IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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UNITED STATES OF AMERICA

v.

1-ETHAN NORDEAN
2-JOSEPH RANDALL BIGGS,

Defendants.

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CR Nos. 1:21-cr-00175-TJK-1
1:21-cr-00175-TJK-2

Washington, D.C.
Tuesday, April 6, 2021
11:30 a.m.

TRANSCRIPT OF MOTION HEARING
HELD BEFORE THE HONORABLE TIMOTHY J. KELLY
UNITED STATES DISTRICT JUDGE

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P R O C E E D I N G S

THE DEPUTY CLERK: We are on the record in criminal matter 21-175, United States of America v. Defendant 1, Ethan Nordean; Defendant 2, Joseph Randall Biggs.

Present for the Government are James Nelson, Jason McCullough and Luke Jones; present from Pretrial Services is John Copes; present for Defendant 1 are David Smith and Nicholas Smith; present for Defendant 2 is John Hull; and also present is Defendant 1, Mr. Nordean; and Defendant 2, Mr. Biggs.

THE COURT: All right. Well, welcome to everyone here.

And we are here for argument on the Government's motion to revoke release conditions for Mr. Nordean and Mr. Biggs. So without further ado, let me turn it over -- I don't know whether it will be Mr. Nelson arguing for the Government in both -- as to both defendants, but I'll go ahead and hear from you, Mr. Nelson, or whoever from the Government is going to take the lead.

MR. NELSON: Thank you, Your Honor. It will be Mr. McCullough.

THE COURT: Mr. McCullough?

MR. MCCULLOUGH: Thank you, Your Honor, and good morning.

As the Government has submitted in its papers, the defendant, Ethan Nordean -- we'll address Ethan Nordean first. The defendant, Ethan Nordean, is dangerous and poses a danger to the community.

The defendant, Ethan Nordean, planned, organized, fundraised and led others onto Capitol grounds on January 6th. The purpose of that effort was to obstruct the certification that was taking place that day. And, in fact, he and his co-conspirators were successful in that effort. They did, in fact, obstruct the certification; they did, in fact, interfere with law enforcement that day; and they did so through a coordinated effort to move onto Capitol grounds and push past barriers and ultimately they did enter the Capitol.

THE COURT: Mr. McCullough, let me ask you to start with -- there was some back-and-forth at the very end -- actually, let me also just start by asking the Government, does the Government object -- I know the -- Mr. Nordean's counsel filed something -- a motion to -- for leave to file a surreply. I think it was late last night. Is there -- does the Government object to me receiving that document? I mean, this isn't a civil case. I'm going to let all the parties say their piece on this, obviously. So does the Government object to that?

MR. MCCULLOUGH: Your Honor, the Government does

not object to it. The Government does not think that it was appropriate in the sense that it did not address new legal issues from the Government's perspective, and I -- I'm happy to start just on one point there. I don't believe that the Government or the defendant are in disagreement as to the issues that put us into a detention hearing setting.

THE COURT: Right. Well, what -- that's what I wanted to just refocus on first. So I'm going to just, for the record, grant that motion and I'll receive that surreply.

Yes, Mr. McCullough. I think starting there, because I did not see that issue percolating until really the very end there. It sounds like what the -- by the end of all the documents -- all the pleadings, it sounds like the defense was arguing that you haven't -- that the grand jury didn't charge felony destruction of property and so there is no presumption and, in fact, you all don't even have a basis to argue for detention. So you know, the best defense is a good offense. So why don't you address, Mr. McCullough, those arguments just before we get into, sort of, the factors and the, sort of, various considerations in play as far as the factors I have to consider.

MR. MCCULLOUGH: Sure.

So Your Honor, the grand jury has returned an

indictment. That indictment includes a conspiracy to obstruct and impede the administration of justice, the official proceeding that was taking place, as well as the second object of interfering with law enforcement. The -- that conspiracy theory and the conspiracy indictment that was returned by the grand jury includes statements as to the destruction of property by co-conspirators that were indicted in separate proceedings. So there is a 371 indictment as to the destruction of federal property. That is one basis on which the grand jury's returned an indictment as to destruction of government property.

Separately, as to 1361 itself, the grand jury returned a count that charges the substantive offense of destruction of government property as well as aiding and abetting the destruction of government property. In that indictment, it is specifically alleged that the damage amount was more than $1,000, and that is in the count that's returned by the grand jury. And so the Government would basically point to that charge of 1361 as a -- basically, an offense that gets you into the detention hearing setting, and it does so in two ways.

One, it is an enumerated offense in Section 2332b(g)(5)(B) which is identified as one of the bases for a detention hearing, and that's in -- so in 3142(f)(1)(A), it says that, On motion of the Government, in a case that

involves, and then any of the enumerated offenses in 2332b, one of those being a destruction of -- felony destruction of government property.

The other, though, Your Honor, is also the fact that there is a rebuttable presumption that applies with respect to that same charge, and so that same charge of 1361 basically in 3142(e)(3)(C) states that someone is subject to the rebuttable presumption that detention is appropriate if they have committed one of these acts. And now, that -- as you know, Your Honor, that is slightly different language in the rebuttable presumption that refers to probable cause by -- a probable cause finding by Your Honor. It's well settled that the return of an indictment makes conclusive the existence of probable cause, but nonetheless the Government has proffered additional evidence as to the probable cause as to the destruction of that property.

So --

THE COURT: Yes, that's one -- Mr. McCullough, just to -- just if I could interrupt for a moment, that point, I thought, was interesting. I don't know if you're quoting from -- I mean, when Chief Judge Howell first had Mr. Nordean before her, she cited a case -- a 1973 Circuit case for that proposition. And I suppose that's the Government's -- it's -- that's the Government's position that if it -- particularly -- well, under, I guess, either

prong, if -- or either bases that you just laid out, I -- under that case, I don't -- I can't look past that indictment -- I'm not saying I would in this case or in any other case, but just as a -- kind of, as a theoretical matter, that case seems to suggest I can't look past the indictment to, sort of, challenge the Government's evidence and say, Gee, I don't think you have enough here, even for the standard of probable cause. The indictment's been returned, and that case would seem to foreclose that. I suppose that -- is that the Government's position?

MR. MCCULLOUGH: That is correct, Your Honor. And in that -- and with respect to that question, that is a question under 3142(e)(3)(C) which is the question as to whether there is a rebuttable presumption. That is what that case does stand for. However, in (f)(1)(A), it's simply that the case involves --

THE COURT: Right.

MR. MCCULLOUGH: -- this criminal act.

THE COURT: Right.

MR. MCCULLOUGH: And so it's not even a probable --

THE COURT: Right.

MR. MCCULLOUGH: -- cause question. We're, frankly --

THE COURT: That's right.

MR. MCCULLOUGH: -- in -- we're in detention land and --

THE COURT: Yes.

MR. MCCULLOUGH: -- so that's where we are, and then it goes to the, kind of, four factors under -- the (g) factors of 3142(g). And so then, you know, it's certainly -- there's plenty of -- there's fertile ground for argument as to how those four factors stack up. The Government -- and that's where some questions as to the strength of the Government's evidence and those might come into play. But, Your Honor, in terms of whether it is appropriate to be having a detention hearing, that is -- we are in the appropriate setting here.

THE COURT: Right. The language about -- the case involves just -- if you were proceeding under that theory, and let's assume for the moment I could look past the indictment, the Government would lose the rebuttable presumption, but we would still be in detention land through that other provision. And with the language, just does the case involve it, it would seem to be not a question. Right or wrong, whatever, the grand jury has charged that offense. I don't know what the argument would be that it -- this case doesn't involve that offense; is that -- that's your position?

MR. MCCULLOUGH: That's correct, Your Honor.

THE COURT: All right. Yep.

All right. So let's talk about the factors.

MR. MCCULLOUGH: Sure.

And so, Your Honor, I think the question here is whether Ethan Nordean poses an identified and articulable threat. And, as the Government has set forth in its papers, the Government views this as Defendant Ethan Nordean having an unwavering commitment to defying lawful functions of the government. The -- Ethan Nordean stated as much in advance of January 6th; he then engaged in that conduct on January 6th; and he has shown no remorse for that action.

And so the -- Your Honor, that, coupled with his ability to encourage, plan, organize and lead others to this kind of activity in the future, that poses the identified and articulable threat. And, Your Honor, the core feature here is that Ethan Nordean planned this from remote locations. He didn't plan this from the, you know -- the west alcove of the Capitol. The defendant planned these actions and made these communications from his home and from other locations. And so as a result, putting this defendant into home confinement does not adequately protect the public from the danger that it faces from someone like Ethan Nordean who is able to plan and organize and direct individuals to follow him into, kind of, invoking the spirit of 1776. He's very clear in his messages before January 6th

that, What people think is that these -- that they're just going to be complacent and they're just going to do -- issue Facebook posts, but, no, we're going to take action. That is the message that Ethan Nordean was broadcasting, and he has indicated no -- nothing to suggest that he would move away from that.

