UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA v. DAVID JUDD, Defendant.	Crim. Action No. 1:21CR40 (TNM)

REPLY TO THE GOVERNMENT'S SENTENCING POSITION

David Judd, through counsel, respectfully submits this Reply to the government's Sentencing Position. In this Reply, Mr. Judd will address the following points: 1) the government mischaracterizes and exaggerates the evidence and openly contradicts prior representations it made to counsel about its view of the appropriate guideline range in this case; 2) USSG § 2A2.2 and § 3A1.4 do not apply, and the government's request for an upward variance is unjustified; and 3) the cases upon which the government relies in its request—*Robertson*, *Reffitt*, and *Webster*—are easily distinguishable both factually and because each of the these defendants denied responsibility and put the government to its burden in weeks-long jury trials unlike Mr. Judd, who accepted responsibility.

The Court should not seriously consider the government's request. Instead, for each of the reasons set forth in the defense Memorandum and sentencing video[1] and

[1] Counsel have previously provided the sentencing video to chambers and the government.

Full Text

8 UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA UNITED STATES OF AMERICA v. Crim. Action No. 1:21CR40 (TNM) DAVID JUDD, Defendant. REPLY TO THE GOVERNMENT'S SENTENCING POSITION David Judd, through counsel, respectfully submits this Reply to the government's Sentencing Position. In this Reply, Mr. Judd will address the following points: 1) the government mischaracterizes and exaggerates the evidence and openly contradicts prior representations it made to counsel about its view of the appropriate guideline range in this case; 2) USSG § 2A2.2 and § 3A1.4 do not apply, and the government's request for an upward variance is unjustified; and 3) the cases upon which the government relies in its request—Robertson, Reffitt, and Webster—are easily distinguishable both factually and because each of the these defendants denied responsibility and put the government to its burden in weeks-long jury trials unlike Mr. Judd, who accepted responsibility. The Court should not seriously consider the government's request. Instead, for each of the reasons set forth in the defense Memorandum and sentencing video 1 and 1 Counsel have previously provided the sentencing video to chambers and the government. 1 8 other exhibits submitted to the Court, a non-custodial sentence is appropriate, constitutes a just punishment, and avoids unwarranted disparities. 2 1. The government mischaracterizes the evidence. The government mischaracterizes Mr. Judd's actions and role when it states that Mr. "Judd acted as an on-the-ground commander" and Mr. "Judd spent over an hour using hand gestures to direct rioters into the tunnel, yelling commands to organize rioters, passing items into the tunnel to be used as weapons." ECF. No. 527 at 2. Mr. Judd was located by the tunnel for over an hour and he joined others in the crowd in waving people towards the tunnel. He was no commander; however; he did not "direct traffic" for hours. He had no bullhorn like others around him. He did not climb up onto the archway as others did so he could yell down to protestors on the ground. He did not go toward the front of the protestors inside the tunnel. Video evidence shows that he periodically waved his arms between 2:52pm-3:16pm,3 and he raised his arms a single time when a shield was passed overhead. His waving of a small American flag—a gesture the government has attempted to characterize as part of Mr. Judd's supposed "organizing" – exemplifies misguided patriotism, not leadership. 2 Counsel also attach one additional letter in support of Mr. Judd, as a supplement to Exhibit 1 to the Defense Sentencing Memorandum, which is a collection of letters to the Court about Mr. Judd 3 See public source video, Just another channel, 3954b33c-dbf3-4b4c-aea5-2aa48c11260b. Another protestor with a bullhorn standing on the archway is seen doing far more to "direct traffic" than Mr. Judd, who is circled in orange. 