ARGUMENT NOT YET SCHEDULED

APPELLEE'S CONSOLIDATED MEMORANDUM OF LAW AND FACT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Consol. Nos. 21-3021 & 21-3022

UNITED STATES OF AMERICA, Appellee,

v.

JOSEPH R. BIGGS and
ETHAN NORDEAN, Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHANNING D. PHILLIPS
Acting United States Attorney

ELIZABETH TROSMAN
ELIZABETH H. DANELLO
LUKE JONES
JASON MCCULLOUGH
* NICHOLAS P. COLEMAN
D.C. Bar #460109
Assistant United States Attorneys
* Counsel for Oral Argument
555 Fourth Street, NW, Room 8104
Washington, D.C. 20530

Nicholas.Coleman@usdoj.gov
(202) 252-6829

Cr. No. 21-175

On January 6, 2021, appellants Joseph R. Biggs and Ethan Nordean, leaders of the "Proud Boys" organization, helped organize and lead a group of Proud Boys members in storming the United States Capitol. During the course of that incursion, appellants helped a crowd knock down and trample a metal barrier set up by the Capitol Police to protect the Capitol, and they later entered the Capitol Building through a door breached by other rioters. The invasion halted the proceedings of a Joint Session of Congress, which had convened to certify the Electoral College vote.

Appellants are charged with criminal offenses stemming from their participation in the Capitol riot. They now appeal the order of the district court detaining them pending trial. Because the district court did not clearly err in finding that no condition or combination of conditions will reasonably assure the safety of the community, the detention orders should be affirmed.

BACKGROUND

Procedural History

On January 20, 2021, appellant Joseph Biggs was arrested in the Middle District of Florida, on a warrant issued by the United States

District Court for the District of Columbia (DE:7; ECF#5:1).[1] Appellant Ethan Nordean ("Rufio Panman") was arrested on February 3, 2021, in the Western District of Washington, on a similar warrant (DE:7; ECF#16:1). Appellants were each charged with several offenses arising from their activities at the United States Capitol on January 6, 2021 (DE:7; ECF#5:15; ECF#16:3).

The government did not seek Biggs's detention at his initial appearance in Florida, and he was released on conditions by Magistrate Judge Embry J. Kidd (ECF:5:2-12). Magistrate Judge Kidd further ordered that Biggs's case be removed to the District Court for the District of Columbia (ECF#5:13). Biggs made his initial appearance in the District of Columbia on March 9, 2021, before Magistrate Judge Zia M. Faruqui (DE:10). Magistrate Judge Faruqui entered an order continuing Biggs's conditional release that same day (ECF#39).

[1] "DE:_" refers to the docket entries in appellants' consolidated cases before the United States District Court for the District of Columbia, at the indicated page. "ECF#_:_" refers to documents entered on that docket, by their ECF numbers and (where relevant) at the indicated page. "A:_" refers to appellants' joint appendix, at the indicated overall page (out of 157). "SA:_" refers to appellee's supplemental appendix. "Mem:_" refers to appellants' joint memorandum of law and fact.

The government requested that Nordean be detained pretrial at his initial appearance in the Western District of Washington (ECF#16:29). Following a detention hearing before Magistrate Judge Brian A. Tuschida on February 8, 2021, Nordean was released on bond, but that order was stayed upon the government's filing that same day of a motion for review in the District Court for the District of Columbia (ECF#6; ECF#7; ECF#16:29-30). On February 8, 2021, Chief Judge Beryl A. Howell ordered that Nordean be transported to the District of Columbia (ECF#9). Nordean moved to lift the stay on the magistrate judge's release order on February 23, 2021 (ECF#13). The government filed an opposition to that motion on March 2, 2021 (ECF#17; ECF#18). Chief Judge Howell held a hearing on the parties' motions on March 3, at the conclusion of which the court orally denied the government's motion for review of the magistrate judge's order and ordered that Nordean be conditionally released (DE:9; ECF#23).

An initial indictment was filed against Nordean alone on March 3, 2021 (ECF#24). A superseding indictment was filed on March 10, charging Nordean, Biggs, and codefendants Zachary Rehl and Charles Donohoe with one count of conspiracy (18 U.S.C. § 371); one count of

obstruction of an official proceeding (and aiding and abetting the same) (18 U.S.C. §§ 1512(c)(2), 2); one count of obstruction of law enforcement during a civil disorder (and aiding and abetting the same) (18 U.S.C. §§ 231(a)(3), 2); one count of destruction of government property (and aiding and abetting the same), in an amount in excess of $1,000 (18 U.S.C. §§ 1361, 2); one count of entering and remaining in a restricting building or grounds (18 U.S.C. § 1752(a)(1)); and one count of disorderly conduct in a restricted building or ground (18 U.S.C. § 1751(a)(2)) (ECF#26).[2]

On March 20, 2021, the government moved to revoke the pretrial release of Biggs and Nordean (ECF#30; ECF#31). Appellants opposed those motions (ECF#32; ECF#42). The Honorable Timothy J. Kelly, to whom the case had been transferred, held a hearing on the revocation motions on April 6, 2021 (DE:12-13). On April 19, Judge Kelly orally granted the government's motions and ordered that appellants be detained pretrial (DE:14-15). The court entered detention orders as to

[2] The initial indictment against Nordean omitted the conspiracy and obstruction-of-law-enforcement counts (ECF#24).

both appellants on April 20 (ECF#65; ECF#66). Appellants timely appealed (ECF#67; ECF#69).[3]

The Charged Offenses

The Proud Boys

As described in the superseding indictment, appellants and their coconspirators, Rehl and Donohoe, are members of the "Proud Boys," a self-described "pro-Western fraternal organization for men who refuse to apologize for creating the modern world; aka Western Chauvinists" (ECF#26:2-3). Members of the Proud Boys routinely attend rallies, protests, and other events, some of which have resulted in violence involving members of the group (*id.*:2). There is an initiation process for new members of the Proud Boys, and members often wear black and yellow polo shirts or other apparel with Proud Boys logos to public events (*id.*).

