IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	
v.	)	**Criminal No. 1:21-CR-00236-JDB**
	)	
FEDERICO GUILLERMO KLEIN,	)	
	)	
Defendant.	)	

REPLY IN SUPPORT OF DEFENDANT FEDERICO KLIEN'S MOTION FOR REVIEW AND REVOCATION OF DETENTION ORDER

The government asks this Court to detain Defendant Federico (a/k/a Freddie) Klein based solely on the conduct with which he has been charged, despite no other allegation, let alone any attempt to "clearly articulate," a future threat to the community. They do so based on the suggestion that because Mr. Klein was an employee at the Department of State on January 6, 2021 his alleged participation in the events of that day somehow alter the burden of proving, by clear and convincing evidence, that Mr. Klein presents an *identified and articulable threat* to an individual or the community.

The government's demand is further exacerbated by its request that Mr. Klein's Speedy Trial Act rights be suspended while the government conducts its investigation. The irony of the confluence of these events should not be lost – while the government argues without basis that Mr. Klein is a danger to the community, their demand has in fact placed Mr. Klein in danger. *See* Josh Gerstein and Kyle Cheney, Capitol Riot Defendant Alleges Beating by Jail Guards,"

Politico (April 6, 2021).[1] The government's demand for pretrial detention is not supported under the law and this Court should respectfully revoke the Detention Order in this matter.

I. It is an Unconstitutional Deprivation of Mr. Klein's Liberty to Detain Him Pending Trial Based Solely on the Conduct He is Merely Alleged to have Committed.

The only new evidence cited by the government in support of its demand for Mr. Klein's pretrial detention is the statement of a woman alleged to have been in a romantic relationship with Mr. Klein, despite an acknowledgement that it has now searched his phone and vehicle. *See* Govt. Opp. at 18 (ECF No. 25). In summarizing its proffer of the evidence against Mr. Klein, the government asserts: "The dangerousness of Klein's participation in the mob that day is only amplified by the fact that, at that time, he was an employee of the Department of State, with an obligation to uphold the Constitution." *Id.* at 24. The government concludes, "[i]f Klien is unwilling to obey orders while in full view of law enforcement, or to conform his behavior to the law when he disagrees with it, despite his oath to the Constitution, it is unlikely that he would adhere to this Court's directions and release orders." *Id.* at 25.

However, "[d]etention cannot be based on a finding that the defendant is unlikely to comply with conditions of release absent the requisite finding of dangerousness or risk of flight; otherwise the scope of detention would extend beyond the limits set by Congress." *United States v. Munchel*, 2021 U.S. App. LEXIS 8810, at *17 (D.C. Cir. March 26, 2021). Rather, "[t]he crux of the constitutional justification for preventative detention under the Bail Reform Act is that, '[w]hen the Government proves by clear and convincing evidence that an arrestee presents an

[1] *Available at* https://www.politico.com/news/2021/04/06/capitol-riot-defendant-beating-guards-479413 last visited April 7, 2021).

identified and articulable threat to an individual or the community, . . . a court may disable the arrestee *from executing that threat.*'" *Id.* at *13 (emphasis added) (*quoting United States v. Salerno*, 481 U.S. 739, 751 (1987)). "Thus, a defendant's detention based on dangerousness accords with due process *only insofar* as the district court determines that the defendant's history, characteristics, and alleged criminal conduct make clear that he or she poses *a concrete, prospective threat to public safety.*" *Id.* at *11.

The government concedes it has no evidence to suggest that Mr. Klein harbored any intent to engage in any violence on January 6, or any day thereafter. Govt. Opp. at 18 (ECF No. 25). There is no suggestion that the person alleged to be Mr. Klein attended the events of January 6 while armed with a weapon and Mr. Klein himself was arrested without resistance without evidence of any attempt or intent by Mr. Klein to cover up any conduct or otherwise evade law enforcement.. Rather, the government would have this court hold Mr. Klein to a standard higher than required by the Bail Reform Act – that because he was employed by the federal government, because of his service as an Iraqi War veteran, that "he should have known better." *That*, however, is not the standard this court must employ in ruling on whether the government has "clearly identified" an "articulable threat" by *clear and convincing evidence. See Munchel*, 2021 U.S. App. LEXIS 8810, at *17. The government's conflated assertion that because Mr. Klein served in Iraq or was himself employed by the government and had issued a security clearance demonstrate his *future* danger to the community is not supported by the law. To hold otherwise would constitute a deprivation of his Constitutional rights under the Fifth

Amendment to the Constitution.[2] *See*, *e.g., Salerno*, 481 U.S. at 755 ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."); *United States v. Motamedi*, 767 F.2d 1403, 1405 (9th Cir. 1985) (The Fifth and Eighth Amendments' prohibitions of deprivation of liberty without due process and of excessive bail require careful review of pretrial detention orders to ensure that the statutory mandate has been respected."). These facts show that he is a student of law and order, having gone so far as to risk making the ultimate sacrifice in service of his country.