2 8 Mr. Judd has acknowledged repeatedly that his actions on January 6 were reprehensible. He should have left the area of the tunnel. He should not have tossed a sparkler. It was thoughtless and potentially dangerous. He will regret his conduct for the rest of his life. That said, the video evidence belies the government's hyperbolic characterization of his conduct. The Court should put aside the government's exaggeration in service of its argument for extensive, disproportionate prison time, As for what we now know was not a firework, 4 it is telling that the government spends over three pages of its memo describing in graphic detail the effects of another defendant's firework. Here, the government unintentionally lends support to Taylor Aff. Agent Taylor's conclusion. Indeed, that the other defendant's device did detonate, causing explosion, supports Mr. Taylor's conclusion that the sparkler Mr. Judd tossed was not designed to cause an explosion. As such, it could not have seriously injured anyone, even in the context of a crowded tunnel.2. The government contradicts its prior representations and has broken the understanding between the parties. Undersigned counsel had long communicated Mr. Judd's desire to resolve the case and spare the government and the Court the time and expense of a trial. During the protracted plea negotiations in this case, on February 22, 2022, the government sent one of undersigned counsel an email that stated, "the supervisory team at the USAO has discussed Mr. Judd's case at length." The email went on to say, "recognizing that the level of violence each individual engaged in on January 6th is on a continuum, we are willing to offer Mr. Judd a revised plea offer." That plea offer— 4 See Defense Sentencing Memo, Exhibit 2, Taylor Aff. 3 8 reportedly considered carefully by the DOJ supervisory team—calculated a guideline range of 41 to 51 months. 5 In subsequent communications, the government affirmed that calculation. 6 Like many January 6 defendants, Mr. Judd reasonably wished to preserve his objection to the application of 18 U.S.C. § 1512 to his conduct in light of Judge Nichols' ruling in Miller. The government rejected a conditional plea and instead proposed a stipulated trial agreement, with the implication that it would request a guideline range consistent with that offered in the plea agreement. Specifically, government counsel wrote, I would assume [the guideline range is 41 to 51 months] since that is how we had previously calculated the guidelines. But, until we have it fully drafted, I cannot promise that for certain. I do know that the 41-51 range is consistent with what has been agreed to by the government in plea agreements in most if not all of the 1512 cases that do not include 111(b) or 2111, but still have assaultive conduct or property damage, to get the plus 8 enhancement under 2J1.2(a)). 7 When the government carefully considered Mr. Judd's case with its supervisory team and calculated the guideline range to be 41 to 51 months, it had all the evidence it has now. Nothing new has emerged that changes the government's earlier characterization of Mr. Judd's case as among those that "do not include 111(b) or 2111, but still have assaultive conduct or property damage." Indeed, early in the case, the government disclosed all the video evidence it now mischaracterizes. Now, only 5 Exhibit 1 to Reply. Prior correspondences from the government that contradict its sentencing position. (emphasis added). 6 Id. 7 Id. (emphasis added). 4 8 after Mr. Judd entered into the stipulated-trial agreement the government offered, the government requests a sentence twice that of what it initially suggested would be appropriate. Government representations are supposed to matter, especially when those representations induce a defendant to waive constitutional rights. See Santobello v. New York, 404 U.S. 207 (1971) (The plea bargain "phase of the process of criminal justice. . . must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."); United States v. Clark, 55 F.3d 9, 14 (1st Cir. 1995) ("Because plea bargaining requires defendants to waive fundamental constitutional rights, we hold prosecutors engaging in plea bargaining to the most meticulous standards of both promise and performance.") (emphasis added). The government's contradicting representations call into question the government's current position as to the degree of criminal culpability of Mr. Judd and the appropriate sentence that is sufficient and no