The Proud Boys organization has a national chairman and is led by a group of individual members known as the "Elders chapter" (ECF#26:2). There are local Proud Boys chapters, typically led by chapter

[3] Donohoe and Rehl are currently held without bond in their respective districts of residence (DE:17-19).

"presidents" (*id.*:3). Nordean is the president of the local Proud Boys chapter in his hometown of Auburn, Washington ((*id.*). Biggs, a resident of Ormond Beach, Florida, is a self-described organizer of Proud Boys events (*id.*).[4]

Appellants' Preparations for January 6

During the days that followed the November 3, 2020, election, appellants posted messages on social media expressing anger and predicting violence over what they perceived as election fraud (ECF#26:2,8-9). On November 5, Biggs wrote, "It's time for fucking War if they steal this shit[,]," and on November 24 he posted, "This is war" (*id.*:8). Nordean posted on November 16 that he was "disturb[ed]" that people were "just accept[ing that] Biden won," and on November 27 wrote:

> We tried playing nice and by the rules, now you will deal with the monster you created. The spirit of 1776 has resurfaced and has created groups like the Proudboys and we will not be extinguished. We will grow like the flame that fuels us and spread like love that guides us. We are unstoppable, unrelenting and now. . . unforgiving. Good luck to all you

[4] Rehl and Donohoe are presidents of their local Proud Boys chapters, in Philadelphia, Pennsylvania, and Kenersville, North Carolina, respectively (ECF#26:3).

> traitors of this country we so deeply love . . . you're going to need it. (*Id.*:9.)

After the members of the Electoral College met on December 14, 2020, and cast the majority of their ballots for Joseph R. Biden, Jr., and Kamala D. Harris, plans were announced on December 19 for a "Stop the Steal" protest event in Washington, D.C., to coincide with Congress's counting and certification of the Electoral College vote on January 6, 2021 (ECF#26:2-3). On December 23, 2020, Rehl posted on social media that January 6 would be "the day where Congress gets to argue the legitimacy of the [E]lectoral [C]ollege votes," and he promised that there would "be a big rally on that day" (*id.*:9). Nordean created an online "crowdfunding" campaign on December 27, 2020, soliciting donations for "[p]rotective gear and communications" to be used by Proud Boys members on January 6 (*id.*). Nordean shared an online link to this fundraising campaign via his social media page, and he encouraged others to share it on their social media pages (*id.*). Rehl similarly posted a link to an online fundraiser entitled, "Travel Expenses for upcoming Patriot Events," which generated over $5,500 in donations between December 20, 2020, and January 4, 2021 (*id.*).

On January 4, 2021, shortly after the Proud Boys national chairman was arrested on a warrant issued by the D.C. Superior Court,[5] Donohoe expressed concern that private communications involving the chairman would be compromised when law enforcement officers examined the chairman's phone (ECF#26:10). Donohoe then created a new channel on Telegram, a private messaging application, entitled "New MOSD," and took steps to destroy the earlier channel (*id.*). The New MOSD channel included appellants, Rehl, Donohoe, and a handful of additional members (*id.*). At 7:15 p.m. that same night, Donohoe posted a message on New MOSD and other messaging channels stating, "Hey have been instructed and listen to me real good! There is no planning of any sorts. I need to be put into whatever new thing is created. Everything is compromised and we can be looking at [g]ang charges." (*Id.*) Donohoe added, "Stop everything immediately," and, "This comes from the top" (*id.*). At 8:20 p.m., an unindicted co-conspirator (UCC-1) posted to the

[5] See Peter Hermann and Martin Weil, "Proud Boys leader arrested in the burning of church's Black Lives Matter banner, D.C. police say," Washington Post (Jan. 4, 2021), available at https://www.washingtonpost.com/local/public-safety/proud-boys-enrique-tarrio-arrest/2021/01/04/8642a76a-4edf-11eb-b96e-0e54447b23a1_story.html.

New MOSD channel, "We had originally planned on breaking the guys into teams. Let's start div[v]ying them up and getting baofeng[6] channels picked out." (*Id.*)

On January 5, 2021, at 1:23 p.m., a new messaging channel, entitled "Boots on the Ground," was created for Proud Boys members in Washington, D.C. (ECF#26:10). Over 60 users participated in that channel, including appellants, Rehl, Donohoe, and UCC-1 (*id.*). Shortly after the channel's creation, Biggs posted a message on the channel stating, "We are trying to avoid getting into any shit tonight. Tomorrow's the day." (*Id.*) Biggs added, "I'm here with [R]ufio [i.e., Nordean] and a good group" (*id.*). Later that evening, Biggs posted another message on the channel, stating, "Just trying to get our numbers. So we can plan accordingly for tonight and go over tomorrow's plan." (*Id.*:11.) At 8:28 p.m., another message was posted to the channel, directing everyone to meet at the Washington Monument at 10:00 a.m. the next morning and promising to provide "[d]etails"; and warning them not to "wear colors" (*id.*:11).

[6] Baofeng is a manufacturer of handheld radios and other communications equipment (ECF#26:10).

At 9:03 p.m., Rehl notified appellants, Donohoe, and others that he had arrived in Washington, D.C. (ECF#26:11). Earlier, Rehl had stated that he was bringing multiple radios with him and that another person would be programming the radios later that night (*id.*). Donohoe requested one of the radios that Rehl had brought (*id.*).