The government's request of this Court to create a new standard for pretrial detention applicable only to those in the service of their government or our Armed Forces – is not supported by the law and must be rejected by this Court.

II. The Government Has Failed to Prove By Clear and Convincing Evidence that Mr. Klein Poses a "Clearly Identified" and "Articulable Threat" to the Community.

The government's attempt to bolster its assertion that Mr. Klein poses a danger to his community based on the severity of the conduct with which he is alleged to have committed is also unpersuasive. In its filing, the government merely reiterates its prior proffers to the court. However, after the government's disclosure that, upon "[a] secondary review of the BWC

[2] The D.C. Circuit also held that this Court should consider the government's proffer of dangerousness as weighed against the fact that the government did not seek detention of defendants similarly situated, or alleged to have committed more serious offenses. *Munchel*, 2021 U.S. App. LEXIS, at *24. Although Mr. Klein is not aware of how the government has treated each and every defendant charged with conduct arising from the events of January 6, a few notable cases stand out. *See* Order Setting Release Conditions, *United States v. Jones*, No. 1:21-cr-00213 (D.D.C. Jan. 28 2021) (the government did not oppose Mr. Jones's release despite video evidence alleging to capture Mr. Jones repeatedly and forcefully strike and break the glass of the window where Ashli Babbitt was shot and killed); Order, *United States v. Brock*, No. 1:21-cr-140-JDB (D.D.C. Jan. 14, 2021) (releasing Mr. Brock pending trial, despite the government's allegation of Brock's being depicted brandishing zip tie handcuffs and donning military-style tactical gear in the Senate chamber). Mr. Klein submits that as the *only* party with knowledge of *the government's* request, or not, of detention, and this court's ruling on that request, it should have the burden of demonstrating that the Bail Reform Act is being applied similarly in similar circumstances so as to avoid its unconstitutional application.

footage" that "it is no longer certain" of its prior allegation concerning statements allegedly made by Mr. Klein, as well as other concerns discussed telephonically with the government, the government agreed to produce, and at 9:30pm on Tuesday, April 7, 2021, did produce, "all of the BWC . . . upon which the government has based its case [against Mr. Klein] to date." In total, the government produced nine hours, fifty-six minutes, and nine seconds of such footage. Defense counsel has reviewed this footage to the best of its ability given the time between its disclosure and the deadline to submit the instant brief.

Immediately of note is the truly chaotic scene depicted by the footage. Among officer shouts of "back up" are protestor shouts of "I can't go anywhere" and "I can't turn around" and "I can't breath." The crowd is fairly described as a "mob" and at times, officers are calmly speaking with protestors, and even attempting to render aid to those that have been injured. At other times, the police appear to be pushing forward toward the exterior of the Capitol, in an organized formation, while protestors gathered in "the Tunnel" appear to be pushing the other way, towards the interior of the Capitol. Those protestors caught in the middle of the officers and the mob are pushed back in forth and several appear to be violently crushed between the riot shields of the officers and other protestors attempting to move the mob forward. The individual alleged to be Mr. Klein is one of those persons.

The government represents that Figure 1 of its brief depicts Mr. Klein with "the [riot shield] in [his] hands, gripping the handles tightly, and the outside of the shield facing and against an officer's body." Govt. Opp. at 12 (ECF No. 25). The government further represents that: "[t]he force with which Klein shoved the shield against the officer is also evident in Figure 1, which shows his face clenched and the veins in his temple protruding from his efforts." *Id.*

The government conveniently neglects to describe the scene immediately preceding the image they cherry-picked, however. As noted, the body worn camera footage captures a line of police officers in formation preparing to march down the Tunnel to force the protestors out. The police officers proceed calmly and methodologically in slow progression against the disorganized mob, ultimately successfully forcing its participants out of the Tunnel. The person alleged to be Mr. Klein is captured in just the one frame, selected by the government, after which, the footage reveals the police, officer after officer, pushing against each other, as well as the mob. Meanwhile, the people at the front of the mob appear to be being pushed by the mob against the police. Although it's not clear what the person alleged to be Mr. Klein is doing as the police line forces protestors out of the Tunnel, neither he, nor anyone in the video, can be fairly described as "ramming a four-foot by two-foot stolen riot shield into the body of a police officer," *id.* at 20, or "battling with officers." *Id.* at 18. The following screen shot is taken just *four seconds* after the photo relied upon by the government:

These officers are not acting defensively – protecting themselves from a "ramming" riot shield – they are pushing forward offensively in a coordinated fashion to move the mob out of the Tunnel.