greater than necessary. Indeed, the government can offer no reasonable explanation for its reversal of its prior representations. It appears that in these cases, in pursuit of the most draconian sentence it can request, the government is willing to cross boundaries to which officers of the court typically adhere. The Court should reject the government's argument for a 90-month sentence as incredible. 5 8 3. The Aggravated Assault Guideline does not apply to Count 22. 8 Mr. Judd was convicted of 18 U.S.C. § 111(a)(1) (Count 22), namely, "Assaulting, Resisting, or Impeding certain officers." Using a common-sense approach, it follows that the corresponding Sentencing Guideline is § 2A2.4, "Obstructing or Impeding officers." The government attempts to ratchet up the guideline range by arguing that the aggravated assault guideline applies to Count 22 on the grounds that the item tossed was a dangerous weapon with the intent to cause bodily injury. The government's reliance on erroneous facts and guidelines commentary as opposed to the guidelines themselves put to rest its guidelines argument. Application Note 1 to 2A2.2 relevantly defines "aggravated assault" as "a felonious assault that involved a dangerous weapon with intent to cause bodily injury (i.e., not merely to frighten) with that weapon" or "an intent to commit another felony." The sparkler was not a dangerous weapon, and Mr. Judd did not toss it with the intent to cause bodily injury. 9 The commentary's expansive definition of aggravated assault includes "intent to commit another felony," which might arguably apply. As these definitions appear in the commentary and not in the Guideline itself, the commentary is not accorded the full force of the Guideline but rather is considered "an agency's interpretation of its own legislative rule." Stinson v. United States, 508 8 Mr. Judd agrees with the PSR that the offense level is determined by applying USSG § 2J1.2; proper application of that § 2J1.2 yields a guideline range of 15-21 months. See ECF. No. 529 at 5. 9 Statement of Offense, ECF. No. 433. 6 8 U.S. 36, 44 (1993). 10 Moreover, the Guidelines' application notes do not qualify for deference under Stinson if they "expand[] rather than interpret[] the Guideline." United States v. Winstead, 890 F.3d 1082, 1091 (D.C. Cir. 2018). The Sentencing Guidelines have separate guidelines for Aggravated Assault (§2A2.2), Assault (§2A2.3) and Obstructing or Impeding Officers (§2A2.4). Meanwhile, the statute for assaulting officers, 18 U.S.C. § 111, includes three degrees of assault. For (simple) assault, the maximum punishment is not more than one year. For offenses that involve physical contact or the intent to commit another felony, the maximum punishment increases to eight years. Both circumstances are found in the same subsection as assault, 18 U.S.C. § 111(a). Congress wrote a separate subsection explicitly titled "Enhanced Penalty" that applies to offenses involving a dangerous weapon or bodily injury, see 18 U.S.C. § 111(b), and increases the statutory maximum to twenty years. In doing so, Congress made a clear distinction in both the structure of the statute and the escalating punishments. The only offenses that qualify for an "enhanced penalty" of up to twenty years in prison are those that involve a dangerous weapon or bodily injury. While physical contact and the intent to commit another 10As the Supreme Court made clear in a recent decision, there are important limits to the deference courts give to an agency's interpretation of its own rules. See generally Kisor v. Wilkie, 139 S. Ct. 2400, 2424-2418 (2019). The Court in Kisor held that, to be granted deference (referred to as Auer deference in reference to Auer v. Robbins, 519 U.S. 452 (1997)), the agency's interpretation must be of a regulation that is genuinely ambiguous. 139 S. Ct. at 2415. Genuine ambiguity cannot be determined based solely on the plain language of the regulation. Instead, courts must exhaust all the "traditional tools" of construction, including consideration of the text, structure, history and purpose of the regulation. Id. (citations omitted). Even if genuinely ambiguous, an agency's interpretation must still be "reasonable" for it to co

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2. The government contradicts its prior representations and has broken the understanding between the parties.

Undersigned counsel had long communicated Mr. Judd's desire to resolve the case and spare the government and the Court the time and expense of a trial. During the protracted plea negotiations in this case, on February 22, 2022, the government sent one of undersigned counsel an email that stated, "**the supervisory team at the USAO has discussed Mr. Judd's case at length.**" The email went on to say, "recognizing that the level of violence each individual engaged in on January 6th is on a continuum, we are willing to offer Mr. Judd a revised plea offer." That plea offer—

[4] *See* Defense Sentencing Memo, Exhibit 2, Taylor Aff.

reportedly considered carefully by the DOJ supervisory team—**calculated a guideline range of 41 to 51 months**.[5] In subsequent communications, the government affirmed that calculation.[6]

