IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**CASE NO. 21-CR-35-3 (EGS)**
	:	
MICHAEL JOHN LOPATIC, SR.	:	
	:	
Defendant.	:	

GOVERNMENT'S RESPONSE TO DEFENDANT'S APPEAL OF DETENTION ORDER

The United States of America, by and through its attorney, the Acting United States Attorney for the District of Columbia, respectfully submits this response to the defendant's Appeal of Detention Order. The government respectfully opposes the Defendant's motion and asks that the defendant, Michael J. Lopatic Sr., remain detained pending trial. The evidence in this case shows that there is a serious risk that the defendant will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror. Furthermore, the evidence shows that the defendant is a danger to the community and to others. Because defendant Lopatic has demonstrated a tendency toward violence, along with a willingness to impede and obstruct the right and lawful function of government and justice, there is no condition or combination of conditions that will reasonably assure his appearance in the District of Columbia and/or the safety of the community. He should therefore be detained pending trial.

In support of its opposition, the government incorporates the arguments in its previous Motion for Pretrial Detention filed on April 2, 2021, 21-CR-35-3 (EGS), ECF No. 34, and its April 6, 2021 Supplemental Motion for Pretrial Detention, 21-CR-35-3 (EGS), ECF No. 40.

PROCEDURAL HISTORY

The Indictment

On January 29, 2021, a federal grand jury sitting in Washington, D.C. returned an Indictment, charging the defendant Michael John Lopatic, Sr. for his role in the riots at the United States Capitol on January 6, 2021. The defendant was charged with: one count of assaulting, resisting, or impeding certain officers, in violation of 18 U.S.C. § 111(a)(1); two counts of Civil disorder, in violation of 18 U.S.C. § 231(a)(3); one count of entering and remaining in a restricted building or grounds, in violation of 18 U.S.C. § 1752(a)(1); one count of disorderly and disruptive conduct in a restricted building or grounds, in violation of 18 U.S.C. § 1752(a)(2); one count of engaging in physical violence in a restricted building or grounds, in violation of 18 U.S.C. § 1752(a)(4); and one count of violent entry and disorderly conduct in a Capitol building, in violation of 40 U.SC. § 5104(e)(2)(F).

Defendant's Arrest and Proceedings in the Eastern District of Pennsylvania

The defendant was arrested at his home in Lancaster County, Pennsylvania, on February 3, 2021. On February 5, 2021, the defendant had his initial appearance in the Eastern District of Pennsylvania, and the United States moved for detention. The government did not appear to articulate, nor did the defendant contest, the basis for a detention hearing under 18 U.S.C. § 3142(f). Magistrate Judge Richard A. Lloret scheduled a detention a pretrial detention hearing for February 9, 2021. Prior to the detention hearing, the government filed a Motion for Pretrial Detention. *United States v. Michael Lopatic*, 21-mj-220, ECF No. 2. Following a detention hearing on February 9, 2021, Magistrate Judge Henry S. Perkin granted the government's motion for the defendant's detention. The defendant was committed to the District of Columbia and transferred to the District of Columbia.

Proceedings in the District of Columbia

On March 29, 2021, the defendant had his initial appearance in the District of Columbia before Magistrate Judge Zia M. Faruqui. At that initial appearance, the Assistant Federal Public Defender requested a detention hearing be set for the defendant, and raised the issue that the defendant's detention hearing in the Eastern District of Pennsylvania was for the purpose of transport, and not detention pending trial. A new detention hearing was set before Magistrate Judge Harvey on April 5, 2021.

On April 2, 2021, the Government filed a Motion in Support of Pretrial Detention requesting the defendant be detained pending trial pursuant to 18 U.S.C. §§ 3142(e) and (f)(2), 21-CR-35-3 (EGS), ECF No. 34, at 1 (hereinafter "April 2nd Motion for Pretrial Detention"). On April 5, 2021, a detention hearing in this matter began before Magistrate Judge G. Michael Harvey. During the hearing, the government reiterated that its basis for requesting a detention hearing was pursuant to 18 U.S.C. § 3142(f)(2) – under provisions (A) a serious risk that such person will flee; or (B) a serious risk that such person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.