So when this case went before Chief Judge Howell on March 3rd, the Government had not returned this broader indictment. The Government had not pointed to the existence of and been able to discuss the existence of the messaging -- the Telegram messages in which Ethan Nordean and others in that group indicated that they were planning for some type of criminal activity. There's very clear discussion of the question that, Everyone stop what you're doing. We don't want to be subject to gang charges. There's another statement about, If we're -- if you're talking about playing Minecraft, you shouldn't have your phone anywhere near you. Minecraft being, kind of, a, you know, playful way to describe engaging in criminal activity.

And so when Chief Judge Howell looked at this without any of that evidence, she said this is a close call. She said he -- Ethan Nordean is heavily involved in pre-planning. She said Ethan Nordean had lots of communications in advance about the stolen election and, kind of, motivating people to come to Washington, D.C. He

had solicited donations, and those donations ultimately in the amount of more than $16,000. He had issued what Chief Judge Howell referred to as fighting words in which he said, you know, Fight now or lose everything, and also, pointed out his statements about invoking the spirit of 1776. And on ground -- on the ground, she pointed out that he was a ringleader of men who were prepared for violent confrontation and he planned -- he himself planned on coming here. And what Chief Judge Howell was asking was, what ties him to these other actions? What ties him to the destruction of property? What ties him to others under his command taking these actions in furtherance of the plan? And that was the question that Chief Judge Howell raised and the Government, at the time of the hearing on March 3rd, was unable to answer those questions because of the pending superseding indictment which indicated others' involvement.

And so here we are now with that additional evidence, and evidence, as I mentioned, that describes the Telegram messages in which individuals are discussing planning for January 6th, and not just planning a march because you don't -- one doesn't need this level of secrecy around planning a march. They're -- ultimately, in those Telegram messages, they're explicit about what conduct is taking place. There are people that say, contemporaneous with these actions, Storming the Capitol. Get there.

People are directing them to push inside. We just stormed the Capitol. That language is consistent with the language that the defendants in this case were using. Joseph Biggs, on the ground, says, We've just taken the Capitol. We just stormed that motherfucker and took it back. That is -- I mean, conspiracies are, kind of, formed with winks and nods. They're not often memorialized in writing. Here, we actually have the writing. We have contemporaneous communications and we have conduct that matches those communications. And after the fact, there is a celebration of, What we accomplished. We took the Capitol. We took it back, including statements by Ethan Nordean.

And in addition to that, Chief Judge Howell asked, Well, what did Ethan Nordean specifically do? How do we know that he was committed to this plan of destroying anything? And the answer is in the returned indictment which is that, as the crowd surged forward, Ethan Nordean took up an advanced position in the initial entry into the Capitol grounds and he and Joseph Biggs stood side by side and they shook a metal barrier to knock it down. Now, that is -- I mean, it's the maximum -- the, you know -- actions are louder than words. When your commanding officer is taking those actions, that speaks volumes as to what the expectation is of the men who are following you. We are here to advance. We are here to break things in the process

if we need to. And so, Your Honor, it demonstrates not only -- it puts the agreement and the plan to action and it shows that Ethan Nordean was fully committed to this effort to storm the Capitol; to push past law enforcement; and to break things, if necessary.

And so then the question becomes, well, what did we do with Dominic Pezzola and this -- and the question as to this destruction of government property as a result of Dominic Pezzola having stolen a riot shield and pushed into the Capitol? And, Your Honor, Dominic Pezzola is a co-conspirator who is simply charged in a different indictment. He arrives at the First Street pedestrian gate. He does so with -- he does so at the same time that Ethan Nordean, Joe Biggs and others are there. There are coordinated actions to move forward. Dominic Pezzola participated in the process of -- as barriers are removed, Dominic Pezzola is there at the front, much like his co-conspirators and the charged defendants in this case, and then Dominic Pezzola steals a riot shield. And one of the defendants in this case, Charles Donohoe, can later be seen carrying the shield with Dominic Pezzola. And Charles Donohoe reports back to the Telegram messaging group, Got a riot shield. This is effectively adopting Pezzola's actions as the work of the group. And, in fact, Dominic Pezzola -- in his case, the 21-cr-52, Dominic Pezzola describes that

the objective was achieved; that stopping the certification was the objective or acknowledged that that was the objective. Now, he attributes that to, Well, that was on the orders of President Trump, but nonetheless the objective of Dominic Pezzola matches perfectly with the objective of this conspiracy. For that reason, he is simply a co-conspirator.

And so, Your Honor, when you go down the, you know, kind of -- the factors here -- the -- if you will, the Chrestman factors that have been discussed by Chief Judge Howell as to how we, kind of, sort through all of this evidence, the question is whether this -- he's been charged with felony or misdemeanor offenses. Clearly, felonies. There's a question as to whether he engaged in prior planning. He did. He fundraised over $16,000. He engaged in planning to obtain communications devices. He obtained protective equipment. He came to Washington, D.C., with a tactical vest and protective headwear. He gave directives in advance, what to wear -- dress in plain clothes, not in the black and yellow -- where to go. And he met -- as the Telegram messages indicate, met with others the night before in an effort to come up with the plan.

Now, there's no indication that he carried a dangerous weapon during the riot, but the other factors all point heavily towards -- in favor of this being a serious

act. Did he coordinate with other participants? Yes, he did. The Telegram messages make clear that he was coordinating not just in ones and twos but with a large group. And when they marched, they marched not to the Ellipse to hear the speeches. They marched to the Capitol and only the Capitol. And during that march, as we point out in our briefing, he makes statements that are encouraging people to focus their attention on the police and those at the Capitol. We represent the spirit of 1776. Remind those who have forgotten. We're here to remind those who have forgotten what that oath is. He then says something to the effect of, You've got to prove it to us. Prove your shit to us, then, effectively pointing out that the law enforcement had arrested one of their brethren and now it was up to law enforcement to prove to them. And he said, We don't owe you anything. You're here to protect and serve the people, not property or bureaucrats, clearly pointing and discussing that, We are going to focus on law enforcement and what's happening inside that building.

As to whether he damaged federal property, threatened or confronted law enforcement, his movements to the front of the group clearly indicate that he is representing both a threat to law enforcement and engaging in damage to government property. He moves to the front of the group. There are law enforcement officers on the other

side. He takes action with Joseph Biggs to dismantle that barrier. And, as we've talked about, that action is a communication to those under his command that, This is what we're here to do.

So Your Honor, all the factors point heavily in favor of this being a, you know, very serious crime. The nature and circumstances of the events charged point heavily in favor of detention here for those reasons. The weight of the evidence against the person, particularly now with the additional evidence that the Government has put forward as to the returned indictment, the Telegram messages which plainly reference criminal activity, that also points heavily in favor of detention.

As to the history and characteristics of the person, Your Honor, the Government appreciates that Defendant Ethan Nordean does not have a criminal history, but the, kind of, nature and characteristics here should, and do, incorporate his statements as to the intent to storm the Capitol, the intent to take violent action, and given that he has shown absolutely no remorse for that action and no remorse for what took place, saying, in fact, the day after the event, If you feel bad for the police, you're part of the problem, I mean, that demonstrates a commitment and a total disregard for the mayhem that took place and the injuries that were done to law enforcement that day. So

that -- I think that speaks volumes to the history and characteristics of the person.

And, Your Honor, the nature and seriousness of the danger of this person to the community, quite simply, as we've set out in the papers, this planning -- this was not something that happened in an instant. This was a planned and coordinated effort and the conduct that took place was a success and Ethan Nordean has celebrated that success, and as a result that makes his potential to do something similar in the future all the more dangerous and all the more acute. The success of this action and the defendant's commitment to continuing such an action in the future or directing others to plan such an action in the future, that is the danger, and that's why the Government is here seeking to revoke detention. The Government does not do it -- the Government has made a careful and thoughtful decision as to why to do this, and the Government believes that Ethan Nordean does pose that danger to the community that these factors are intended to address.

THE COURT: All right. Before -- I have some follow-up questions even before I hear from the Government -- I mean, even before I hear from defense counsel. But, Mr. McCullough, why don't you -- I think it makes -- it's probably most efficient, since I think the arguments really overlap, for you to address Mr. Biggs, as well.

MR. MCCULLOUGH: Sure, Your Honor.

I think that many of the same --

THE COURT: Right.

MR. MCCULLOUGH: -- many of the same issues here go to Defendant Biggs. The -- Defendant Biggs was also involved -- directly involved in the planning and coordination of this event. He is involved in the communications as to when and where to meet, what to wear, etcetera. He is also involved in fundraising, though, to the Government's information, perhaps -- we don't have a specific dollar sum to offer to the Court. But, again, the same language in advance of January 6th, the same encouragement of this kind of violent action is present from, you know, as far back as November 5th when Joe Biggs says, It's time for fucking war if they steal this shit. That drumbeat of language as to a plan for violent confrontation on January 6th is there and it's present. He is involved in the planning of the January 6th effort. He had -- that marches and directs, much like Ethan Nordean, this group of men to the United States Capitol. They march around to the First Street gate. Joseph Biggs, as much like Ethan Nordean, pushes toward the front. As the Government points out in its briefing, Joseph Biggs makes contemporaneous statements as they are entering the Capitol that reflect the plan. We've just taken the Capitol. We

just stormed this -- the Capitol. The Government points out those quotes that Joseph Biggs states that are, kind of, contemporaneous with his actions. Much like Ethan Nordean, he pushes down this barrier which, again, that is an action that speaks volumes as to what is expected and what is to be done.