In addition, less than two minutes later, the person alleged to be Mr. Klein can be seen with officers on *both sides* of the riot shield alleged to be in his possession, apparently being crushed by either another riot shield and a translucent object (potentially a door). Again, the scene is that of utter chaos, but, importantly, it does not depict any person "engaged in hand-to-hand combat with officers to cross that threshold, in effect leading a wave of rioters in an insurrection against Congress." *Id.* at 19.

The government also represents to the court that Figure 2 of its brief captures Mr. Klein on body worn video camera "shov[ing] a riot shield in between the Capitol Building doors, preventing officers from closing them" *id.* at 6, and "us[ing] the riot shield to aid the greater effort when he used the shield as a wedge in the door to the building, *preventing the officers from closing the doors against the mob*." *Id.* at 15 (emphasis added).

This representation also fails to accurately depict the scene as it happens. Indeed, from the footage relied upon by the government, it's not apparently clear that the officers are trying to close the doors in question. Doing so would have been futile – as depicted in the photograph below, the full-length glass of one of the doors has been shattered, which would allow the protestors to simply step through if they were closed. And in the five seconds between the government's photo, *id.* at 16, and the screen shot below, video footage depicts the police pulling the riot shield away from the protestors and, as depicted in the screen shot below, the individual alleged to be Mr. Klein is depicted ducking to the ground. It's thus unclear whether anyone was

trying to block the police from closing any doors or if the police were pulling the riot shield back from the protestors.

The government describes Mr. Klein as "not a singular violent presence, individually battling with officers in the Lower West Terrace tunnel for thirty minutes" and submits that it has "proffered extensive evidence that Klein was an *active, fervent, voluntary, and committed aggressor* against the police officers attempting to stem the violence." *Id.* at 18-19. However, even an expedited review of the nearly 10 hours of video footage produced by the government tells a different narrative. The government could have made this video available sooner – it was requested on March 14, 2021; the government could have presented this footage at Mr. Klein's prior detention hearings; and the government could have allowed Mr. Klein to challenge its characterization of the footage at a preliminary hearing. Instead, the government withheld this footage – "all of the BWC . . . upon which the government has based its case to date" – until the eleventh hour of Mr. Klein's detention hearing.

The government has chosen not to make this video footage available to the Court, but nevertheless asks the Court to hold that Mr. Klein should be detained pending trial based solely on its *proffer* of the conduct with which Mr. Klein has been charged. Mr. Klein humbly submits that *clear and convincing* evidence requires more.

III. The Government Is Not Entitled to Pretrial Detention

The government asserts that this court should conclude that a charge pursuant to 18 U.S.C. § 111(b) is a "crime of violence" for purposes of determining whether the government is entitled to a detention hearing under 18 U.S.C. § 3142(f)(1)(A). In support of this assertion, the government relies on *United States v. Taylor*, 848 F.3d 476 (1st Cir. 2017), in which the First Circuit held that section 111(b) constituted a "crime of violence" under the Armed Career Criminal Act, 18 U.S.C. § 924(e). Govt. Opp. at 9 (ECF No. 25). And while it may be that a number of Circuits have similarly concluded that section 111(b) constitutes a "crime of violence" under the ACCA, the D.C. Circuit has not. Nor has the government cited any authority concluding that section 111(b) is a "crime of violence" under the Bail Reform Act.

Moreover, the First Circuit's holding in *Taylor* focused on whether the first alternate means of committing the enhanced offense of section 111(b) – using a deadly or dangerous weapon – rendered the offense a "crime of violence." 848 F.3d at 491-94. Indeed, the court expressly acknowledged that the appellant/defendant had not argued that the alternate means of committing the enhanced offense, "inflicting bodily injury," precluded a determination that the enhancement was a "crime of violence." Yet, as the Seventh Circuit held in *United States v. Bennett*, 863 F.3d 679 (7th Cir. 2017), "inflicting bodily injury on or otherwise causing bodily injury to a person . . . need not connote violence." *Id.* at 681. The government attempts to distinguish *Bennett*, by suggesting that one cannot be convicted under section 111(b) for nonviolent conduct. Govt. Opp. at 10 (ECF No. 25) ("Klein identifies no similar case law

interpreting the violent conduct that § 111(b) *necessarily* encompasses (emphasis added)). That, of course, is a misapprehension of the law. *Singleton*, 182 F.3d at 11 ("In determining whether an offense is a crime of violence, courts look to the elements of the offense, not the real world conduct."); *Montcrieffe v. Holder*, 569 U.S. 184, 191 (2013) (A statute cannot categorically be a "crime of violence" unless "the least of the acts criminalized" has as an element the "use, attempted use, or threatened use of physical force.").