Like many January 6 defendants, Mr. Judd reasonably wished to preserve his objection to the application of 18 U.S.C. § 1512 to his conduct in light of Judge Nichols' ruling in *Miller*. The government rejected a conditional plea and instead proposed a stipulated trial agreement, with the implication that it would request a guideline range consistent with that offered in the plea agreement. Specifically, government counsel wrote,

> I would assume [the guideline range is 41 to 51 months] **since that is how we had previously calculated the guidelines**. But, until we have it fully drafted, I cannot promise that for certain. **I do know that the 41-51 range is consistent with what has been agreed to by the government in pleas agreements in most if not all of the 1512 cases that do not include 111(b) or 2111, but still have assaultive conduct or property damage, to get the plus 8 enhancement under 2J1.2(a)**).[7]

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after Mr. Judd entered into the stipulated-trial agreement the government offered, the government requests a sentence twice that of what it initially suggested would be appropriate. Government representations are supposed to matter, especially when those representations induce a defendant to waive constitutional rights. *See Santobello v. New York*, 404 U.S. 207 (1971) (The plea bargain "phase of the process of criminal justice. . . must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."); *United States v. Clark*, 55 F.3d 9, 14 (1st Cir. 1995) ("Because plea bargaining requires defendants to waive fundamental constitutional rights, **we hold prosecutors engaging in plea bargaining to the most meticulous standards of both promise and performance**.") (emphasis added).

The government's contradicting representations call into question the government's current position as to the degree of criminal culpability of Mr. Judd and the appropriate sentence that is sufficient and no greater than necessary. Indeed, the government can offer no reasonable explanation for its reversal of its prior representations. It appears that in these cases, in pursuit of the most draconian sentence it can request, the government is willing to cross boundaries to which officers of the court typically adhere. The Court should reject the government's argument for a 90-month sentence as incredible.

3. The Aggravated Assault Guideline does not apply to Count 22.[8]

Mr. Judd was convicted of 18 U.S.C. § 111(a)(1) (Count 22), namely, "Assaulting, Resisting, or Impeding certain officers." Using a common-sense approach, it follows that the corresponding Sentencing Guideline is § 2A2.4, "Obstructing or Impeding officers." The government attempts to ratchet up the guideline range by arguing that the aggravated assault guideline applies to Count 22 on the grounds that the item tossed was a dangerous weapon with the intent to cause bodily injury. The government's reliance on erroneous facts and guidelines commentary as opposed to the guidelines themselves put to rest its guidelines argument.

Application Note 1 to 2A2.2 relevantly defines "aggravated assault" as "a felonious assault that involved a dangerous weapon with intent to cause bodily injury (*i.e.*, not merely to frighten) with that weapon" or "an intent to commit another felony." The sparkler was not a dangerous weapon, and Mr. Judd did not toss it with the intent to cause bodily injury.[9] The commentary's expansive definition of aggravated assault includes "intent to commit another felony," which might arguably apply. As these definitions appear in the commentary and not in the Guideline itself, the commentary is not accorded the full force of the Guideline but rather is considered "an agency's interpretation of its own legislative rule." *Stinson v. United States*, 508

[8] Mr. Judd agrees with the PSR that the offense level is determined by applying USSG § 2J1.2; proper application of that § 2J1.2 yields a guideline range of 15-21 months. *See* ECF. No. 529 at 5.
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U.S. 36, 44 (1993).[10] Moreover, the Guidelines' application notes do not qualify for deference under *Stinson* if they "expand[] rather than interpret[] the Guideline." *United States v. Winstead*, 890 F.3d 1082, 1091 (D.C. Cir. 2018).