And so for the same reasons, Joseph Biggs is committed to this common plan or scheme. He understands that destruction is a natural and foreseeable consequence of what this conspiracy has wrought. Defendant Biggs enters the Capitol within -- close -- within two minutes of Dominic Pezzola going through the window. Defendant Biggs then leaves the Capitol and 30 minutes later comes back in a second time. And so I mean, that just demonstrates his, kind of, commitment to interrupting, interfering with the official proceedings that were taking place inside as well as a disregard for any efforts by law enforcement to have cleared the building or keep the crowd away.

And, Your Honor, it's quite simply the same question with respect to Joseph Biggs. Joseph Biggs planned for these -- this conduct -- engaged in the planning, organization of this conduct from his home. He advised others where to go; what, you know -- what to wear; where to meet; and how we were going to move to execute the plan. And so the same question as to the Government -- the

Government's ability to protect the public goes to Defendant Biggs. It's simply the fact that Joseph Biggs, much like Ethan Nordean, has not indicated that he has any different view as to January 6th and the events of January 6th now than he did on January 5th. And so if Defendant Biggs is to be left at home under home detention, there is no way to effectively monitor his communications in a way that would protect the public.

THE COURT: Let me -- and I'm sure I'm previewing what I'm going to hear from defense counsel, but let me just play devil's advocate here in a variety of ways.

What we have to go on as far as defendants associated with the Capitol breach and defendants generally is what they do and what they say and other facts that are -- we can associate with the defendant. Here, we don't have any weapons. I think the Government has conceded that. Not only no weapons used that day at the Capitol, no weapons found at their homes or that have been associated with them in any other way, either defendant. No criminal history for either defendant. We have a situation where they've both -- I don't weigh this too, too heavily, but I do have to weigh it, I think -- that they've been out now since their release in these cases initially. I'm not -- I understand the Government has new evidence, and I don't blame the Government for coming forward later when the case, as far as

you all -- as far as you -- if you -- in your all -- in the Government's view, changed when certain information came to light. That's fine. But they've been out now for the many weeks it's been without a problem. And I have a -- PSA reports from both of them that don't recommend changes in their conditions.

And then we get to the issue which is really the core issue which is, sort of, you know, dangerousness and violence. And, you know, the evidence of violence on that day is, you know, pretty muted. We have -- I take your point, Mr. McCullough. First of all, we have this fence -- the shaking of the fence. Okay. It's something, but it's not directed at a person, certainly. We do have, as I think, Mr. McCullough, you mentioned, the -- both defendants moving toward the front of a group -- maybe, not at the very front -- in which case they would have had the opportunity to, sort of, more directly engage in violence. I -- so I weigh that. They're toward the front of a group of people who are advancing on the Capitol. Fair enough. But it's not, you know, violence through their -- directly through their hand, if you will. And then we have -- and then we go to the evidence -- so -- and that's where we were when the case first came in and the Government did not move to detain them.

The new -- the delta here -- the new evidence is

this issue of planning and what -- the messages the Government has put forth. I think, you know, look, they do show connectivity. They do show planning of some sort. And I'm not saying that at a future hypothetical trial, the Government's not going to be able to stitch together all of this and lay a lot of things that happened that day at these defendants' hands. Maybe they -- at their feet. Maybe you will. But in terms of weighing the question of dangerousness and detention, there is no -- we have -- we definitely have some invocations of fighting months beforehand. Okay. I don't -- they're -- locking up everybody who said, Gee, we've got to fight, clearly -- but as for the -- when we get down to the day in question, there isn't anything that is very clearly an invocation to violence at least as I see it.

Now, again, you know, I'm looking at the evidence you have as a snapshot right now and this doesn't, I don't think, say anything one way or the other about the -- I mean, it does say something about the strength of the case at this moment, but whether you're able to connect all that up, you may well be able to, but I don't know -- if I'm looking solely not at criminal liability here but I'm looking at dangerousness, how -- what's the best -- I'm going to ask a couple of questions. But in light of all of that, you know, what's the best evidence that the Government

has really that what they were -- and, look, I also understand the argument that, Judge, look at the context and, from what happened, you can infer that this was a plan to do violence. Okay. Maybe that gets you somewhere, but I think there were probably a lot of people showing up that day with a lot of -- it's possible, with a lot of different plans. Some went one way; some went the other way. In terms of connecting the planning to violence, it's not -- it's -- these messages don't, you know -- don't move the needle that much.

The other piece I just want to mention while it's on my mind is, you know, and that's one of the things -- I mean, the other thing that has happened since -- the other development in the -- in this area that's happened since at least the Government filed its initial motion and since even a lot of the briefing has taken place here is the Circuit's decision in Munchel which, you know, suggests that I have to look at the uniqueness and the context of what happened on that day as part of a forward-going analysis of, is the person a threat?

And so I guess, if you would, Mr. McCullough, address those two things. I mean, the issue of violence and whether I can really infer -- what to make of the fact that clearly there was messaging about a plan. It's not at least overtly a plan that they -- that anybody mentioned violence

about. Now, you know, maybe, that's good operational security, but it is what it is. And then as far as Munchel goes, how does the Government reconcile, kind of, what the Circuit instructed me to do -- all courts to do going forward in terms of Munchel and whether we, kind of, meet the strictures that they laid out there?

MR. MCCULLOUGH: Sure. So Your Honor, the -- one quick thing on -- you mentioned, kind of, whether they had any weapons in their home. They did have weapons in their home, but we're not aware of any effort to bring those weapons to --

THE COURT: All right.

MR. MCCULLOUGH: -- Washington, D.C., but --

THE COURT: Thank you for that correction.

MR. MCCULLOUGH: -- I just wanted to point that out.

The -- Your Honor, the Telegram messages the morning of the event -- there are others in this small group of actors. It's fewer than 10 participants in this Telegram message group where plans were being discussed. They say, I want to see thousands of normies burn that city to ash today. I will settle with seeing them smash some pigs to dust. So this idea of preparing for some sort of violent confrontation, including violent confrontation against law enforcement, that is in the Telegram messages. It's not,

Oh, you know, yes, and I agree, that's what the plan is, but that is -- I mean, that's a pretty stark memorialization of where this group was in terms of its thought process as to January 6th. This is not, We're going to march, we're going to listen to the speech, and we're going to protect people. This is, I want to see thousands of normies burn that city to ash. I would settle with seeing them smash some pigs to dust. Now, these are not words spoken by Ethan Nordean or --

THE COURT: Right.

MR. MCCULLOUGH: -- Joseph Biggs, but these are the statements of others in that group. And when Ethan Nordean and Joe Biggs moved forward and they -- and there is a metal barrier separating this mob of people, that they have led to the Capitol, from law enforcement, they take action to rip it down. I mean, that is -- that's a violent action, Your Honor, and when you do that with -- when you -- when I, you know, do that with one person behind me, it says one thing. When I do it with 100 people behind me that I led to the Capitol grounds, it says a different thing, especially in this context. And so --

THE COURT: Mr. McCullough, can I just jump in and ask you one question right there. You -- the -- at various times, the Government's motion references photos and videos and you've embedded photos in the motion. Do I have -- if

-- to the extent there are relevant video, do I have those video?

MR. MCCULLOUGH: You do not, Your Honor. The Government would be pleased to submit that video, the video of them tearing down the barrier, or other video of them marching to the Capitol.

THE COURT: Well, whatever you think -- I mean, you reference in the motion photos and video and there are some photos here. I just -- I wasn't aware that any -- I had received any video. So I would say, from the Government's perspective -- I mean, I'm -- I think I'm probably -- we're going to probably have to come back on very short notice for me to rule on this because I, you know -- I think it's -- I think, given the import of Munchel and the different decisions that all of us in this courthouse have to make with regard to defendants going forward, I, you know -- I want to take my time and make the right decision here. And so if you all want to submit that as, you know -- obviously, provide a copy to the defense -- I think it makes sense for me to receive it. I don't know how you've been doing that in other cases. I've had other -- in some of my other cases, I've had the Government simply, sort of, refer to video that had been publicly posted. I don't know if this is that type of thing where you can point to a place on the Internet where it exists or whether it's something you

would need to submit separately, but however you want to do it I will receive it and consider it.

MR. HULL: If I may, Your Honor, Dan Hull for Joe Biggs. I would applaud and join in on the idea of getting that tape on the fence to you. I would very much like you to see that.

THE COURT: Okay. Good.

All right. So -- and anyway, Mr. McCullough, I'm sorry. I interrupted you, but I wanted to make that point about the video.

MR. MCCULLOUGH: Sure.