Prior to the detention hearing resuming on April 6, 2021, Magistrate Judge Harvey ordered the government in this case, and in *United States v. Kyle Fitzsimons*, 21-CR-158-KBJ, to file supplemental briefing clarifying the legal basis under the Bail Reform Act on which the government relied for its detention request in both matters. The government filed its Supplemental Motion for Pretrial Detention, 21-CR-35-3 (EGS), ECF No. 40 (hereinafter "April 6th Supplemental Motion"), the same day, prior to the resumption of the detention hearing. In the April 6th Supplemental Motion, the government clarified that in the instant matter, as well as in *United States v. Clayton Ray Mullins* (1:21-mj-233), the government requested a detention hearing

pursuant to 18 U.S.C. § 3142(f)(2) – under provisions (A) a serious risk that such person will flee; or (B) a serious risk that such person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror. This is because the government is taking the position that 18 U.S.C. § 111(a)(1) does not constitute a crime of violence. By contrast, in *United States v. Kyle Fitzsimons*, 21-CR-158 (KBJ), the government moved for a detention hearing pursuant to 18 U.S.C. § 3142(f)(1)(A) because one of the charged offenses in that case is 18 U.S.C. § 111(a)(1) and (b) (Assaulting, Resisting, or Impeding Certain Officers causing Bodily Injury), which constitutes a crime of violence. Additionally, regardless of the basis for the detention hearing, the government argued, detention is appropriate under the factors set out in § 3142(g)." *Id*. at 2-3.

After the government filed its April 6th Supplemental Motion, the detention hearing resumed before Magistrate Judge Harvey. During the proceedings, the government noted that after further review of the procedural posture of the case and the proceedings in the Eastern District of Pennsylvania, it appeared that the February 9, 2021 detention hearing before Magistrate Judge Perkin was a pretrial detention hearing under the Bail Reform Act, and that the defendant was ruled to be held pending trial. Magistrate Judge Harvey reviewed the docket in the Eastern District of Pennsylvania and found that the defendant had a detention hearing in the arresting jurisdiction and that the defendant was ruled to be held pending trial. *See* April 6, 2021 Minute Entry for Proceedings held before Magistrate Judge G. Michael Harvey, 21-CR-35-3 (EGS). Magistrate Judge Harvey advised the defendant that he if wished to revoke the arresting jurisdiction's ruling, he may move to revoke that order before Chief Judge Howell.

On April 7, 2021, the government received a copy of the transcript from the defendant's February 9, 2021 detention hearing in the Eastern District of Pennsylvania and provided a copy to

defense counsel. On April 12, 2021, the defendant filed his motion seeking to revoke Magistrate Judge Perkin's decision.

ARGUMENT

1. A Detention Hearing Was Appropriate because there is a Serious Risk the Defendant Will Obstruct or Attempt to Obstruct Justice.

The Bail Reform Act ("BRA") provides for a detention hearing in one of two ways. First, under certain circumstances related to a defendant's past criminal history at the time the defendant is alleged to have committed the offense or the offense the defendant is alleged to have committed, a rebuttable presumption in favor of detention applies, and the court proceeds directly to the detention hearing to consider whether the defendant has rebutted the presumption, and, if so, whether detention is warranted under the factors in § 3142(g). See § 3142(e)(2)-(3). In that route to a detention hearing—which is not at issue here—the court proceeds directly to the question of whether detention is appropriate under § 3142(g) without considering any factors in § 3142(f). *See, e.g., United States v. Taylor*, 289 F.Supp.3d 55, 63-64 (D.D.C. 2018) (finding the charged offenses "trigger[ed] the presumption," and then considering whether detention was appropriate under § 3142(g) without separately analyzing whether a detention hearing was warranted under § 3142(f); *United States v. Hunt*, 240 F. Supp.3d 128, 133-34 (D.D.C. 2017) (same); *United States v. Muschetta*, 118 F.Supp.3d 340, 343-44 (D.D.C. 2015) (same).

The second way in which a case proceeds to a detention hearing is through § 3142(f). Section 3142(f) states that a "judicial officer shall hold a hearing to determine whether any conditions or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of such person as required and the safety of any other person and the community." Such a hearing shall be held upon motion of the government under 18 U.S.C. § (f)(1)

for certain qualifying offenses, none of which is applicable in this case. Under 18 U.S.C. § 3142(f)(2), a hearing shall be held "upon a motion of the attorney for the Government or upon the judicial officer's own motion in a case, that involves- (A) a serious risk that such person will flee; or (B) a serious risk that such person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure or intimidate a perspective witness or juror."

