and hoods, stood up on their chairs, and began yelling while waiving signs shaped as hands containing messages that read “KKK # 1” and “Go Jeffie Boy.” They could be heard yelling “thank you” to then Senator Sessions and referenced the “whities in the South.” Specifically, Defendant Barry yelled: “wait a minute, you can’t arrest me, I’m white” and “I’m a white man, you cannot take me out of here, I own this government.” Defendants

Barry and Bianchi continued yelling as they were removed from the hearing room, calling then Senator Sessions a racist and stating that his nomination would lead to racist policies. While Defendants Barry and Bianchi were being led down a hallway away from the hearing room, Defendant Ali-Fairooz occupied the very space they vacated holding up a sign that read “end racism stop [S]essions.”

Less than thirty minutes later, at approximately 10:06 a.m. Senator Richard Shelby was providing an opening statement in support of then Senator Sessions. During these remarks, Senator Shelby stated that “Jeff Sessions’ extensive record of treating all Americans equally under the law is clear and well documented.” In response to this statement, Defendant Ali-Fairooz, who had been sitting with Defendants Barry and Bianchi before their disruption and removal, let out aloud burst of laughter, followed by a second louder burst of laughter. Capitol Police Officers then attempted to quietly escort Defendant Ali-Fairooz from the room, however, she grew loud and more disruptive, eventually halting the confirmation hearing. Her disruptive behavior included yelling that then Senator Sessions “voting record was evil” and waving a sign that read: “support civil rights, stop [S]essions.”

III. LEGAL STANDARD FOR JOINDER

“Joinder of defendants is governed by Super. Ct. Crim. R. 8(b), which states that ‘[t]wo or more defendants may be charged in the same indictment or information 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.’” Ball v. United States, 26 A.3d 764, 767 (D.C. 2011). “In a case involving multiple defendants, Rule 8(b) allows joinder only if the offenses ‘are based on the same act or transaction or series of acts or transactions.’” Jackson v. United States, 623 A.2d

571, 578 (D.C. 1993) (quoting Ray v. United States, 472 A.2d 854, 857 (D.C. 1984)). The D.C.C.A. has held that

[m]ultiple offenses constitute a “series of acts or transactions” joinable under Rule 8(b) only if they fall into one of three categories: (1) where the offenses are committed to achieve “a specific common end,” (2) “where one offense logically leads to another,” or (3) “where the offenses are part of a common scheme or plan,” and are so closely connected in time and place “that there is necessarily a substantial overlap in proof of the various crimes and ‘it would be difficult to separate proof of one from the other.’”

Settles v. United States, 522 A.2d 348, 352 (D.C. 1987) (quoting Davis v. United States, 367 A.2d 1254, 1262 (D.C. 1976)). In order for offenses to fall within the first category above, often called the common goal or end category, “the sets of offenses must be directed toward a specific goal or must depend for their success upon each other.” Jackson, 623 A.2d at 579.

IV. ARGUMENT

A. **The Offenses were Committed to achieve a “specific common end”**

In the instant matter, joinder is proper under Rule 8(b) because the offenses for which each defendant is charged were committed to achieve the specific common end of impeding and disrupting the confirmation hearing of then Senator Sessions by drawing attention to the fact that they believed him to be racist. The government expects the evidence to show that all three Defendants waited in line together and sat together in the Kennedy Caucus room. Once Defendants Barry and Bianchi were removed for standing on chairs in white robes and hoods, waving signs supporting the KKK, and yelling derogatory comments at then Senator Sessions, Defendant Ali-Fairooz immediately held up a sign intended to draw a link between then Senator Sessions and racism. No more than thirty minutes later, Defendant Ali-Fairooz also created a scene after scoffing at Senator Shelby’s comments and then yelling that then Senator Sessions’

voting record was “evil,” while simultaneously waving a sign that read: “support civil rights stop sessions.”