And so, Your Honor, with respect to the -- how Munchel changes this, it fundamentally does not change the question as to whether these defendants pose an identifiable threat to the community. And the question is whether -- prior to January 6th, whether there was a, you know -- a leadership plan in place and these men led a group to attack the Capitol. That is the Government -- that's the Government's evidence that they led this attack on the Capitol and --

THE COURT: I mean, it's clearly your strongest point, I think, no doubt. Your strongest argument is a leadership argument. What that says -- what, exactly, they were leading and how connected that is to violence and how connected that is to, sort of, forward-looking violence, I

think, is, kind of, the core of the question. Go ahead.

MR. MCCULLOUGH: That's certainly right, Your Honor. I mean -- but I think the question here is whether that effort to lead and direct a group, to fundraise for a group can still be accomplished and whether the Government has a -- sorry, whether Your Honor has a basis to believe that any strictures put in place as to their home confinement will be strictly followed. And now, the defendants have not -- there have been no identified issues with their home detention and their release conditions thus far, but, Your Honor, the Government would submit that there -- we don't know what the communications have looked like. And so it's certainly commendable and appropriate to point out that there have been no identified instances, but that doesn't answer the question, and one that was -- and one that's posed, as to whether they can launch another similar event from their homes and whether the release conditions provide any comfort that we can protect the public from that effort.

And so, again, it's -- it, you know -- the -- if we look at, you know, kind of, the breaking of the barrier and the leadership forward in isolation, right, if we say, well, it's a, you know -- it's a breaking of a barrier; right? Big, you know -- big deal; right? Come on. It's like, how is that violent? It's violent when you have --

when you're, you know -- it's the difference between opening a bottle of wine and opening a bottle of champagne. When you've got 100 people behind you and that -- and you unleash that force, what does it mean; right? What does it mean? And what is the -- and what does that act really tell those people who are following you? That we are here to advance; we are here to --

THE COURT: I think that exact question has always been at the heart of these cases and why, you know -- viewing the individual act and looking at the context, but then also trying to consider it was -- I mean, on, you know -- on the record as being -- as recognizing the unique -- the uniquely bad and pernicious -- how uniquely bad and pernicious that effort was that day to interrupt the peaceful transfer of power. I think, in some ways, the Circuit has flipped that a little bit and -- at least in the detention context and, I think, appropriately made -- has instructed us to look closely at, you know, that's a unique -- that was a uniquely bad situation. Well, what is the risk of danger going forward? And I think, you know, that's the question. You've mentioned Pezzola a few times. There's a defendant who had weapons-making and bomb-making equipment in his house. He had -- or instructions, not equipment. Instructions. He -- and there were several statements of people that were close to him indicating a

future -- that they could be a future -- a vector for future violence. We don't have those direct similar statements here, but we do have a leadership role that is clearly different and more advanced.

Let me turn to whoever wants to address this -- whichever Mr. Smith will be addressing this question for Mr. Nordean.

MR. NICHOLAS SMITH: Thank you, Your Honor. It will be Nick Smith, and good afternoon.

THE COURT: Good afternoon.

MR. NICHOLAS SMITH: We'd like to say at the outset thank you to Your Honor for accepting the surreply brief. We understand that Your Honor is correct that that's normally a civil litigation tool, but thank you nonetheless.

And going on that point to begin with, we understand that the Court is likely to rule -- or already has ruled that the Government has satisfied a detention hearing predicate under 3142(f), but with Your Honor's indulgence I'd just like to make a few points on that in response to the Government, if that's okay with the Court.

THE COURT: Absolutely. I mean, look, I -- for this -- on this point and on the other -- on the earlier point about the surreply and letting the Government -- look, I -- and letting the Government submit some of this video they want me to see, you know, this isn't -- I'm happy to

enforce the civil rules and try to get civil cases as streamlined as possible. Criminal cases have to move quickly, too. But when someone's liberty is at stake, I'm going to hear your arguments. I'm going to receive whatever both sides want me to hear and see. So please, Mr. Smith.

MR. NICHOLAS SMITH: Okay. Thank you, Your Honor.

So to follow up on that point, Your Honor noted correctly that the Court -- it's not the Court's role at this point to look past an indictment, and Mr. Nordean would agree with that point. I think the argument that we were trying to make in the surreply -- and I think it was alluded to in some of the earlier briefs -- is that even though the Court doesn't second-guess the grand jury, the Government still has a burden of pleading the elements of a defense [sic], and I think I heard Mr. McCullough here say this morning that the Government agrees that its sole predicate for detention here today, notwithstanding the conversation about the new conspiracy charge, is destruction of federal property under 1361. And, Your Honor, our briefs are pointing out that the indictment -- the superseding indictment does not actually allege any specific destruction of property. There's a reference that the parties have been making to shaking a metal barricade. That appears in Paragraph 58 of Government's indictment. And if Your Honor carefully reads Paragraph 58, you'll see that it says,

quote, Nordean and Biggs shook a metal barricade with Capitol Police on either side of the barricade until Nordean and Biggs and others in the crowd were able to knock it down. The crowd, including Nordean, Biggs, Rehl and Donohoe, advanced past the trampled barricade.

Now, the Government doesn't allege destruction in this paragraph, and in other Capitol cases it has. When there's damage exceeding $1,000 to satisfy the 3142 predicate, the Government knows how to plead it and does, and this isn't just a pleading issue. I understand this isn't Twombly and Iqbal, Your Honor. We -- this is not pleading with, you know -- but nevertheless, there is a burden to plead the elements of an offense. There is no destruction of property pled here. And there's a reason, Your Honor, and it goes to the video that Your Honor hasn't seen, because there isn't destruction of property in that video, Your Honor.

Now, if Your Honor would scroll down to Count 3 --

THE COURT: Well, Mr. Smith -- all right. All right. I'll -- I -- let me just ask this question while it's on my mind, then. Well, if all of that is true, why do you concede -- I mean, you're pointing all this out because it -- number one, obviously, in the various factors I have to consider, strength of the Government's evidence is one of them, and this would go to that, for sure. But is there --

are you making a residual or a predicate argument -- an argument before that that if they haven't pled it, even if the grand jury has returned -- and the -- clearly, the grand jury has charged them with that offense -- we're still properly in detention land even if the grand jury has -- even -- I would argue, even if the -- I mean, as I discussed with the Government earlier, the language, I think it's whether the case involves a particular charge. I think that's right. Maybe something slightly different. But it's hard to get away from that language if -- even if there's a count on here that charges felony destruction of property, even if that might be subject to challenge by a pretrial motion or whatnot, I mean, isn't it fair to say the case involves that if that's the quote?

MR. NICHOLAS SMITH: I think Your Honor is putting your finger on the verb, "involves," and -- but what we're countering with here is we're saying the case involves an offense of government -- destruction of government property if it's pleaded. Now, there's one reference in the indictment to destruction of property. You've read that paragraph, Your Honor, and it doesn't allege destruction of property because the Government's video doesn't show that, but I'll get to that in a second.

But then if Your Honor scrolls down to Count 4 of the indictment which --

THE COURT: I --

MR. NICHOLAS SMITH: -- is the charging count --

THE COURT: I'm there.

MR. NICHOLAS SMITH: -- and if Your Honor sees this, it says, quote, They aided and abetted others known and unknown to forcibly enter the Capitol and thereby cause damage to the building in an amount more than $1,000, Your Honor. There is no allegation of damage to the building from the co-conspirators in this case in this indictment. What it alleges is that there's damage to a barricade at some stage outside of the Capitol. So Your Honor, we're making the point that it -- our argument is actually that 3142(f) is not satisfied. And we don't think it's a technicality either, Your Honor, because if Your Honor looks at the 3142(f)(1) offenses, they're not just all felony offenses. They're all -- there's large parts of the Federal Criminal Code that are not included in 3142(f) because, as the D.C. Circuit pointed out in the Singleton case citing Salerno, Your Honor, this is supposed to be -- detention is supposed to be reserved for the most serious felony offenses.

Now, we're hearing a lot about conspiracy charges and obstruction of justice and civil disorder, but none of those offenses are actually listed in 3142(f). Okay? So we're in a very unusual scenario where the gravamen of the

Government's case is not the legal basis for its detention request. The tail is wagging the dog here with the -- there is some -- there is a misdemeanor offense -- there's two misdemeanor offenses they've pled, trespass which doesn't distinguish these defendants from hundreds of others and destruction of property, but destruction of property is not pleaded in this indictment.

So Your Honor --

THE COURT: So --

MR. NICHOLAS SMITH: Yeah. So --

THE COURT: I mean, I'll just point you to Paragraph 23 that talks about the Capitol suffering millions in damage, broken windows, doors, graffiti, blah, blah, blah, blah, blah. Is it not fair to read that and read -- indictment along with that to plead a factual basis for the conspiracy that they were engaged in to tag them or at least to charge them with -- well, to lay that at the feet of their conspiracy that at least some of that damage that's set forth in Paragraph 23 can be linked back to their -- the, sort of, organization and the conspiracy that they allegedly engaged in?