The sole question at the first step under § 3142 is whether the government has established the threshold question of whether "a hearing is appropriate." *United States v. Singleton,* 182 F.3d 7, 9 (D.C. Cir. 1999) (citing 18 U.S.C. § 3142(g)); *see also United States v. Gloster*, 969 F. Supp. 92, 95 (D.D.C. 1997) (holding court can conduct a "fact-sensitive inquiry" into the defendant's long criminal history "only under Sections 3142(e) and (g), that is, after the triggering provisions of Section 3142(f) have been met and detention therefore is available") (emphasis in original). By contrast, at the second step, "the judicial officer must consider several enumerated factors to determine whether conditions short of detention will 'reasonably assure the appearance of the person as required and the safety of any other person and the community.'" *Id*. (quoting 18 U.S.C. § 3142(g)) (emphasis added); *see also United States v. Ailon-Ailon*, 875 F.3d 1334, 1336-37 (10th Cir. 2017) (setting forth same two-step process).

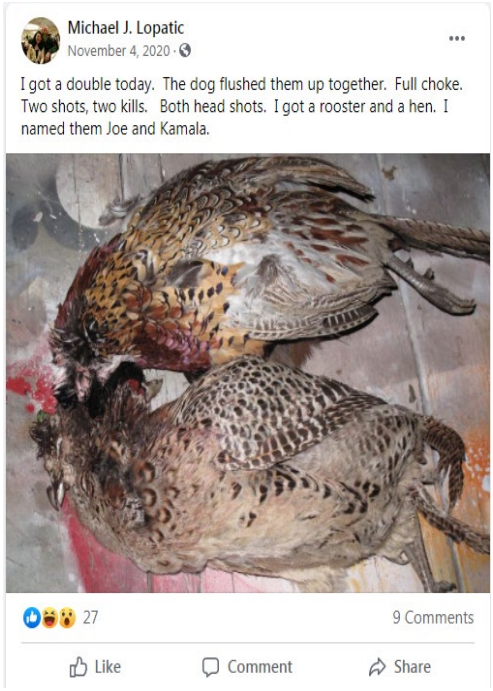
In the defendant's case, a detention hearing was appropriate because there is a serious risk that the defendant "will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure or intimidate a perspective witness or juror." The defendant claims that this case is nearly identical to that of his co-defendant Clayton Mullins, whom Chief Judge Beryl A. Howell ordered released. *See United States v. Clayton Ray Mullins*, 21-mj-233. Defendant's Appeal of Detention Order, at 4. Although Mullins was at the time charged with violations of the same statutes, Defendant Lopatic's conduct, and the evidence against him, is separate and distinct

from Defendant Mullin's conduct. The Court's detention decision must be made individually based upon the evidence that is before the Court, and here that evidence shows that Defendant Lopatic poses a serious risk of obstruction. *United States v. Munchel*, No. 21-3010, 2021 WL 1149196, at *7 (D.C. Cir. Mar. 26, 2021) (citing *United States v. Tortora*, 922 F.2d 880, 888 (1st Cir. 1990)).

Contrary to the defendant's claims that no evidence was presented that the defendant would obstruct justice, the evidence of the defendant's serious risk to obstruct justice began the day after the 2020 Presidential election. Evidence from the defendant's Facebook account directly links his actions on January 6th to his refusal to accept the results of the 2020 Presidential Election and his disgruntled perception of government officials. On November 4, 2020, immediately following the November election of now-President Joseph R. Biden, Jr. and now-Vice President Kamala Harris, the defendant posted to social media that the election was a "Call to Arms." He also posted a photograph of two dead pheasants, apparently shot by the defendant. In the caption, he noted that he named the dead birds "Joe and Kamala," a clear reference to President Joseph Biden and Vice President Kamala Harris.