Nor is the government entitled to a detention hearing because, as it asserts, a riot shield is an inherently dangerous weapon. *See* Govt. Opp. at 10-11. However, to quote the government, "[i]n most circumstances, a police riot shield is a defensive tool, designed to encourage peace and to protect the bearer from physical injury or other harm." *Id.* at 12. Judge Lamberth's ruling in *Chansley* is not inapposite. There, the court distinguished between "inherently dangerous" weapons, including "guns, knives, and the like" and concluded that a six-foot pole with a metal spearhead fixed to the top was an inherently dangerous weapon. *United States v. Chansley*, No. 21-cr-3-RCL, at 13-14 (D.D.C. March 1, 2021). Although the court went on to observe that "objects that have perfectly peaceful purposes may be turned into dangerous weapons," *id.* (*quoting United States v. Rocha*, 598 F.3d 1144, 1154 (9th Cir. 2010)), the definition considered in *Rocha* and the other cases cited by the court all enjoyed the benefit of a conviction affirming the nature of the object's use. Here, the government would have this Court make a determination as to whether an object is a dangerous weapon based solely on the manner in which an accused is alleged to have used that object.

IV. Tolling the Speedy Trial Act While Ordering the Indefinite Detention of Mr. Klein Denies Justice.

In addition to demanding Mr. Klein's pretrial detention, the government also seeks to delay the proceedings in Mr. Klein's case without a clear delineation of a path to trial. The

government asserts that its request to stay proceedings in this case by at least 60 days is akin to the finding, by a number of courts, that excluding time from Speedy Trial Act calculations because of the COVID-19 Pandemic serves the ends of justice. *See United States v. Talyor*, No. 18-001918, 2020 U.S. Dist. LEXIS 232741, at *23 (D.D.C. Dec. 10, 2020) ("[T]he realities of the present pandemic ensure that the ends of justice served by a continuance decidedly outweigh the interests of [the defendant] and the public in a speedy trial."). Here, the delay is not caused by the unknown time before which we can gather safely to prosecute and defend criminal cases, but by the government's concession that it is overwhelmed by the volume of evidence in *this* case.[3]

Nor does the government address Mr. Klein's argument that the combination of his pretrial detention based solely on the conduct with which he has been charged as well as the government's request to delay proceedings for some indeterminate amount of time constitute an unconstitutional application of the Bail Reform Act. *Salerno*, 481 U.S. at 745 n.3.

This is not a case where the court is asked to assess, looking backwards, a defendant's pretrial length of detention, but rather a case where the government seeks the pretrial detention of a defendant *and does not now know* when it will be prepared for trial. In so doing, the government has asked the Court to apply the Bail Reform Act in a manner that is facially unconstitutional by overriding one of the explicit procedural safeguards recognized by the

[3] The government's citation to a recent opinion of the D.C. Court of Appeals is ironic in that were that Court's precedent applicable here, it could not seek the detention of Mr. Klein absent a showing of *some additional* conduct demonstrating an accused's danger to the community. *See Pope v. United States*, 739 A.2d 819, 827 (D.C. 1999) ("In most, if not all, cases, proof of (1) probable cause that a defendant committed [the crime of assault with intent to kill while armed] and (2) the facts and circumstances of the charged offense, will be insufficient, *without more*, to establish by clear and convincing evidence that a defendant is dangerous and preventively detainable." (emphasis added).

Supreme Court in holding the Bail Reform Act facially constitutional. *See id.* at 747 ("The maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act.").

The government cannot have it both ways – insist on the detention of Mr. Klein based solely on the allegations with which he is charged while concomitantly refusing to provide *any* certainty regarding when Mr. Klein can expect to exonerate himself by a jury of his peers.

CONCLUSION

Mr. Klein has now been detained over a month based solely on the government's allegation that he participated in the violence that occurred at the Capitol Building on January 6. Because the government is not statutorily entitled to a detention hearing in this case; because the government has failed to articulate a specific threat to the community posed by Mr. Klein or that no condition or combination of conditions of release would reasonably assure such safety; or because, in the alternative, detaining Mr. Klein while simultaneously depriving Mr. Klein the right to a Speedy Trial would violate his due process rights, the Court must Order Mr. Klein's release subject to any conditions the Court deems necessary to assure the safety of his community.

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Dated: April 7, 2021

Respectfully submitted,

/s/ Stanley E. Woodward, Jr.

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Defendant.	)	
	)	

CERTIFICATE OF SERVICE

On April 7, 2021, the undersigned hereby certifies that a true and correct copy of the foregoing was electronically filed and served via the CM/ECF system, which will automatically send electronic notification of such filing to the following registered parties:

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