MR. NICHOLAS SMITH: Well, Your Honor, I think that would be their best argument. I agree with Your Honor that that's the best hook they've got, but if that's the case there's a problem here, because this paragraph is in

virtually every indictment they've filed in the Capitol cases.

THE COURT: Yeah.

MR. NICHOLAS SMITH: So if it were --

THE COURT: I don't know that that's a problem. I mean, is it? Why is that a problem?

MR. NICHOLAS SMITH: It's a problem because, Your Honor, the charge that's the hook under 3142(f) has to be pleaded in connection with specific property damage. If it were sufficient to just cite all of the damage to the Capitol in one paragraph and plead no facts linking the specific charge in the indictment to it, then this would be -- then really there is no reason why 360 people have not automatically satisfied 3142(f) and, Your Honor, we would argue that's contrary to Salerno. This is about -- bail determinations are about individualized analysis based on the specific crimes that are pleaded -- properly pleaded against the defendant in front of the Court. And so we agree with the Court that that's probably the only hook in the indictment to connect damage to the defendants, but that that's -- forget about Iqbal and Twombly. That doesn't satisfy, you know, basic pleading requirements because there's no causation alleged here, Your Honor.

But, you know, we appreciate that the Court has thought about this issue already and it would -- thinks that

there's more important issues to discuss here. So getting to Munchel, Your Honor, the Munchel decision, we argue, is actually a fortiori of everything that the Government has -- we've heard this morning as the most powerful argument the Government has for detention. And in Munchel, Your Honor, the court emphasized that a couple of arguments that the Government has made here today just simply don't work; don't satisfy dangerousness. Judge Katsas, dissenting in Munchel, pointed out that he would not just have sent the case back for a do-over; he would have reversed outright. And one of the arguments Judge Katsas zeroed in on was the contention that bravado about patriotism and a stolen election and comments of a political nature that don't identify a specific articulable threat to anyone simply don't even sound under 3142(g)(4). That's what Judge Katsas's point was. And I think the kinds of arguments you're hearing today are, sort of, as though this decision doesn't exist or that what Judge Katsas says didn't happen. These are the types of arguments the D.C. Circuit is saying don't work. They're infringements on people's liberties and free speech rights to put people in prison -- in jail pretrial because of their political beliefs or because they think that something wrong happened in the election. The court is saying that can't happen, Your Honor.

The next best argument the Government comes up

with is to cherry-pick messages, Your Honor, from a Telegram chat in which 60 participants were in there. There's no allegation the defendant even knows them. And, Your Honor, we'll point out that one individual in these Telegram chats is cited repeatedly over and over and over. He's an unindicted co-conspirator in this case, Your Honor. There's no allegation that the defendant knows this person. Okay? So if the Government's right that it can just put together a chat window of 60 people where some people make vague but alarming remarks and then jail a defendant on the basis of those remarks that a defendant might not even know, Your Honor, then consider the implications of that. Why limit it to a Telegram chat window with 60 people? Why not say the defendant was on a Twitter thread online where there was 150 people and way down -- the defendant himself might not have made any violent comments, but way down in the Twitter thread there's someone who says, This politician should be killed or dead. Your Honor, that's -- so the --

THE COURT: Mr. Smith, I'll just say -- I mean, the -- Twitter, you know -- anybody can jump into a Twitter thread; right? But people are generally not randomly connected on the kinds of messaging systems that we're talking about here. It's a -- Twitter's a -- much more of an open forum; isn't that fair to say?

MR. NICHOLAS SMITH: It is fair to say, Your

Honor, and -- but that goes to how these people -- individuals -- the 60 individuals got into this Telegram message, and this connects up to a larger point about basically a series of claims the Government has had -- made in this case, ever-shifting claims to detain Nordean which it's been -- through all right after, and I'll explain how this connects to the Telegram chat.

At first, the Government was representing to the Court that these are encrypted communications --

THE COURT: Right.

MR. NICHOLAS SMITH: -- encrypted -- end-to-end encrypted. And the -- and that's actually a manner and means of the conspiracy, Your Honor. It turned out the Government was wrong factually. These messages are not end-to-end encrypted. Telegram doesn't encrypt messages for group chats, Your Honor. So there is no -- that whole species of the means of the conspiracy was based on a premise that could have been verified on Google in 30 seconds, Your Honor.

So there's a second point here, Your Honor. The Government has said, basically, it comes down to this video that, you know -- Munchel says that the Government has to identify a specific and articulable threat to an individual or the community and vague comments don't suffice about politics, much less comments of other people. So they say

there's a video of a destruction of a barricade. The Government's brief represents, quote -- it's the video that Your Honor hasn't seen -- quote, Personally dismantled a barricade. Your Honor, the video you're going to see does not show the defendant touching a barricade, much less physically dismantling it, Your Honor. It doesn't show him trampling on a barricade, and it doesn't show the destruction of the barricade. It shows a barricade sideways on the ground, Your Honor. And the reason this is important is because in the first two attempts to detain Nordean pretrial, there were different explanations for why he needed to be detained pretrial. They had nothing to do with a barricade, Your Honor. At first, he was a risk of flight because there was a fake passport in his home. That claim is --

THE COURT: Mr. Smith, I -- let me just interrupt you on one point just before you -- you've set this up as, Gee, the, you know -- you've set up the video to knock it down, and I'm not so sure that's -- I mean, I asked to see the video today. They didn't provide it to me. So I don't think we can -- I don't think it's fair to say, The Government has said it's all about this video, because I don't -- I mean, they reference it. I understand they do. But I take their argument now at least, and I don't -- I mean, those -- what you're pointing out happened before I

was assigned to the case, and not that it's not relevant. I'm going to let you complete your point. But I see their argument or at least -- and at least as I interpret the strongest point of their argument not necessarily a thing about the video, although I think the video's relevant, but it -- I think the planning aspect is -- I mean, put aside the -- I mean, I know you don't want to and I'm not going to, but regardless of what the specifics of these messages say, the thrust of the Government's argument, it seems to me, is the, kind of, leadership/planning aspect of this. Maybe their evidence isn't as strong as in other cases about that, but that seems to me to be at least conceptually what they're arguing.

Anyway, continue. I'm sorry to have taken you away from the thrust of your argument, but I just wanted to make -- you, kind of, set up this video as -- I mean, obviously, Mr. Hull had said he wants me to see it, you know? I -- now, I really can't wait to see it. But I don't know that the whole -- the detention decision is going to turn on that, but --

MR. NICHOLAS SMITH: Okay. Your Honor, fair enough. The reason we brought up the video is because I believe that Mr. McCullough is using the video to show -- to try to reach for some sort of element of potential violence --

THE COURT: Sure.

MR. NICHOLAS SMITH: -- because in the Munchel decision -- I'm looking at it now and it says that what was important to the court was the absence of evidence that, quote, Munchel or his wife -- or his mother committed any violence on January 6th, the absence of evidence that Munchel or the co-defendant assaulted a person on January 6th, and in light -- if -- and what the court said -- that's the end of the quote -- if, in light of the lack of evidence that, quote, Munchel or the co-defendant committed violence on January 6th, the District Court finds that they do not pose a threat of committing violence in the future, the District Court should consider this finding in making its dangerous [sic] determination. So I think, Your Honor, that the video seems to be what the Court [sic] is using to show potential violence here, but I think Your Honor pointed out something at the beginning of -- before throwing it to the defense that it almost doesn't matter what the video shows about the barricade because, as Judge Katsas pointed out, this determination of the 3142(g) is not backward-looking. It's forward-looking. So -- and Judge Katsas also pointed out that, The transition has come and gone and that the threat has long passed.

So what the Government is trying to do here is to force the Court, notwithstanding Munchel, to look backwards

to look at what happened to a barricade on January 6th rather than looking forwards. And the reason this is so much stronger than Munchel from the defendants' perspective is that Munchel, unlike Mr. Biggs and Mr. Nordean, didn't have a history of perfect compliance with the strictest conditions of confinement that you can imagine that Judge Howell imposed in this case. We have a record now of the defendants not making mistakes. They're limited to the Districts in which they live. They have to wear ankle bracelets. It becomes very difficult to find work, as Your Honor knows, when you're confined to your home; when you have a child, like the defendant does, to raise. He's limited to his home. He has a third-party custodian in the form of his wife who has guaranteed his appearance in these cases. He's made exemplary efforts to not just get rid of any firearms that could possibly be in his constructive possession, but to get rid of all of his wife's owned -- legally owned firearms. They're gone as well, Your Honor. What you haven't seen is any articulation of what -- how this threat is supposed to materialize. Judge Katsas says, The transition has come and gone and the threat has long passed. The Government responds, Well, he's still a danger. These aren't facts. A danger how? Where?

THE COURT: Well, their argument is that he's a -- he -- it stems from the planning point I was making before.