Exhibit 1

Exhibit 2



These two social media postings indicate the defendant's intent – to literally call others to arms – in response to the election. As discussed in the Government's April 2nd Motion for Pretrial Detention, in the weeks following the November election, the defendant posted more violent

photographs of birds he shot and killed, and linked those birds to current Democratic congressional leaders, including then-Senate Minority Leader Chuck Schumer, the Speaker of the House of Representatives Nancy Pelosi, and Representatives Adam Schiff and Jerry Nadler, both of whom acted as Impeachment managers during the Impeachment of President Donald J. Trump.

Exhibit 3

Exhibit 4


Michael J. Lopatic
November 6, 2020 ·
Another good flush for this pup. I got her while going low running her mouth. I called this old bird Nancy.

Exhibit 5

These photographs are not just violent or offensive – they show the defendant's statement of mind with respect to the 2020 Presidential election, and are a harbinger of his actions to obstruct the peaceful transition of power and the functioning of a democratically elected government. Lest there be any ambiguity about the defendant's intent on January 6th, 2021, days before he traveled to Washington, D.C., the defendant on Facebook and advocated for others to "ASSEMBLE ON

THE CAPITAL JANUARY 6, 2021," and pledged, "UNITED WE STAND, GO FORTH AND WE FIGHT."

Exhibit 6

Starting on January 6, 2021, the defendant's stated intent to obstruct the election and democratic government evolved into actions designed to obstruct not just the election results and the government, but also the judicial system. Indeed, the defendant trespassed across the U.S. Capitol Grounds and assaulted officers in an attempt to obstruct the election – and then stole the body worn camera of another police officer and disposed of it, destroying what would have undoubtedly been a crucial piece of evidence. The video evidence submitted in the April 2nd

Motion for Pretrial Detention, and incorporated herein, shows that the defendant's actions in stealing the bodyworn camera were both premeditated and deliberate. That the defendant had the foresight to traverse an angry mob to take what would have been a crucial piece of evidence in bringing those who attacked the officers – and the Capitol – to justice shows that he was not merely swept up by the passions of the day.

This evidence, specifically (1) social media statements showing the defendant traveled to the U.S. Capitol on January 6th to fight the results of the 2020 Presidential Election, (2) social media statements showing his disdain and disregard for current government officials; (3) his willingness to act violently to obstruct the government from carrying out the election results; (4) his actions to steal an invaluable piece of evidence that could be used to prosecute rioters, including himself, from January 6th; and (5) his decision to dispose of that stolen bodyworn camera – rather than return it to law enforcement, or even wait to provide it to a lawyer, shows that the defendant poses a serious risk of obstructing justice. Accordingly, it was appropriate for a detention hearing to held, pursuant to § 3142(f)(2)(B) because there is a serious risk the defendant "will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure or intimidate a perspective witness or juror."

2. The Basis for Detention Hearing in the First Instance Does Not Constrain the Court's Consideration of the Factors Under § 3142

Under the Bail Reform Act, whatever the basis for the defendant's detention hearing, § 3142's plain language not only permits but requires the Court to consider the full panoply of factors under § 3142(g) in determining whether to release or order detained a defendant. *See* § 3142(g) (noting that the judicial officer "shall . . . take into account" the § 3142(g) factors). As discussed in the April 6th Supplemental Motion, at 2-3, although the government is not seeking a hold pursuant to

18 U.S.C. § 3142(f)(1)(A) [Crime of Violence], it still must argue the appropriate factors under § 3142(g). Indeed, once the government has established a circumstance "triggering a detention hearing," the court "must consider the enumerated factors" in § 3142(g). *United States v. Singleton*, 182 F.3d 7, 9 (D.C. Cir. 1999). In *United States v. Michael Thomas Curzio*, 21-CR-041, Judge Carl J. Nichols considered whether the plain text of the Bail Reform Act limits a judge from considering the enumerated factors in § 3142(g), and held that Section 3142(g) contains no language limiting the consideration of those factors to hearings held only under subsection (f)(1), subsection (f)(2) or vice versa. In holding the defendant, Judge Nichols stated, "I, therefore, conclude that either (f)(1) or (f)(2) is satisfied, and as I've said here, I believe (f)(2) was satisfied, that I'm required to examine all of the Section 3142(g) factors without regard to which subsection initially led the magistrate judge properly in my view to hold the detention hearing." *See Exhibit 6,* Transcript of Video Motion Hearing Before the Honorable Carl J. Nichols, *United States v. Michael Curzio*, 21-CR-41, at 26 – 27. Accordingly, it is appropriate for the Court here to consider the § 3142 (g) factors in determining whether to held the defendant.