At 9:09 p.m., UCC-1 broadcast a message to the New MOSD and Boots on the Ground channels, stating, "Stand by for the shared baofeng channel and shared zello channel, no Colors, be decentralized and use good judgment until further orders . . . Rufio is in charge, cops are the primary threat, don't get caught by them or BLM, don't get drunk until off the street." (ECF#26:11). UCC-1 then provided a specific radio frequency (*id.*). At 9:17 p.m., Biggs posted a message on New MOSD explaining that there had just been a "meeting," and that more "[i]nfo" would be "coming out" (*id.*). Minutes later, Biggs posted that he had just spoken with the Proud Boys national chairman, and stated, "We have a plan. I'm with [R]ufio." (*Id.*) After Donohoe asked what the "plan" was, so he could "pass it on to the MOSD guys," Biggs replied that he had given

the Proud Boys chairman "a plan," namely "[t]he one [Biggs] told the guys and he said he had one" (*id.*:11-12).[7]

The Events of January 6

Proud Boys members gathered near the Washington Monument at 10:00 a.m., and appellants and Rehl led the group, including Donohoe, to the east side of the Capitol (ECF#26:12).[8] The group was not wearing the Proud Boys black-and-yellow colors (*id.*). Several members, including Biggs and Rehl, were holding walkie-talkie style communication devices (*id.*). Nordean and Biggs carried and used a bullhorn at different times to direct the group (*id.*).

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[7] In their description of the facts, appellants insist that the various messages sent by appellants, Rehl, Donohoe, and other Proud Boys members were merely "crude" statements, or consistent with lawful activity, i.e., marches or other political protests (Mem:16-18). Appellants do not actually claim in their argument section that those potentially innocent explanations rendered any of Judge Kelly's factual findings clearly erroneous. In any event, as the finder of fact, Judge Kelly "was not required to accept [appellants'] potentially innocent explanations for [their] behavior." *United States v. Dinkane*, 17 F.3d 1192, 1200 (9th Cir. 1994).

[8] Donohoe sent a message indicating that he would be temporarily in charge at the gathering, until Nordean and Rehl arrived (ECF#26:12).

At about 12:53 p.m., appellants and Rehl led the group, including Donohoe, to the First Street pedestrian entrance to the Capitol, which was secured by a small number of Capitol Police officers standing behind waist-high metal barriers (ECF#26:12). Members of the crowd violently disassembled and trampled the metal barriers, and appellants, Rehl, and Donohoe then charged over the fallen barriers toward the Capitol (*id.*). As the crowd approached additional sets of metal barriers, certain individuals who had arrived at the First Street pedestrian gate with appellants, Rehl, and Donohoe removed more barriers (*id.*:13). Appellants, Rehl, and Donohoe then advanced toward the west plaza of the Capitol, where additional metal barricades and officers were deployed (*id.*).

Appellants shook a metal barricade, while Capitol Police officers were on the other side, until eventually appellants and others in the crowd were able to knock it down (ECF#26:13). The crowd, including appellants, Rehl, and Donohoe, advanced past the trampled barricade (*id.*). When they arrived at the west plaza, appellants and Rehl positioned themselves at the front of the crowd (*id.*). Biggs took a video in which he announced, "[W]e've just taken the Capitol" (*id.*).

Nordean paced at the edge of a line of law enforcement officers, while Donohoe advanced with a crowd up a flight of stairs toward the Capitol (ECF#26:13). The crowd overwhelmed the law enforcement officers who opposed their advance (*id.*). At about 2:13 p.m., another Proud Boys member, Dominic Pezzola, used a riot shield to break a window of the Capitol Building on the northwest side; this allowed rioters to enter the building and force open an adjacent door from the inside (*id.*:13-14). Biggs and Proud Boys members Gilbert Garcia, William Pepe, and Joshue Pruitt entered the Capitol Building through that door (*id.*). Biggs subsequently exited the building and posed for a photograph with several Proud Boys members at the top of the steps on the east side of the Capitol (*id.*:14).

About 30 minutes after he first entered the Capitol Building on the west side, Biggs and two other Proud Boys members, in addition to others, forcibly reentered the building through the Columbus Doors on the east side (ECF#26:14). They pushed past at least one law enforcement officer in doing so (*id.*). Biggs and another Proud Boys member then traveled to the Senate chamber (*id.*).

Meanwhile, Nordean entered and remained in the Capitol Building, including in the Rotunda, before exiting with another Proud Boys member (ECF#26:14).[9]

Appellants' Initial Release

As noted supra, the government did not seek Biggs's pretrial detention, and he was released on conditions by Magistrate Judge Faruqui following the March 9, 2021, initial appearance in Washington, D.C. (DE:10; ECF#39).

After the magistrate judge in the Western District of Washington conditionally released Nordean, however, the government moved on February 8, 2021, to stay the release order and sought review by the district court, pursuant to 18 U.S.C. § 3145(a) (ECF#6:1). The government argued that there was a rebuttable presumption in favor of detention, because (1) Nordean had been charged with destruction of property (18 U.S.C. § 1361), which was a crime of violence under 18 U.S.C. § 3142(f)(1)(A); and (2) one of the offenses identified in 18 U.S.C.

[9] Rehl entered the building at 2:53 p.m., through the same door first entered by Biggs on the west side (ECF#26:14). At 3:38 p.m., while some rioters were leaving the building, Donohoe announced on the Boots on the Ground channel that "[w]e are regrouping with a second force" (*id.*).

§ 3142(e)(3)(C), namely an offense specifically enumerated in 18 U.S.C. § 2332b(g)(5)(B) for which a maximum penalty of 10 years' imprisonment or more is prescribed (*id.*:19-20). The government further argued that Nordean posed a risk of flight under 18 U.S.C. § 3142(f)(2)(A) (*id.*:21).

Finally, the government argued that the four factors specified in 18 U.S.C. § 3142(g) weighed in favor of detention, because (1) the nature and circumstances of Nordean's offenses were very serious, given that Nordean had helped lead an attack on the Capitol to prevent Congress's certification of the Electoral College vote; (2) the weight of the evidence against Nordean, which consisted primarily of photographs and videos showing Nordean's participation in the Capitol riot, was very strong; (3) Nordean's history and characteristics established that he had actively recruited new members to join Proud Boys and participate in future acts of violence; and (4) Nordean's release posed a substantial risk of danger to the community (ECF#6:21-23). With respect to this last factor, the government argued that Nordean and his fellow Proud Boys associates showed no sign of accepting the election result, and they were likely to foment rebellion again (*id.*:23). The government further argued that Nordean posed a risk of flight, noting that Nordean had made comments

on social media suggesting that he wanted to move and "start a new life," and that an unsigned passport, issued to someone else who resembled Nordean, had been found at Nordean's house at the time of his arrest (*id.*:17,23).