And I'll read you another quote from Munchel. In our view, those who actually assaulted police officers and broke through windows, doors and barricades, and those 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 cleared the way. My only point is they -- that the Circuit also put planners in a category along with other folks who, you know, did display clear violence that day, etcetera. I'm not saying that means that carries the day for the Government here at all, but they -- there is that language in the opinion.

MR. NICHOLAS SMITH: And, Your Honor, I thought Your Honor would ask me about this. So I have a canned response. I am sorry.

THE COURT: Good.

MR. NICHOLAS SMITH: But what the Circuit was saying, Your Honor, is that if the evidence fits. The Circuit was not saying if this case falls into a category of offenses regardless of how many times the Government's explanation for its detention decision has shifted --

THE COURT: Sure.

MR. NICHOLAS SMITH: -- no matter what the facts are. Your Honor, so I think what the court was saying there is that if there's an element of a conspiracy that's

factually established that so -- indicates violence in the future at some articulable moment in time, then, of course, the Circuit's saying, you know, we would -- that -- the outcome would be different than in Munchel.

But, Your Honor, to go to Your Honor's next -- second point which was leadership, leadership per se, of course, is not criminal. I think, Your Honor -- so -- and plans per se are not criminal. And I think the Court did a very fine job pointing out that these references to plans and leadership are very equivocal. I think that's the best way of putting it; that a reference to coming to D.C. to do a plan can't be sufficient to jail somebody for what could be longer than a year when we don't know what -- the Government hasn't shown what that plan is.

But, Your Honor, it's worse than that. Whatever Your Honor might think of the evidence we've put together to try to rebut this plan notion being a conspiracy, Your Honor, I think it's significant that the Court has not contested the veracity of affidavits we've filed showing that Nordean and Mr. Biggs actually did have a plan on January 6th and it was -- involved a musician coming to an Airbnb house they rented in Washington, D.C., around 3:00 to 4:00 o'clock. Now, the Government might come back and say, There is a -- there's a possible conspiracy to assume control of Congress -- one of the most grave offenses you

can imagine -- that is not inconsistent with having a music party in D.C. blocks away from the scene of this notorious offense within a number of hours. The Court -- the Government might say that, Your Honor, but we think at the very least at this stage when an affidavit has not been rebutted and its veracity is not questioned that that serious doubt should have some effect on the weight of the Government -- the weight of the evidence analysis to the extent that conspiracy is -- to the extent that conspiracy is a basis for detention, Your Honor. So we think that the Court should seriously consider the implications of a plan to hold a music party at 3:00 to 4:00 in the afternoon when the Government is alleging a multi-month, long-planned, intricate conspiracy to assume control of Congress. We think that's a relevant point, Your Honor. And so we don't think leadership per se is a basis for detention.

And, Your Honor, there's a couple of other points that Mr. McCullough didn't hit on that are relevant here. So as the Court knows, we're still in the pandemic. The trial calendar is very congested. The Government might say that's the fault of the defendants, not their charging decisions, but nevertheless there's a very congested calendar from the Capitol cases. There is still a prison pandemic in -- it is well known, and Your Honor could almost take judicial notice at this point, that there is a much

higher incidence of COVID-19 in jails and prisons than out in the outside world. And as a result of that, you're seeing hundreds and thousands of prisoners who have been convicted of crimes that are beyond, you know, comparison with what's alleged in this case -- you're talking about leaders of mafia families being released; you're talking about importers of tens of thousands of, you know -- dozens of kilos of cocaine being released; armed violent felonies of criminals being released, having their sentences reduced. The other day, Your Honor, I saw one where a double life sentence was reduced to time served because of COVID-19.

So this is -- this context is important, Your Honor, because you have the Government saying, although two federal judges have found that there -- that 3142(g) is not satisfied, there are conditions of confinement. Although they're complying with their conditions; although the conspiracy charge is based on things that might not be a criminal conspiracy, Your Honor, they should go to prison -- jail for possibly up to a year or longer in the middle of a pandemic, Your Honor, when there are people who have been convicted of more serious crimes -- not alleged, convicted -- who are being released.

So Your Honor, I don't understand the Government's position with how those two things are reconcilable, Your Honor. So we think that if a defendant is complying with

his strict conditions, to jeopardize their lives and put them in jail when people who are convicted are being released, Your Honor, is not appropriate, and we think that's why the Government doesn't have a response to that point, Your Honor.

And the last point I'll make, Your Honor, is these -- the Government's motions are based on proffers. This isn't like a trial where the evidence -- there's a fact finder who's had an opportunity to weigh the evidence and decide the claims. These are -- these cases are based on the Government's proffers basically saying, you know, the Government's credible, they're putting forward this evidence, and the Court should trust it. But, Your Honor, there's this. I don't think that the history of the efforts to detain Nordean should be disregarded here as though they didn't happen.

The Court will see in our papers that they -- the Government initially claimed that Nordean was a flight risk because of a passport that looked like him. It turned out that was not accurate. But it also -- the Government represented this passport had been found next to Nordean's bed. The purpose of that representation, Your Honor, was to show that he's a flight risk. But it actually wasn't found next to his bed. It was found in his wife's jewelry box, and this is significant because it's a falsehood, Your

Honor. It's a falsehood that's put forward in an attempt to detain someone pretrial. The claim has been abandoned, Your Honor.

But there's something more significant, and this is the last point. In front of Judge Howell, the Government represented that Nordean used, quote, Encrypted communications on January 6th to lead a multi-point invasion of the Capitol. Okay? At the same time it made that representation, it had Nordean's phone. It had seized his phone. The phone showed that his -- the record showed his phone was off during January -- the January 6th events, Your Honor. So why is the Government saying that Nordean used encrypted communications on January 6th to lead a multi-point invasion if his phone is off? But it's worse, Your Honor. The Government also said he used a BaoFeng radio which is a ham radio, an amateur radio, to lead people into the Capitol if his phone didn't. It turned out, Your Honor, that he didn't receive that radio until after January 6th. Then the Government comes back and says, Actually, the radio we seized from his home is not the one that he got after the 6th. But it turns out it was, Your Honor. So the larger point is not -- it's not the minutia of these points, but at what point do the shifting explanations and rationales for detention mean something, Your Honor?

THE COURT: All right. Very well, Mr. Smith. I

read your papers on that latter point.

As to the point about COVID, you mentioned a case in which someone -- a defendant's two lifetime sentences were reduced to time served; is that --

MR. NICHOLAS SMITH: Correct, Your Honor.

THE COURT: That was not one of my cases, was it?

MR. NICHOLAS SMITH: No.

THE COURT: No, I didn't think so.

All right. Let's -- let me hear, Mr. Hull, from you, please.

MR. HULL: Good afternoon, Your Honor.

And let me, first of all, say that I support almost everything that Mr. Smith said, but let me make some points that are related, supportive of his arguments and, I think, very important.

I want to step back a little bit. All of -- we're all lawyers. Most people in this room or this discussion are lawyers. We like theories. And the Government has had a number of rolling theories in this case about how this all occurred, and I made a list of them that I'm not going to go through in graphic detail, but they, kind of, go like this. The Proud Boys were responsible for this. The second theory was that there was multiple small conspiracies of people and groups of people who did this and the rest of it was spontaneous and, kind of, attributable to the madness of

crowds, if you will. The third is Oath Keeper, Three Percent. The fourth theory was -- and my favorite -- Alex Jones, Roger Stone; then, about three weeks ago, it was back to an alliance between Proud Boys and Oath Keepers probably in Central Florida, although I guess both the indictments and the news media had problems putting those two together. So that was abandoned for a while. Now, we're back to Oath Keeper. And I'm not sure what it will be next week, but I just gave you six.

I like theories. That's one of the reasons I became a lawyer. I like ideas. But I think we need to really be thinking about all of this as, you know, officers of the court, me for my client, Joe Biggs. Why are we rolling theories and, at the same time which is just as important, having accumulating or snowballing discovery going at the same time? We've got new theories that are being put forth in large part arising out of certain indictments, and that's fine. They can, you know, plead alternatively. They can be inconsistent. But we have accumulating discovery at the same time. And from what I understand -- I went through a lot of the discovery. I had a little bit of a delay but finally finished the discovery I'd been given -- which is voluminous -- over the weekend. And I understand from talking to Mr. McCullough there will be a lot more discovery. The discovery in this -- there

will be discovery that I can possibly get from other defendants, but certainly I will get from the Government. I appreciate the discovery has not -- I appreciate that it is trickling in, if you will, but that tricking in is, from what I understand, at some point, likely to be from time to time a snowball. We've got -- a snowballing, if you will. So we've got all these shifting theories and discovery that, you know, keeps building up and, at the same time, I have a client who is here today, I think, because, in fact, we are in detention land. We're talking about, is he dangerous? And we're also talking about whether he's a flight risk, whether he would flee. So I would hope that the Court could, kind of, look at all of this through the lens of shifting theories and more discovery to come, because there's quite a bit. And Mr. Smith's right. There's a tendency here a little bit, maybe, by everyone on both sides to cherry-pick about what's there, but I understand a lot more is coming.