The message conveyed by the Defendants in their costumes, signs, and vocal protests, was the same and was conveyed close in time and location. The actions of all three Defendants were intended to achieve the same common goal: impede and disrupt then Senator Sessions’ confirmation hearing by drawing attention away from the hearing itself and directing it instead toward the Defendants’ perception of the nominee’s racist views, policies, and voting record. This specific and unitary goal was shared by each Defendant and advanced by their actions, and demonstrating that all three Defendants engaged in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Therefore, joinder under Rule 8(b) is appropriate.

B. Judicial Economy Would be Served By Joinder of Trials

There is, traditionally, a presumption in favor of joinder . . . because joint trials do conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial. @ Brown v. United States, 718 A.2d 95, 102 (D.C. 1998) (citing Carpenter v. United States, 430 A.2d 496, 502 (D.C.) (en banc) (internal citation omitted)). In this balance some amount of prejudice will be permitted in favor of judicial economy and the concomitant expedition of cases. @ Id. (citations omitted).

Further, a joint trial promotes the goal of trial economy and assures that a criminal transaction need only be proved once. @ Coleman, 619 A.2d at 46 (internal quotation marks and brackets omitted). In this case, judicial economy would be served by joining the trial of Defendant Ali-Fairooz with the trial of Defendants Barry and Bianchi.

Much of the evidence that the Government intends to introduce against these three Defendants is the same. The foundational evidence establishing the core elements of the charges against each Defendant will be elicited through testimony from the same officer. Video of the confirmation hearing showing Defendants Barry and Bianchi creating a disturbance, also shows Defendant Ali-Fairooz standing with them, speaking to one of the officers as he tries to remove Defendant Bianchi, and then immediately holding up a sign where Defendants Barry and Bianchi had been standing. In addition, many of the additional witnesses would be the same in both cases, since Capitol Police officers were involved in the removal and arrest of all three Defendants. The amount of time that all witnesses would spend waiting in the courthouse would be substantially reduced if the cases were joined for trial. Thus, substantial government resources will be expended in securing the witnesses for trial in these matters, resources which could be conserved if the trials were joined.

C. No Prejudice Would Inure to the Defendant By Joinder At This Time

At the initial status hearing for all three Defendants on February 17, 2017, prior Defense Counsel for all three Defendants orally moved the Court to consolidate these matters for trial. The Court took that motion under advisement and set all three of these matters for the same trial date of April 27, 2017. The Government has spoken to current Defense Counsel for Defendant Ali-Fairooz, who indicated that he does not oppose joinder. The Government also spoke to current Defense Counsel for Defendant Barry on April 19, 2017, who indicated at that time that he had not made a decision whether he would oppose joinder. The Government has not had an opportunity to speak with Defendant Bianchi, who is now representing himself *pro se*, regarding joinder. Nevertheless, Defendants have had adequate notice that these matters may be tried together, given that Defendants' own prior counsel initially moved for joinder in February.

Moreover, the parties have been operating as though the matters would be tried together, since February 2017, including by having combined status hearings and providing identical discovery. Accordingly, Defendants should not be prejudiced by the fact that the Government is now also moving for joinder.

CONCLUSION

WHEREFORE, the government respectfully moves to join these cases for trial.

Respectfully submitted,

CHANNING PHILLIPS
UNITED STATES ATTORNEY

JOHN GIDEZ
CHIEF, FELONY MAJOR CRIMES TRIAL SECTION

/s/ Jason Covert _____
JASON COVERT
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served by efilng upon the attorney for Defendant Barry, Frederick Iverson, and for the attorney for Defendant Ali-Fairooz, Samuel Bogash, on April 23, 2017.

I HEREBY CERTIFY that a copy of the foregoing was served by certified mail at the last known address for Defendant Bianchi on April 24, 2017.

/s/ Jason Covert _____
JASON COVERT
ASSISTANT UNITED STATES ATTORNEY