Nordean filed a motion to lift the stay on the detention order on February 23 (ECF#13:1-2). Nordean argued that (1) the complaint filed against him failed to establish probable cause that he had committed a § 1361 offense; and (2) destruction of property was, in any event, not a crime of violence or an offense listed under 18 U.S.C. §§ 3142(e)(3)(C) and 2332b(g)(5)(B) (ECF#13:5-11). Nordean further claimed that he was not a risk of flight, asserting that the passport issued to another man and found inside Nordean's house belonged to an ex-boyfriend of Nordean's wife, who had kept it with the ex-boyfriend's consent (*id.*:12-13).[10]

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[10] Nordean later submitted an affidavit from his wife, asserting that she had obtained the passport for her ex-boyfriend, who never retrieved it after their relationship ended (ECF#20:1-2).

Appellants insist that this and other factual disputes between themselves and the government were examples of "false" or "inaccurate" claims by the prosecution (Mem:9-12). Appellants do not, however, show that Judge Kelly relied on any "false" information in rendering the detention decisions at issue here.

(continued . . .)

Finally, Nordean argued that the § 3142(g) factors did not weigh in favor of detention (*id.*:13-16).[11]

The March 3 Hearing

On March 3, 2021, Chief Judge Howell held a hearing on the parties' competing motions (A:6-7). At the hearing, the government reiterated that Nordean had been charged under § 1361, triggering a rebuttable presumption in favor of detention (A:23-27). The government acknowledged that, at the time of the hearing, it was relying on an aiding-and-abetting theory of liability for the destruction of property at the Capitol (A:65-66). Specifically, the government argued that it was

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In any event, the government has attempted to provide the district court with the most current information it possesses at the time of any filing and has regularly corrected or updated that information as the investigation progresses. Despite appellants' complaints (see, e.g., Mem:8 n.3, 10 n.4, 23 n.10), these and other post-indictment disclosures do not amount to violations of the government's discovery obligations; rather, the government has sought to fulfill those obligations in a timely and responsible manner.

[11] Nordean also filed a motion for release from custody, arguing that because a preliminary hearing had not been held within 14 days of his initial appearance in court, release was required under 18 U.S.C. § 3060(a) and Fed. R. Crim. P. 5.1 (ECF#15). Chief Judge Howell subsequently ruled that no preliminary hearing was required once the initial indictment was returned against Nordean on March 3, and thus the motion for release was moot (A:15-17).

reasonably foreseeable that the group of men Nordean led to the Capitol would engage in acts of property destruction while violently entering the building (A:66-69).

The defense argued that the government was "conflating" aiding-and-abetting liability with *Pinkerton* liability and had failed to show the former because it did not allege that Nordean took any specific action to facilitate the destruction of property (A:69-71). The defense further noted that the government had not (at that time) charged Nordean with a conspiracy to commit any crime (A:71-72).

Ruling from the bench, Judge Howell opined that because Nordean had been indicted under § 1361, a listed offense under § 2332b(g)(5)(B), there was a rebuttable presumption in favor of detention pursuant to § 3142(e)(3)(C) (A:73-74). In the alternative, Judge Howell ruled that § 1361 was a "crime of violence" within the meaning of § 3142(f)(1)(A), because it involved the use or attempted use of force against the property of another (A:74). Judge Howell found that the government had proffered evidence showing that Nordean was "heavily involved" in organizing, planning, and leading the Proud Boys activities on January 6 (A:76-79). However, the court also found that the government had not alleged that

Nordean caused any damage to property or injury to any person (A:80). The court accordingly opined that, although a "close call," the nature and circumstances of Nordean's offenses did not "necessarily" weigh in favor of detention (A:80). Similarly, although the weight of the evidence that Nordean was involved in crimes at the Capitol was strong, the evidence that Nordean aided and abetted a violation of § 1361 was "not as strong" (A:81). Third, the court noted that Nordean had strong ties to his community and no reported criminal history, which counterbalanced his role as a leader of the Proud Boys (A:81-82). Nordean's personal history and characteristics thus weighed "narrowly" in favor of release (A:82). Finally, the court noted that although Nordean's role in the riot was "indisputabl[e]," there was no allegation that he carried any weapons or directed others to do so (A:82). The court acknowledged the evidence concerning the additional passport, but opined that any risk of flight could be addressed by conditions (A:82-83). Thus, although it was a "close case," which a future assigned judge might want to "take another look at," the court ordered that Nordean be released on conditions (A:83-84; ECF#23).

The Motions to Revoke Appellants' Release

The superseding indictment was returned against appellants, Rehl, and Donohoe on March 10, 2021 (ECF#26). On March 20, 2021, the government filed motions to revoke appellants' pretrial release (ECF#30; ECF#31). The government argued that "new evidence set forth in the indictment highlight[ed] the grave danger" posed by appellants (ECF#30:1; ECF#31:1). That evidence included (1) private messages among Proud Boys members showing that appellants were leading the group and directing its planning for January 6; (2) video evidence that appellants personally engaged in the destruction of government property by shaking and knocking down a metal barrier on the Capitol grounds, before leading a group of men to the plaza outside the Capitol Building (ECF#30:1-3; ECF#31:2-3). In particular, the government informed the district court that it had obtained video footage of appellants engaged in the toppling of the metal barrier (ECF#30:5; ECF#31:7). The government further highlighted appellants' pre-riot statements threatening violence over the election results and their post-riot statements indicating a lack of remorse, contempt for law enforcement officers, and/or continued anger over the election (ECF#30:7-8; ECF#31:5-7,9).