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[10]As the Supreme Court made clear in a recent decision, there are important limits to the deference courts give to an agency's interpretation of its own rules. *See generally Kisor v. Wilkie*, 139 S. Ct. 2400, 2424-2418 (2019). The Court in *Kisor* held that, to be granted deference (referred to as *Auer* deference in reference to *Auer v. Robbins*, 519 U.S. 452 (1997)), the agency's interpretation must be of a regulation that is genuinely ambiguous. 139 S. Ct. at 2415. Genuine ambiguity cannot be determined based solely on the plain language of the regulation. Instead, courts must exhaust all the "traditional tools" of construction, including consideration of the text, structure, history and purpose of the regulation. *Id.* (citations omitted). Even if genuinely ambiguous, an agency's interpretation must still be "reasonable" for it to control. *Id.* (citation omitted).

felony make a defendant subject to a greater sentence than assault, those circumstances fall closer, both in penalty and text, to assault than to offenses involving a dangerous weapon or infliction of bodily injury. These distinctions, enacted by Congress, provide important context when determining the weight that should be afforded to the definitions of "aggravated assault" within the commentary to §2A2.2.

The commentary lists four categories of aggravated assault. Three of them are directly tied to the distinction Congress created within the statute itself – use of a dangerous weapon with intent to cause bodily injury, bodily injury, and strangulation. *See* USSG § 2A2.2, Application Note 1. The fourth category – intent to commit another felony – is an outlier because it is unrelated to an intent to commit bodily injury. The Sentencing Commission simply elevated intent to commit another felony into the next more serious category despite the distinctions made by Congress within the statute itself. The Commission, then, made the "intent to commit another felony" prong of 18 U.S.C. § 111(a)(1) tantamount to the aggravated assault crimes contained in the "enhanced penalty" prong of 18 U.S.C. § 111(b), even though the statutory maximums for the different prongs vary by twelve years. Notably, and without explanation, the Commission did not elevate the "physical contact" prong of 18 U.S.C. § 111(a)(1). There is simply no justification for the Sentencing Commission to treat the two prongs of 18 U.S.C. § 111(a)(1) differently than each other, a clear contravention of the distinctions created by Congress. For these reasons, no deference should be given to the commentary that elevates the intent to commit another felony

to an aggravated assault. The definition of aggravated assault can be determined directly by examining the relevant statute directly.

4. USSG 2A2.4 applies under a common-sense and plain reading of the Guidelines.

USSG 2A2.4 is clearly the appropriate guideline for Count 22. Under 2A2.4, the base offense level is 10. If the Court determines that the sparkler was a dangerous weapon under the Guidelines' definition, the offense level is increased by 3 levels. It is important to note here that the Guidelines' definition of "dangerous weapons" broadens and differs in meaningful ways than the Court of Appeals' definition of "dangerous weapon" for purposes of the statutory sentencing enhancement. The Guidelines define dangerous weapon as

> (i) an instrument capable of inflicting death or serious bodily injury; or (ii) an object that is not an instrument capable of inflicting death of serious bodily injury but (I) closely resembles such an instrument; or (II) the defendant used the object in a manner that created the impression that object was such an instrument.

USSG § 1B1.1. The Circuit has defined "dangerous weapon" as an object likely to produce death or great bodily injury. *United States v. Broadie*, 452 F.3d 875, 881-82 (D.C. Cir. 2006). An object that is not likely to produce death or great bodily injury—such as the sparkler—is not a dangerous weapon for purposes of the statute.

Assuming the 3-level "dangerous weapon" increase under the Guidelines and after a two-level decrease for acceptance, the overall offense level for Count 22 under § 2A1.4 is 12, yielding a guideline range of **8 to 14 months**.

5. Section 3A1.4 does not apply

Incredibly, after prior communications in which the government represented that the guideline range after a plea would be 41 to 51 months, without any reference to allegations of terrorism, the government brings up for the first time and requests that the Court apply the terrorism enhancement. Without doubt, the government appears to treat the January 6 cases differently than other cases. Equally without doubt, Mr. Judd's actions nowhere meet the terrorism enhancement.