Now, on Mr. Biggs himself, Mr. Biggs was arrested -- and I say that in quotations -- turned himself over on January 20th, Inauguration Day. He did that to the care of two FBI agents that he knew. One in particular, he'd known for a long time. He has been on home detention for -- I wrote this down -- 11 weeks or 77 days or 2 months and a week. There's different ways of, you know, putting

it. And the day that -- two days after the Government filed its motion -- they filed it on a Saturday. On Monday, I got in touch with Mr. Biggs's probation officer or Pretrial Services person and there is in Document No. -- I filed two versions of it, one proofread -- better proofread and the other was the original, 42 and 47. And you will see at the end of that one exhibit is where the Pretrial Services, Mr. Sweatt, in Orlando says he -- that, I have no concerns about his compliance with his conditions of release or his location monitoring equipment.

Now, what's really interesting -- and I did not notice this until really about a week ago -- is that the same day or the day afterwards, there was also a Pretrial Services report, I think, that His Honor had ordered from D.C. And D.C., of course, has had Orlando be the Pretrial Services point people. That would be Charles Sweet -- excuse me, Charles Sweatt, not Sweet. And there is a comment in there that was given to Christine Schuck -- I might be mispronouncing her name -- who's with Pretrial Services in D.C., and that is that Mr. Biggs has been super compliant. Super compliant since January 20th. Your Honor, you've probably seen more reports than I have. I've seen a lot of these. Maybe Mr. McCullough's seen more. But I have never seen the nomenclature "super compliant" be used in a Pretrial Services assessment of someone who was a defendant

in a case, and I wanted to bring that to your attention.

As, I think, the Court knows from my filing which is hopefully short and sweet, the primary thing in Mr. Biggs's life is a young daughter who's --

(Brief interruption.)

Excuse me. I'll get rid of that. I apologize.

(Brief pause.)

My apologies.

The primary thing in Mr. Biggs's life and has been for three or four years under this -- excuse me, under -- three years under this regime is a daughter who he extricated for a lot of different reasons from Austin, Texas, when he moved in 2018 to the Ormond Beach area. When he is at home during the day, he has primary care for his daughter. She will turn four this month. And there are other people that can help, but that is the primary thing in his life, and it may be the reason why he's been speaking almost daily -- pretty close to daily, maybe, about four or five days -- would be an exception to his Pretrial Services person, Mr. Sweatt, in Orlando. He has been -- as I've mentioned in other hearings, he's been a model pretrial defendant.

I don't know -- I could go on about certain aspects of Mr. Biggs not being dangerous and not being a risk, but I'm not sure that -- I think, maybe, if the Court

would ask me some questions, I'd be happy to field them. But I'm not sure that I need to say much more than what's in the record about his compliance so far. Is he dangerous? Is he a risk? The answer to both is clearly no. We can nitpick on some things. It happened with respect to the fence; what planning is; what fundraising is; and what certain comments are that were made, sort of, right after this event, but I would like to focus on the things I just mentioned about Mr. Biggs's home detention so far.

He has, by the way, also been --

(Brief interruption.)

MR. NICHOLAS SMITH: Your Honor, if I may, I think I --

MR. HULL: I'm sorry?

THE COURT: Go ahead, Mr. Hull.

MR. HULL: I would be more than happy to answer questions that His Honor had. There is a number of things that I wrote down when Mr. McCullough was talking, a few points when Mr. Smith was talking, and I'm not sure all of them need to be addressed today, but this has been a model pretrial defendant, and the evidence that's been used so far has been somewhat vague and flimsy and, I think, cherry-picking would be the word that I would use, as well. I was surprised this was filed and, to be honest with you, I asked that it be withdrawn and it was not, and I was

surprised at that, too.

THE COURT: No, Mr. Hull. I don't have any specific questions. I think you've made the point about your client and his both lack of a record and compliance while on supervised -- while on release in this case.

Mr. McCullough, why don't I give you -- before we -- so what I plan to do is, then, just pick a very quick turnaround date, have the Government -- Mr. McCullough, I assume -- how quickly do you think you'll be able to get me whatever you -- whatever video you want to get me or --

MR. MCCULLOUGH: Before the close of business today.

THE COURT: Okay.

MR. MCCULLOUGH: Before 5:00 p.m. today.

THE COURT: All right. Great.

So before we pick a quick turnaround time, and I'll rule when we come back, I want to allow you, Mr. McCullough, to address anything either Mr. Smith or Mr. Hull has raised in their argument.

MR. MCCULLOUGH: I appreciate that, Your Honor.

A couple things that Mr. Smith raised.

And so Mr. Smith refers to a series of arguments that the Government made and then had to withdraw or -- that's just factually untrue. The Government made statements as to the use of encrypted messages to lead this

group of men. Now, the -- these messages -- these Telegram messages are encrypted messages, and that is just a fact. And Mr. Smith can shake his head as to what "encrypted" means, but there is a difference between end-to-end encryption and end-to-server encryption, and Mr. Smith can basically make these, kind of, windup arguments as though the Government has changed course. The Government has put forward Telegram messages in which planning was occurring and there was an understanding at least -- well, the -- I will say this; that these messages could be, you know, kind of, shielded from public view by nuking them and otherwise. So the Government has not withdrawn its claim as to the use of this Telegram messaging application from which Telegram proudly declares they've never answered service of process on. So I think that's pretty stark that that's where this planning was going on and that's where they're talking about the use of -- sorry, they're talking about, kind of, you know, Let's all, you know -- every -- all the planning stops now unless we're going to be, you know, brought up on gang charges. So I think that's pretty significant.

Second, this question about the passport. Your Honor, you can see Mr. Nordean on the video today. You can look at other pictures. Mr. Smith concocted a distorted picture of Ethan Nordean's face and said, Doesn't look anything like him. Your Honor, it looks exactly like him.

And so, you know, Your Honor can make that comparison as well and we can put that in front of you. Now, the Government did not press forward with the passport argument as to Ethan Nordean and flight risk because he has been home for 30 days and he has not fled. And I'll point out two things. Mr. Smith says exemplary compliance with Pretrial. Perhaps true; however, the, you know -- two points in the Pretrial report, one being the do-not-possess-firearms. In the Pretrial report, On March 31st, 2021, the supervising officer reported that defendant informed him he was missing a firearm and he hadn't reported it stolen. The firearm was reportedly stolen in late December or early January. Just went missing, as it does. You know what else is missing? His passport. The defendant reported to the Western District of Washington that he lost his passport. PSA has no additional information to report. So you know, this idea about exemplary compliance, I think there's -- there are some issues there, you know?

Finally, you know, with respect to, kind of, this idea that there's no future dangerousness, the leadership point that Your Honor pointed to from the Munchel decision is important. It is critical. There are specific and articulable issues that can arise with someone like Defendant Ethan Nordean and Defendant Joe Biggs who are able to plan and organize a group of men to take a violent and

criminal action. Mr. Smith referred to this idea that this is, you know -- that the ransacking of the Capitol would be this kind of a grave crime. Well, it -- the defendants did, in fact, carry that crime out. That is what they are charged with. They are charged with committing a grave act against an institution of democracy. And the idea that someone walks away from that and says, If you feel bad for law enforcement, you're part of the problem, and, you know, I can't quit this, you know -- I'll lose my family; I'll lose my marriage; I can't quit this, I think that that poses a danger. And as to what that danger may be, correct, there will not be another counting of the Electoral College vote. But will there be another meeting of Congress, whether it be the State of the Union? Will there be another meeting of a state or local legislature? Yes, there will be. And so that's the issue, is what will this conspiracy wrought in the future? And I think that there -- for someone that is capable of moving this group of men and to commit these acts, I think that is an important point for Your Honor to consider.

So that -- those were the primary points that I wanted to make and, Your Honor, thank you very much.

MR. NICHOLAS SMITH: Your Honor, since the Government referenced the quality of the evidence we submitted, I'd just like to quickly respond to --

THE COURT: I'll give you a minute, Mr. Smith.

MR. NICHOLAS SMITH: Thank you, Your Honor.

So Mr. McCullough just said that the defense concocted the passport photo of Mr. Nordean that we submitted in our briefs. We didn't concoct it. It was taken right from the Government's briefs.

On the second point, the stolen firearm point, Mr. Nordean has already cleared this up with his probation officer. The fact is, it took him several steps under a state procedure to track down the firearm to accurately represent to the probation officer that it had been stolen and the context and the facts in which it had been stolen. It was left in a vehicle in December or January before a get-together in Seattle. The doors were left unlocked. The gun was taken out. And the reason Mr. Nordean explained this to the probation officer in March was he had to verify his facts to get them represented accurately to the probation officer. And, Your Honor, the probation officer, Mr. Beetham, now acknowledges that there's nothing untoward about the stolen firearm claim.

The one last point, Your Honor, is that you'll notice that Mr. McCullough did not respond to my point about the phone being off during the day or Mr. Nordean supposedly using BaoFeng radios, although he didn't possess them on January 6th. There's no response to that point and it's

significant, Your Honor.