In their oppositions to the motions, appellants insisted, inter alia, that (1) the government had failed to establish that the metal barrier was destroyed or that the damage was in excess of $1,000 (ECF#32:12-13); (2) the government had failed to allege a criminal conspiracy to violate 18 U.S.C. § 1512(c)(2), because disrupting Congress's certification of the Electoral College vote did not amount to obstructing a proceeding before Congress; (*id.*:17-18); (3) the government had failed to allege a violation of, or a conspiracy to violate 18 U.S.C. § 231(a)(3), because knocking down the metal barrier did not amount to a "violent physical act[ ]" against the police (*id.*:18-19); (4) the evidence that Biggs was a leader and organizer was not "new," because the government had long known that Biggs had led other Proud Boys events (ECF#42:6-7); and (5) appellants had been compliant with their pretrial release conditions thus far (ECF#32:11,21-22; ECF#42:1).[12]

[12] In supplemental pleadings, appellants asserted, inter alia, that (1) the former Acting United States Attorney stated during a news interview on March 22, 2021, that he did not know what the Proud Boys "full plan" was, but gave prosecutors "marching orders" to build conspiracy charges against rioters; (2) the government had provided 1,500 pages of "Telegram" chat messages by Proud Boys members in Washington, D.C., on January 5-6, 2021, which did not include any messages from Nordean referencing crimes, but did include messages by some members (continued . . .)

The April 6 Hearing

Judge Kelly, the newly assigned district judge, held a hearing on the revocation motions on April 6, 2021 (A:89-90). The government explained that since the initial detention hearing before Chief Judge Howell, it had obtained additional evidence – the Telegram communication-application messages – showing that appellants had played crucial leadership roles in the Proud Boys members' activities before and during the riot (A:98). The government argued in particular that appellants' leadership roles in the events of January 6 rendered them particularly dangerous (A:105-08).[13] Appellants, by contrast,

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complaining about a lack of organization; (3) Nordean had proposed that a rock musician perform for Proud Boys members at a rented residence on the afternoon of January 6, 2021, supposedly showing that Nordean did not originally intend to go to the Capitol that day; (4) video evidence showed that Nordean stopped another person at the riot from shoving a police officer; (5) Biggs dismantled the metal barrier for safety reasons; and (6) Biggs told Proud Boys to avoid wearing Proud Boys "colors" to avoid conflict with counter-demonstrators (ECF#34:1-2; ECF#41:1-9; ECF#53:2-3; ECF#57:1).

Appellants repeat many of these assertions in their description of the facts (Mem:21-22), although they again do not argue that these assertions actually rendered Judge Kelly's findings clearly erroneous.

[13] The government further alleged that Dominic Pezzola's activities were relevant in this case, because video images showed that Donohoe was (continued . . .)

reiterated that – in their view – the government had failed to allege any felony charges and in any event had "cherry-pick[ed]" certain Telegram messages to construct a conspiracy charge (A:119-20, 125-26).

Judge Kelly's Ruling

Judge Kelly issued his oral ruling at a hearing on April 19, 2021 (SA:1-2). First, Judge Kelly opined that the indictment established probable cause that appellants committed a felony violation of § 1361, thus triggering the rebuttable presumption in favor of detention under § 3142(e)(3)(C) (SA:11-12).[14]

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carrying the stolen shield with Pezzola, thus effectively "adopting" Pezzola's actions for the group (A:13-14).

[14] The court rejected appellants' argument that the § 1361 charge was defective as a matter of law (SA:12). In their description of the facts, appellants continue to insist that the superseding indictment fails to allege sufficient facts to sustain the felony charge against them (Mem:20). Appellants do not make any such claim in their argument section, however, and have accordingly waived it on appeal. *See Cratty v. United States*, 163 F.2d 844, 851 (D.C. Cir. 1947) (questions raised but not argued in briefing are treated as abandoned). To the extent that appellants believe the indictment does not provide them with sufficient information about the nature of the property and damage involved, seeking a bill of particulars is the appropriate procedural vehicle. *See Jackson v. United States*, 359 F.2d 260, 263 n.1 (D.C. Cir. 1966) (the "purpose" of a bill of particulars "is to elucidate the indictment").

The court then proceeded to consider the § 3142(g)(1)-(4) factors (SA:13). First, the court found that the offenses charges were serious and included an offense defined by Congress (in 18 U.S.C. § 2332b(g)(5)) as a "federal crime of terrorism," namely the § 1361 violation (SA:13-14). Furthermore, appellants had been charged with conspiring to stop, delay, or hinder Congress's certification of the Electoral College vote, in violation of § 1512(c)(2); and obstructing or interfering with law enforcement officers protecting the Capitol and its occupants, in violation of § 231(a)(3) (SA:15). The court acknowledged that appellants had not been charged with carrying weapons or fighting with police officers (SA:15-16). However, the court found that the allegations described in the superseding indictment and other government pleadings established that the "nature and circumstances of the offense weigh[ed] strongly in favor of detention" (SA:16-44).[15]

[15] The court stated that it had reviewed the video footage of appellants at the metal barricade and did not find it "terribly compelling" or "clear evidence" that appellants intentionally shook the barricade in order to bring it down (SA:34). However, the court found that the video showed that appellants were "right against the fence," and "clearly happy about law enforcement becoming overwhelmed and the mob pressing forward" (SA:34).

(continued . . .)

Second, the court found the "weight of the evidence" was "strong enough to weigh in favor of detention," despite the facts that much of the evidence was circumstantial and the government's theory of liability for the substantive offenses rested on attempt or aiding-and-abetting theories (SA:44-45). The court considered but rejected appellants' arguments that there were innocent explanations for some of their coordinated activity and preparation for the January 6 events, noting that statements made by some of the coconspirators suggested that they planned unlawful acts (SA:45). The court further rejected Nordean's argument that there were no messages in which he specifically directed others to commit crimes, noting that a conspiracy case did not depend on such "precise orders" (SA:46).[16]

The court further ruled that it would consider the actions of Pezzola in determining the "nature of the circumstances of the offense here" (SA:36). The court noted that a grand jury had indicted Pezzola as a Proud Boys member, even though appellants disputed that fact (SA:36). Furthermore, although Pezzola had been indicted as part of a separate conspiracy, appellants' coconspirator, Donohoe, was seen carrying the shield with Pezzola (SA:36). Moreover, Pezzola had been photographed at the Capitol wearing an earpiece, consistent with his having participated in joint communications with Proud Boys members (SA:36).