The government's request for an upward variance under the terrorism enhancement for Mr. Judd's tossing of a sparkler should be dismissed offhand as an absurd contortion of the evidence. Not surprisingly, the government cannot cite a single case in which any district judge has applied the terrorism enhancement to a January 6 defendant, let alone a January 6 defendant like Mr. Judd who engaged in no pre-planning, brought no weapons, who was not part of any extremist organization, and who injured no one. The only case the government cites repeatedly, *United States v. Abu Khatallah*, 314 F. Supp.3d 179, 198 (D.D.C. 2018), is entirely inapposite. Mr. Khatallah was the leader of an extremist militia organization who was convicted after trial of material support of terrorism and related counts for *planning and directing the 2012 Benghazi attack*. The now infamous Benghazi attack that Mr. Khatallah directed was described by the district judge:

> The basic narrative of the attack was not disputed. Beginning at around 9:45 p.m. on September 11, 2012, a group of twenty or more armed men breached the main gate of the Special Mission compound. The Mission housed a contingent of State Department personnel and, that night, U.S Ambassador to Libya J. Christopher Stevens, whose permanent station was in Tripoli but who regularly traveled to

> Benghazi. The intruders set fire to Mission buildings and the fire spread to Ambassador Stevens's living quarters. He and State Department IT specialist Sean Patrick Smith died of smoke inhalation while trapped there. Hours later, militants used small arms, machine guns, rocket-propelled-grenade launchers, and mortars to attack the Annex about a mile away. Two State Department security officers, Tyrone Woods and Glen Doherty, were killed by the mortar fire at the Annex. Three other U.S. government personnel were injured during the attacks.

314 F. Supp.3d at 182. That the government resorts to relying on *Khatallah* in support of its request for an upward variance based on the terrorism enhancement for Mr. Judd once again shows an apparent lack of fair-dealing and rational judgment when it comes to the government's consideration of January 6 defendants. And the government's prior representations further undermine its novel, current position.

6. The three January 6 cases upon which the government relies are easily distinguished.

The government relies on three cases in support of its request for a 90-month sentence for Mr. Judd. Each of these cases is distinguishable in significant respects, not the least of which is that none of those defendants accepted responsibility. Each defendant held the government to its burden and had jury trials. Mr. Judd, on the other hand, entered into a stipulated-trial agreement that spared the Court and the government the resources of a trial. That the government knows this, fails to mention this important distinction, and instead asks the Court to rely on these other cases again demonstrates just how egregious the government's request is here.

The cases upon which the government relies are additionally distinguishable in the following ways:

United States v. Robertson, 21CR34[11]

Mr. Robertson was a police sergeant and an Army veteran. Following the election of 2020, he espoused violence on social medial to overturn the results, including by starting a "counter-insurgency" and through "open-armed rebellion." He traveled to D.C. with a gas mask, food rations, and a large wooden stick. A neighbor and co-defendant testified at Mr. Robertson's trial that Mr. Robertson was planning for violence. As a police officer, he was trained to use the wooden stick as a weapon. When standing with a group on the West Plaza after someone threw a smoke grenade at officers, he blocked officers' path, raising his stick in "port arms," a tactical position used by the military and law enforcement. His stick struck two officers as they tried to move past him. Mr. Robertson entered the Capitol with the first group of those who breached the building. He walked around chanting, banging his stick on the ground. Following January 6, Mr. Robertson bragged on social media about his conduct, showing pictures of himself inside the Capitol with the comment, "I am fucking PROUD of it." He also wrote that the next American revolution had occurred and that people should "buckle up or stay home." After he learned of an FBI warrant, he destroyed his phone, texting a friend, "everything problematic has been destroyed."

While Mr. Robertson was on pre-trial release, he trafficked in firearms in direct violation of the court's order. When his home was searched after he was placed on pre-trial release, law enforcement discovered a M4 rifle and a partially assembled pipe bomb, in direct violation of the court's order. He also had a history of lying about

[11] Gov. Sentencing Memo, ECF. No. 124.

his military record. Mr. Robertson went to trial and was convicted of all counts by a jury.