And finally, Your Honor, the thrust of the Government's argument here is that there's some sort of danger that's possible even though he's locked up in his home. They've seized his phone, but let's say there was some theoretical way in which he could communicate inappropriately with others from within the confines of his phone [sic]. That's, sort of, where the Government has retreated to at this point; that there could be communications within a home. So Your Honor, as Your Honor knows, there are --

THE COURT: But, Mr. Smith, when you say within a home, you mean using a computer.

MR. NICHOLAS SMITH: Well, within the place in which he's now -- his strict conditions of release now include home confinement.

THE COURT: Right. No, I understand that --

MR. NICHOLAS SMITH: So with --

THE COURT: -- but my point is --

MR. NICHOLAS SMITH: With a computer --

THE COURT: Right.

MR. NICHOLAS SMITH: -- and I think Your Honor knows that it's not unusual at all, if that is the Government's argument, to impose a separate special condition that would prevent those -- exactly the sorts of

communications the Government is discussing. And, in fact, some judges in the Capitol cases have imposed that condition.

THE COURT: Well, I -- you were going to -- that's where I was about to wind up in this whole thing. That was a -- something I was going to raise, but continue.

MR. NICHOLAS SMITH: And so, Your Honor, we think that if -- a condition -- if the Court is inclined to subscribe to the Government's theory of risk in this case which is virtual risk, the Court could simply impose a condition that would prevent the defendant from not just discussing the case except through lawyers with defendants but from any Proud Boy, period. And in that case, there is no -- then that leaves no articulable risk that the Government has identified to anyone in society.

THE COURT: Well, you have -- you -- the question is whether he would comply, but -- so --

MR. NICHOLAS SMITH: Well, and he -- I -- we would argue his perfect compliance to date would -- is indicative of his compliance with a special condition. But, Your Honor, the last point that Mr. McCullough made was that the future risk is not concerning January 6th. Judge Katsas said we have to look forward, not backward. So the Court -- so the Government has pointed to future meetings of Congress, Your Honor, but that's exactly the point that

Judge Katsas addressed in his dissent. He said that the Government in that case -- in the Munchel case had said, What about March 4th? There was a threat to the Capitol on March 4th. Your Honor probably knows the city was on lockdown, and then this threat didn't materialize. And what Judge Katsas said is the Government cannot keep coming back with threats that don't materialize when they're not connected to the defendant in the case.

THE COURT: All right. I've heard enough on Munchel. I mean, I would just say the fact that a threat doesn't materialize doesn't mean there is no threat going forward, you know? The absence of evidence is not the -- is not evidence of absence -- whatever that old saying is.

All right. So --

MR. HULL: Your Honor, may I have two minutes?

THE COURT: Who -- Mr. --

MR. HULL: Two minutes?

THE COURT: What -- I -- yes, you can have one minute. How's that?

MR. HULL: I -- thank you, Your Honor.

I wanted to make a couple of comments about -- responses quickly to what Mr. McCullough had said about planning, fundraising -- which we're not too worried -- these kinds of things, and I would also ask that all the parties be allowed to supplement somehow, if they did it

within 24 hours, what's been done here today.

THE COURT: Mr. Hull, you --

MR. HULL: Yes?

THE COURT: This isn't -- Mr. McCullough had made these points before and you had an opportunity to respond to them.

MR. HULL: No, no, no, no, these -- well, he did, and I could do them by way of supplement, but I think they're important to raise here.

Mr. Biggs -- and I didn't want to belabor Mr. -- my argument on Mr. Biggs that it would be just to have him remain free. What -- Mr. Biggs has been a planner and a coordinator his whole life. He planned two events like this. They always go to the Capitol. And he's also done them in Portland. Fundraising is always important and it usually goes to, you know, Airbnb. The -- what to wear and what not to wear was because of a stabbing that happened on December 12th in the Harrington Hotel and wanted to make sure that Antifa could not easily locate Proud Boys. There are --

THE COURT: Mr. Hull, all these --

MR. HULL: Yes?

THE COURT: -- arguments you could have made --

MR. HULL: I agree, Your Honor. I'm done.

THE COURT: This is -- and so if you want to file

something, I -- if -- because I'm giving -- because I'm letting the Government go ahead and --

MR. HULL: I would like to. I was trying to cut this short and let you ask me questions. That didn't happen. But I agree. I will just do it by supplement.

THE COURT: All right. If -- let me say this. If any party wants to file a supplement by the -- by today, you're given permission to file something today -- something responding to our discussion here today. And we'll come back shortly and I'll make a decision.

But, Mr. Hull, I didn't mean to cut you off. It's just that -- you could have made -- those are all points you could have made when I called on you to make your argument. So you know, I --

MR. HULL: You're exactly correct, Your Honor. I stand corrected. I appreciate your comments.

THE COURT: All right. So let me ask the parties if they're available -- just looking at -- I have quite a full week. How does 3:00 o'clock on Thursday work or 2:00 o'clock on Friday?

Mr. McCullough, for you first.

MR. MCCULLOUGH: Both of those times work for the Government, Your Honor. Thank you.

THE COURT: All right. Mr. Smith?

MR. NICHOLAS SMITH: Your Honor, we would prefer

the earlier hearing, if --

THE COURT: Thursday?

MR. NICHOLAS SMITH: Yes.

THE COURT: Thursday at 3:00 o'clock. All right.

MR. DAVID SMITH: Excuse me, Your Honor. I have to butt in here. David Smith here.

THE COURT: Yes.

MR. DAVID SMITH: I can't make it on Thursday. My partner doesn't realize that because I just -- I -- he doesn't have my calendar. I can do it on Friday at 2:00 o'clock, though.

THE COURT: All right. Mr. Hull, can you do it at -- Friday at 2:00 o'clock?

MR. HULL: Yes, sir.

THE COURT: All right. So I'll receive whatever additional -- whatever supplements the parties want to file today; and, Mr. McCullough, I'll receive that -- you'll send someone over with the video; and then we'll be back here Friday at 2:00 o'clock in which -- at which time I will rule.

Right now -- let me just ask -- I guess, Mr. McCullough, you're the best person to ask. I know -- what is the -- had we tolled the speedy trial clock until we were -- until our last scheduled hearing on the 8th?

MR. MCCULLOUGH: That -- our last scheduled

hearing on the --

THE COURT: I'm sorry, the 1st.

MR. MCCULLOUGH: -- 2nd -- the 1st --

THE COURT: On the --

MR. MCCULLOUGH: On Thursday --

THE COURT: The 1st.

MR. MCCULLOUGH: -- the 1st. Correct.

THE COURT: The 1st.

MR. MCCULLOUGH: So we were tolled through April 1st. I think these -- I think we should -- the Government would propose to continue tolling from the 1st and through this date and until Your Honor renders a decision on this motion. The efforts to provide discovery to the defendants is ongoing. As you -- as Your Honor has pointed out, the discovery is quite voluminous; will give the defendants an opportunity to receive and review that discovery. So the Government would submit that tolling is in the interests of justice at least through the time of Your Honor rendering a decision. The Government would also submit that there -- that that time should continue to toll afterwards. The Government has not obtained Mr. Smith or Mr. Hull's view on that.

THE COURT: All right. Mr. -- let me ask Mr. Smith and Mr. Hull. I'm not going to ask you to toll it or suggest that we toll it until I -- I mean, at -- to some

indeterminate time in the future. My thought is we could do it nunc pro tunc to the 1st which is where, I think, we left off and then simply to Friday, the 9th. So it would be nunc pro tunc from the 1st to the 9th and for the reasons the Government laid out in terms of voluminous discovery. I'll rule when we come back on the 9th, and then we'll figure out where we go from here with regard to speedy trial.

MR. NICHOLAS SMITH: No objection, Your Honor.

MR. HULL: No objection.

THE COURT: All right. So that's what I will do.

I will find that the time nunc pro tunc to April 1st through our next hearing April 9th is excludable under the Speedy Trial Act because the ends of justice that are served by taking such action outweigh the best interests of the public and this -- and the defendant -- both defendants in a speedy trial. I'm doing so here to give the defendant -- both defendants a continuing opportunity to receive the very voluminous discovery in this case. And we will further address that, then, on the 9th.

Is there anything further, Mr. McCullough?

MR. MCCULLOUGH: No, Your Honor. Thank you.

THE COURT: All right. Is there anything further, Mr. Smith?

MR. NICHOLAS SMITH: No. Thank you, Your Honor.

THE COURT: Anything further, Mr. Hull?

MR. HULL: No, sir.

THE COURT: All right. Very well. I will see everyone on Friday and we will go from there.

Counsel are dismissed.

(Proceedings concluded at 1:25 p.m.)

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CERTIFICATE OF OFFICIAL COURT REPORTER

I, TIMOTHY R. MILLER, RPR, CRR, NJ-CCR, do hereby certify that the above and foregoing constitutes a true and accurate transcript of my stenographic notes and is a full, true and complete transcript of the proceedings to the best of my ability, dated this 14th day of April 2021.

/s/Timothy R. Miller, RPR, CRR, NJ-CCR
Official Court Reporter
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