[16] The court acknowledged that some Proud Boys members expressed confusion during the riot, but it noted that the indicted conspiracy did

(continued . . .)

Third, the court acknowledged that appellants had no prior criminal history and that Biggs had been compliant with his pretrial release conditions (SA:49). The court noted contrary information, namely that (1) Biggs had made troubling statements in public since 2018, and had initially lied to the FBI about whether he was at the Capitol on January 6; and (2) Nordean had informed his pretrial services officer that he had lost his passport and could not return it and failed to report the loss of a purportedly stolen firearm for several months (SA:50-52). The court nevertheless found that this factor weighed in favor of release (SA:53).

Finally, the court found, by clear and convincing evidence, that no condition or combination of conditions would reasonably assure the safety of other persons or the community (SA:53). The court found, inter alia, that (1) appellants had made statements suggesting that force or violence was justified in response to the supposedly "stolen" election; (2)

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not encompass all Proud Boys members (SA:46). The court further acknowledged that the former Acting United States Attorney had given what the court called an "unprofessional interview," but it found that the prosecutor's remarks did not "weaken[ ] the case" alleged in the indictment (SA:46-47).

appellants were alleged to have planned, aided, or coordinated the January 6 activities at the Capitol and attacks on law enforcement officers; (3) as leaders of the Proud Boys movement, appellants could "produce events that draw large numbers of people"; and (4) appellants could communicate by using another Proud Boys member's phone or computer, even if the court directed them not to (SA:53-56). The court noted that appellants were alleged to have taken significant steps to conceal their communications from law enforcement, citing Donohoe's creation of a new channel when he believed the old one had been "compromised" (SA:56-57). The court further noted that it was "highly suspect" that Nordean had reported his passport as lost and then delayed reporting the alleged theft of his gun, which "rais[ed] the possibility that these items are stashed somewhere or being held by an associate" (SA:57). Judge Kelly also observed that appellants had never expressed remorse and were unlikely to sever ties with the Proud Boys organization, to which they had devoted so much energy and time (SA:57). Finally, although appellants had complied with their conditions of release thus far, Judge Kelly "simply d[id]n't know what [he] d[id]n't know," because the court had "no way of" finding out if appellants had

committed any violations (SA:57-58). The court accordingly ordered appellants' detention (SA:58).

ARGUMENT

A. Applicable Legal Principles and Standard of Review

As relevant here, a judicial officer must hold a detention hearing upon government motion if the case "involves . . . a crime of violence . . . or an offense listed in section 2332b(g)(5)(B) for which a maximum term of imprisonment of 10 years or more is prescribed[.]" 18 U.S.C. § 3142(f)(1)(A).[17] At the hearing, the government is not bound by the rules of evidence, *see* 18 U.S.C. § 3142(f), and may proceed by proffer, *United States v. Smith,* 79 F.3d 1208, 1209-10 (D.C. Cir. 1996). If, after the hearing, the judicial officer finds by clear and convincing evidence that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community," the judicial officer "shall order the detention of [the

[17] 18 U.S.C. § 2332b(g)(5)(B)(i) includes, in its list of offenses, 18 U.S.C. § 1361, whose maximum penalty is 10 years' imprisonment where the damage to property is in excess of $1,000.

defendant] before trial." 18 U.S.C. § 3142(e)(1), (f); *United States v. Munchel*, 991 F.3d 1273, 1279-80 (D.C. Cir. 2021). In making this determination, the court must consider the following factors: (1) the nature and circumstances of the offense charged, including whether, for example, the offense is a crime of violence; (2) the weight of the evidence against the person; (3) the history and characteristics of the person; and (4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release. 18 U.S.C. § 3142(g); *Munchel*, 991 F.3d at 1280.

When reviewing an order of detention, this Court accepts the district court's factual findings, including its finding concerning a defendant's dangerousness, unless clearly erroneous. *Smith*, 79 F.3d at 1209; *see also United States v. Simpkins*, 826 F.2d 94, 97 (D.C. Cir. 1997) ("[W]e hold that the magistrate's determination of danger to the community under *any* condition was not clearly erroneous."); *United States v. Abuhamra*, 389 F.3d 309, 317 (2d Cir. 2004) ("This clear error standard applies not only to the court's specific predicate factual findings but also to its overall assessment, based on those predicate facts, as to the risk of flight or danger presented by defendant's release."). "Where

there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985).

B. Discussion

1. The District Court Committed No Procedural Error.

Appellants raise three procedural objections to the district court's ruling (Mem:28-31,33-35). First, appellants argue that the court's ruling was inadequate under Fed. R. App. P. 9(a)(1), because it omitted an "inquir[y]" into potential conditions that could have been imposed on appellants had they been released and further failed to "offer reasons" why such conditions would be insufficient (Mem:28-31). Second, appellants argue that the court improperly assigned the burden of persuasion to the defense (Mem:31-33). Third, appellants assert that the court incorrectly assumed that, to be adequate, conditions of release must "guarantee" that appellants would pose no danger to the community (Mem:33-35). These arguments are without merit.

First, Judge Kelly fully complied with the requirements of Rule 9(a)(1), which requires the district court to "state in writing, or orally on the record, the reasons for an order regarding the release or detention of

a defendant in a criminal case." Fed. R. App. P. 9(a)(1). Judge Kelly confirmed that he "looked closely at the kinds of conditions [he] could impose on" appellants, and explained at length why he could not find that those conditions were likely to be sufficient to protect the community (SA:55-58). *See Peralta v. United States*, 849 F.2d 625, 626 (D.C. Cir. 1988) (requirements of, inter alia, Rule 9(a)(1) satisfied "when the transcript clearly embodies the district court's findings and reasons for detention").