By contrast, Mr. Judd did not espouse or plan for violence prior to January 6. As members of his family describe, he was part of an innocuous family "text chain" in which the family discussed traveling to Washington to support the president they all admired. When his family could not go, Mr. Judd hitched a ride with two women from the area. He brought no weapons of any kind. Unlike Mr. Robertson, he did not enter the Capitol or boast about the violence that broke out. He never espoused "revolution." And he has complied with conditions of release for the past two years.

United States v. Reffitt, 21CR32

Like Mr. Robertson, Mr. Reffitt had a weeks-long jury trial. Mr. Reffitt traveled from Texas to D.C. armed with an AR-15 rifle and a .40 caliber firearm. On January 6, he carried his firearm, wore a tactical helmet and bullet-proof armor, and carried flexicuffs. Mr. Reffitt was a member of the Texas Three Percenters militia group, a group that reportedly espouses "rebellion" against the federal government. Mr. Reffitt recruited another militia member to travel with him and provided him with armor plates and zip ties. Witnesses testified at his trial that he told members of the militia group that he planned to physically drag Speaker Pelosi of the Capitol building by her ankles, with her head hitting every step of the way down. At trial, the government presented numerous statements and messages in which Mr. Reffitt espoused extreme violence to take over the Capitol. At the Capitol, Mr. Reffitt repeatedly rushed at officers. In its sentencing memo, the government identified Mr. Reffitt's actions as

the first breach of the Capitol. After the breach, Mr. Reffitt threatened to hurt his two children if they reported him, telling them that they would be traitors and traitors get shot. Like Mr. Robertson, Mr. Reffitt gave a media interview in which he boasted about his actions at the Capitol and declared that Congress "had been in power too long" and it was up to him and his compatriots to "notify the government that the transgressions had gone on too long." In a search of his home after January 6, law enforcement uncovered several firearms and an illegal firearms silencer.

Following Mr. Reffitt's conviction by a jury, the government requested an upward departure based on 3A1.4, cmt. n.4., arguing:

> Here, the evidence submitted at trial clearly shows that Reffitt's conduct was calculated for these ends. First, the evidence showed that Reffitt both planned and carried out coercive and intimidating acts targeting the U.S. government. He brought a firearm and police-style flexicuffs onto Capitol grounds. Carrying his holstered handgun and clad in body armor that could withstand rifle fire, Reffitt was one of the first rioters to confront United States Capitol Police officers on the stairs on the west side of the Capitol building. There, he intimidated law enforcement officers by advancing toward them at the head of a mob of rioters. He impeded an interfered with those officers not only by refusing to obey their verbal commands to stop advancing, but also by continuing forward even after they discharged less-than-lethal munitions at him. And, using both his voice (amplified through his megaphone) and hand gestures, he urged others behind him to continue moving toward the Capitol building, which they did, overrunning the officers and breaching the building, causing the legislators to evacuate from their chambers and cease performing their constitutional duties.

ECF. No. 39. Judge Friedrich, a former member of the Sentencing Commission who presided over Mr. Reffitt's trial, declined to apply the enhancement.

The ways in which Mr. Judd's case is different from Mr. Reffitt's case are too numerous to list here. The most salient contrasts are obvious: Mr. Judd was not a

member of a militia organization. He did not recruit and arm another militia member to come with him. He did not carry any firearms. He did not espouse revolution and violence to overthrow Congress. He did not threaten to kill members of his family who might "snitch" on him. To the contrary, he has expressed his remorse and shame repeatedly to his loved ones and became even more involved in his church after January 6.

United States v. Webster, 21CR208

Like defendant Robertson, Mr. Webster was also a police officer. He traveled to D.C. with an NYPD-issued bulletproof vest and a firearm. He also brought a military-issued rucksack containing ready to eat meals and water. He wore his bulletproof vest and carried a large metal flagpole to the Capitol. According to the government, Mr. Webster "led the charge" and positioned himself at the front of a mob facing police officers. During confrontations between the police and protestors, Mr. Webster approached an officer and yelled expletives such as "fucking commie, motherfuckers" at him. After a confrontation with this officer, Mr. Webster began swinging his pole as a weapon, striking the metal bike rack that separated him from the officer. When the officer tried to retreat, *he then tackled an officer to the ground, dragged the officer by his helmet, and tried to tear off his gas mask. This caused tear gas to get trapped in the officer's mask and he struggled to breathe. The officer testified at trial that he felt unable to breathe and felt like he was being kicked on the ground.* That officer sustained bodily injury. After January 6, Mr. Webster told a friend, "[N]ever forget this date." He also deleted photos he took on his phone on January 6.