Appellants complain (Mem:30-31) that the court failed to comply with this Court's command in *Weaver v. United States*, that district courts "inquire concerning available financial and nonfinancial conditions of release and offer reasons why they do not 'assure that the person will not flee or pose a danger to any other person or to the community.'" 405 F.2d 353, 354 (D.C. Cir. 1968) (citation omitted); *see also United States v. Stanley*, 469 F.2d 576, 584-85 (D.C. Cir. 1972) (under *Weaver*, district court should provide "facts which might augur risks" of flight or dangerousness and "reasons why an imposition of conditions might not sufficiently minimize them"). But Judge Kelly did just that: he provided a factual explanation why specific conditions likely

would be ineffective to protect the public (SA:56-58 (noting that (1) appellants and their coconspirators had taken active steps to hide their communications from law enforcement; (2) Biggs had lied to the FBI about whether he entered the Capitol; (3) Nordean's report of the loss of his passport, and his long-delayed report of the theft of his firearm, raised the risk that he had hidden those items with his associates; (4) appellants' long-time connection to the Proud Boys movement undermined confidence that they would abide by a no-contact order; and (5) there was no practical way to monitor appellants' compliance with a no-contact order). Neither Rule 9(a)(1) nor *Weaver* requires more than Judge Kelly's "sufficiently clear" and "concise" statement "of the reasons for the detention." *Peralta*, 849 F.2d at 626 (citing, inter alia, *Weaver*, 405 F.2d at 354).[18]

[18] Although appellants further complain (Mem:30-31) that the court "terminated" further discussion of proposed conditions after the court had already ruled, nothing in Rule 9(a)(1) requires a court to entertain a defendant's arguments indefinitely. In any event, the proposals appellants cited (see Mem:30), namely, electronic surveillance and the posting of Nordean's home and money as bond, did not address the court's primary concern about appellants' communications with other Proud Boys members. Indeed, the court explained as much after the defense made those proposals (SA:65-66).

Second, the district court did not "mistakenly impose" on appellants the burden of proving the absence of a threat to public safety (Mem:31-32). Appellants apparently base this argument on Judge Kelly's observation, on two occasions during his ruling, that the judge "d[id]n't know what [he] d[id]n't know" (Mem:31 (citing SA:57,66)). Appellants conclude that because Judge Kelly expressed uncertainty, but still ruled in favor of detention, he must have assumed that appellants bore the burden of persuasion (Mem:32-33).

Appellants, however, overstate the significance of the court's two remarks. The first was made in connection with the court's assessment of what weight to give appellants' compliance with their conditions of release thus far (SA:57). Although the court acknowledged that it was not aware of any noncompliance, it correctly observed that it was not possible to verify whether appellants had been in contact with witnesses or victims in the case (in violation of one existing condition of appellants' release), or with Proud Boys members generally (which was not a violation) (SA:57-58). The court made the second remark after Nordean's counsel raised the possibility of posting bond and using appellants' homes

as collateral; the court again noted that it would have no practical way of verifying whether appellants were engaged in prohibited communications (SA:66). These remarks did not "shift the burden of proof" to the defense; they simply reflected the lack of information that would give greater significance to certain facts. *Cf. Hughes Air Corp. v. C.A.B.*, 492 F.2d 567, 572 (D.C. Cir. 1973) (board did not improperly "shift the burden of proof" to opponents of regulatory change, "by relying on the absence of evidence either way" as to competitive impact on local carriers); *United States v. MMR Corp.*, 907 F.2d 489, 502 (5th Cir. 1990) (prosecutor did not improperly shift burden of proof to the defense by arguing to jury that there was a lack of evidence for defense arguments); *City of Alexandria v. Cleco Corp.*, 735 F. Supp. 2d 448, 464 (W.D. La. 2010) (magistrate judge's observation that there was a lack of support for plaintiff's argument did not "improperly shift the burden to the plaintiff" as to a defense motion to dismiss).

Third, the court did not (see Mem:33-35) mistakenly interpret § 3142(f) to require a finding that proposed conditions would "guarantee" appellants' appearance in court or the safety of the community. The court instead correctly applied the statutory standard (SA:58 (finding that

conditions would not "reasonably assure" public safety)). Nor, contrary to appellants' assertions (Mem:33-34), did Judge Kelly repeat the mistake made by the district court in *United States v. Xulam*, 84 F.3d 441 (D.C. Cir. 1996). In *Xulam*, the district court simply asserted that the defendant might flee, a possibility that was "true of every defendant released on conditions." *Id.* at 444.

By contrast, Judge Kelly cited specific reasons why the particular safety risk posed by *these* defendants was unlikely to be contained by conditions short of detention (SA:56-58,65-66). Appellants' arguments notwithstanding (Mem:34-35), those reasons were amply supported by the government's proffered evidence. The risk that appellants' associates might permit them to use a cell phone or computer was quite real, given that (1) appellants had access to a significant network of fellow Proud Boys members; and (2) there was evidence that Proud Boys members obtained and shared radios and other communications equipment (see, e.g., ECF#26:11-12). Moreover, contrary to appellants' claim (Mem:34-35), there was substantial evidence that Proud Boys members used the Telegram channels to evade law enforcement; indeed, coconspirator Donohoe was alleged to have created a new channel immediately after

the Proud Boys chairman was arrested; taken steps to destroy an earlier channel; and warned Proud Boys members that their plans had been "compromised" (ECF#26:10). Similarly, UCC-1 was alleged to have used the channels to warn Proud Boys members that "cops" were the "primary threat" (ECF#26:10-11). The court accordingly did not rely on mere "speculation" in concluding that a no-contact condition was unlikely to succeed (Mem:35).

2. The District Court Did Not Clearly Err in Finding That Appellants Presented a Threat to Public Safety.

Appellants insist (Mem:35-41) that Judge Kelly's finding that appellants presented a significant threat to the public was inconsistent with this Court's recent decision in *Munchel*, 991 F.3d 1273. In *Munchel*, the district court ordered the pretrial detention of two persons indicted in connection with the January 6 riot for obstruction of an official proceeding and unlawful armed entry of the Capitol. *Id.* at 1277-78. This Court remanded for further proceedings, concluding that the district court had given insufficient consideration to the facts that (1) the government had not alleged that either defendant vandalized any

property or harmed any person at the Capitol; and (2) the "unique opportunity" that the defendants had to interfere with the election would not recur. *Id.* at 1283-84. Because appellants in this case also did not commit any violent assaults, and – unlike the defendants in *Munchel* – were not alleged to have carried any weapons on January 6, appellants insist that Judge Kelly's findings must have been clearly erroneous (Mem:38-39).[19]

Judge Kelly, however, expressly distinguished the situation of the defendants in *Munchel* from that of appellants, citing this Court's recognition that "[t]hose who aided, conspired with, planned, or coordinated such actions, are in a different category of dangerousness than those who cheered on the violence or entered the Capitol after others had cleared the way" (SA:54 (quoting *Munchel*, 991 F.3d at 1284)).

[19] Appellants further assert (Mem:38) that there is "no evidence" that they destroyed federal property. That is incorrect; as described supra, the government submitted in the district court video evidence depicting appellants' direct participation in the shaking and toppling of the police metal barrier. We are submitting a copy of that video footage to this Court (SA:84) and stand by our assessment of its contents. However, because Judge Kelly did not find the video "terribly compelling" and thus did not significantly rely on it (see SA:34), it is unnecessary for this Court to revisit that issue here.

Although appellants dismiss that statement of this Court as "obiter dictum" (Mem:39), it is fully in keeping with the Supreme Court's admonition that "conspiracy poses a 'threat to the public' over and above the threat of the commission of the relevant substantive crime – both because the '[c]ombination in crime makes more likely the commission of [other] crimes' and because it 'decreases the probability that the individuals involved will depart from their path of criminality.'" *United States v. Jimenez Recio*, 537 U.S. 270, 275 (2003) (citing *Callanan v. United States*, 364 U.S. 587, 593-94 (1961)) (brackets in original).

Moreover, the district court further "considered" the threat posed by appellants "in context," by assessing "the resources and capabilities of" appellants. (SA:55 (citing *Munchel*, 991 F.3d at 1283)). As described supra, Judge Kelly found that appellants presented a significant danger to public safety, because, inter alia, they and their coconspirators (1) had made statements suggesting that violence was justified in response to the election; (2) were alleged to have planned, aided, or coordinated the forcible entry of the Capitol and attacks on law enforcement officers; (3) as leaders of the Proud Boys movement, could "produce events that draw large numbers of people"; (4) could communicate by using another Proud

Boys member's phone or computer, even if the court directed them not to; (5) were alleged to have taken significant steps to conceal their communications from law enforcement; (6) had either lied to the FBI about involvement in the riot (in the case of Biggs), or made "highly suspect" reports about the loss or theft of a passport and a firearm (in the case of Nordean); (7) had never expressed remorse; and (8) were unlikely to sever ties with the Proud Boys organization (SA:53-58). The court further noted that it had no way of verifying appellants' compliance with important conditions of release (SA:57-58).

Thus, the district court conducted a "forward-looking assessment," *see Munchel*, 991 F.3d at 1285 (Katsas, J., concurring and dissenting in part), of appellants' dangerousness, and properly concluded that their positions of leadership within a nationwide organization like Proud Boys made them significantly more threatening than the defendants in *Munchel*. Judge Kelly accordingly had ample basis to find that these significant differences between appellants and the defendants in *Munchel* outweighed the superficial similarities appellants focus on here (see Mem:38-39).

Finally, although appellants identify a number of other defendants who were charged with conspiracy in connection with the January 6 riot but who were not detained pretrial by other judges (Mem:40-41), "the dangerousness inquiry [under § 3142(g)] must be an individualized one." *See United States v. Stone*, 608 F.3d 939, 946 (6th Cir. 2010). Moreover, "[a] decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) (quoting 18 J. Moore et al., Moore's Federal Practice § 134.02[1][d], p.134–26 (3d ed. 2011)). Judge Kelly was not only authorized, but required, to make an "individualized" assessment of appellants' dangerousness, regardless of any alleged "conflicts" with the decisions of other judges in other cases involving the January 6 riot (see Mem:40). Appellants identify no clear error in the district court's assessment, and it should accordingly be affirmed.

CONCLUSION

WHEREFORE, the government respectfully submits that the order of the District Court should be affirmed.

Respectfully submitted,

CHANNING D. PHILLIPS
Acting United States Attorney

ELIZABETH TROSMAN
ELIZABETH H. DANELLO
LUKE JONES
JASON MCCULLOUGH
Assistant United States Attorneys

/s/
NICHOLAS P. COLEMAN
D.C. Bar #460109
Assistant United States Attorney
555 Fourth Street, NW, Room 8104
Washington, D.C. 20530
Nicholas.Coleman@usdoj.gov
(202) 252-6829

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I HEREBY CERTIFY pursuant Fed. R. App. P. 32(g) that this memorandum of law and fact contains 8052 words, excluding the parts exempted by Fed. R. App. P. 27(a)(2)(B) and D.C. Circuit Rule 32(e)(1), and therefore complies with this Court's order of May 4, 2021, allotting the government 10,400 words. This memorandum has been prepared in 14-point Century Schoolbook, a proportionally spaced typeface.

/s/
NICHOLAS P. COLEMAN
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of May, 2021, I have caused a copy of the foregoing Appellee's Memorandum of Law and Fact to be served by electronic means, through the Court's CM/ECF system, upon J. Daniel Full, Esq., counsel for appellant Biggs, and David B. Smith & Nicholas D. Smith, Esqs., counsel for appellant Nordean.

/s/
NICHOLAS P. COLEMAN
Assistant United States Attorney