At trial, Mr. Webster testified and called the officer he assaulted "a rogue cop" and questioned the officer's integrity. Mr. Webster never apologized to the officer he attacked.

Once again, Mr. Judd's case stands in sharp contrast. He did not travel to Washington with items such a bulletproof vest and rucksack of provisions, which signifies a readiness for violence. He did not bring a firearm or a pole. He did not tackle an officer to the ground or cause bodily injury. He did not have military training or law enforcement training that he utilized to attack police officers. He did not put the government to its burden. Far from blaming officers, Mr. Judd has apologized to officers and those who were inside the Capitol.

The cases the government relies on are unpersuasive and only serve to highlight mitigating factors that warrant a downward variance for Mr. Judd, not the least of which is his wholehearted acceptance of responsibility, reflected in his agreement to a statement of offense, his letter to the Court, his statements to family and loved ones, his complete compliance with conditions of release, and his increased involvement in his church and volunteer activities. These manifestations of Mr. Judd's remorse show that instead of doubling down on the terrible things that took place on January 6, he is has learned and grown from his admitted lack of judgment.

Conclusion

The government's request for extensive prison time undermines its own credibility and should not be considered seriously by this Court.[12] Instead, a non-custodial sentence following the time that Mr. Judd served incarcerated pretrial will promote respect for the law and basic principles fair play in our criminal legal system, avoid unwarranted disparities with other January 6 cases and cases that arise out of heated political protest, and is sufficient to meet all other goals of sentencing.

Respectfully Submitted,

A.J. KRAMER
FEDERAL PUBLIC DEFENDER

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[12] Should the Court impose a custodial sentence, Mr. Judd will move for release pending appeal under 18 U.S.C. § 3143 and would respectfully request a briefing schedule.

From: Larce Blake <[redacted]>
Date: Tue, Feb 21, 2023 at 11:33 AM
Subject:
To: Larce Blake <[redacted]>

Dear Honorable Judge,

I am writing to express my support for my neighbor, David, who is currently facing charges that I believe do not accurately represent the man I have come to know over the years. As a neighbor, mentor, and friend, I have known David for many years, and he has always been a man of great integrity, compassion, and faith.

Growing up in our neighborhood was not easy, but David made it a lot more bearable. One of my fondest memories of growing up with David was the way we used to play sports in the cul-de-sac. We would spend hours outside, tossing a football, dribbling a basketball, or hitting a baseball, and David was always the one leading the way.

Despite the fact that we had limited space to work with, David would always find a way to turn our games into something special. He would use his creativity and ingenuity to come up with new variations on old classics, and he would encourage us to push ourselves to be the best we could be.

David wasn't just a great athlete; he was also a great teacher. He would take the time to show us how to throw a perfect spiral, how to make a layup, or how to swing a bat. He would patiently explain the rules of the game and offer tips and tricks to help us improve our skills.

Beyond his athletic abilities, David was always a role model for us. He was kind, respectful, and always willing to lend a helping hand. He taught us the importance of hard work, determination, and perseverance, and he showed us how to be good citizens and community members.

Throughout his life, David has been a devoted man of God, and his faith has been the foundation of his character. He has always been honest, hardworking, and dedicated to his family and community. He has never been involved in any criminal activities, and the charges he is facing are entirely out of character.

I believe that David deserves a fair sentencing, and I trust that justice will be served. I urge the court to take into consideration his exemplary character, his many years of service to the community, and the positive impact he has had on so many lives.

Thank you for your time and consideration.

Larce Blake