3. A Consideration of the § 3142(g) Factors Shows the Defendant Should Remain Held

As the government discussed in its April 2nd Motion for Pretrial Detention, there are four factors under § 3142(g) that the Court should consider and weigh in determining whether to detain a defendant pending trial: (1) the nature and circumstances of the offense charged; (2) the weight of the evidence against the defendant; (3) his history and characteristics; and (4) the nature and seriousness of the danger to any person or the community that would be posed by his release. See 18 U.S.C. § 3142(g). The government incorporates its arguments here in, and submits that there are no conditions or combinations of conditions which can effectively ensure the safety of any other person and the community or the defendant's return to the Court. While his medical

conditions may be serious and should receive appropriate treatment, his medical conditions did not prevent him from traveling from Pennsylvania to DC, rallying his associates to do the same, navigating an intense crowd to the forefront of the police line, assaulting an officer, then making his way through the crowd to go and take the BWC of another officer

CONCLUSION

The defendant has demonstrated a tendency toward violence and a willingness to impede and obstruct the right and lawful function of government and justice. Considering all of the factors set forth above in light of the substantial sentence the defendant faces, there is no combination of conditions that will reasonably assure his appearance in the District of Columbia and/or the safety of the community. He should therefore be detained pending trial.

WHEREFORE, the government respectfully requests the Court deny the Defendant's Appeal of Detention Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the Government's Motion for Pretrial Detention was served on all counsel of record via the Court's electronic filing service.

/s/ Colleen D. Kukowski
COLLEEN D. KUKOWSKI
Assistant United States Attorney

Date: April 19, 2021

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	
	:	Docket No. CR 21-041
	:	
vs.	:	Washington, D.C.
	:	Tuesday, March 9, 2021
MICHAEL THOMAS CURZIO,	:	9:50 a.m.
	:	
Defendant.	:	

TRANSCRIPT OF VIDEOCONFERENCE MOTION HEARING
BEFORE THE HONORABLE CARL J. NICHOLS
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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P-R-O-C-E-E-D-I-N-G-S

THE DEPUTY CLERK: This is criminal case year 2021-041, United States of America versus Michael Thomas Curzio, defendant number two. Pretrial Officer Christine Schuck. Counsel please introduce yourself for the record beginning with the government.

MR. MEINERO: Good morning, Your Honor, Seth Adam Meinero for United States.

THE COURT: Mr. Meinero, good morning.

MR. BALAREZO: Good morning, Your Honor, Eduardo Balarezo for Mr. Curzio.

THE COURT: Mr. Balarezo. It's looking like we have a few other people on. We might as well make sure we have everyone's appearances before we begin.

I note that Mr. Curzio is on by video. It also appears that Ms. Ravindra may be on.

MS. RAVINDRA: Good morning, Your Honor, Tara Ravindra on behalf of the United States. Mr. Meinero is going to be speaking and is on video as well.

THE COURT: Very well, thank you.

I think the parties well know where we are today which is that I ordered supplemental briefing on some issues related to Mr. Curzio's motion to vacate the magistrate judge's detention order here. Here's how I would like to proceed.

I'd like to hear argument beginning first with the

government on the questions that I posed in the last hearing and on which the parties submitted supplemental briefs and on any additional information or evidence that the government would like to bring to my attention or argue about with respect to the question under 3142(g) of whether there are conditions that it could have showed the conditions of release that could have assure the safety of the community.

So I kind of want to wrap both of the legal questions around what's at issue here together with the facts around Mr. Curzio's situation and dangerousness. I'll then turn to Mr. Balarezo, back to the government. I'll probably then take a short recess and come back and do a decision orally, but obviously if something comes up that changes that plan, we'll just take it as it goes.

So, Mr. Meinero, let -- obviously we're here on Mr. Curzio's motion to set aside the magistrate judge's detention order. Why am I not empowered to consider whether the detention hearing should have been held at all under 3142(f)(2)?

MR. MEINERO: Well, sir, there's no mechanism for reopening the question of whether the hearing was appropriate in the first instance.

There was no objection -- as a factual matter, there was no objection to holding the hearing or for the stated basis for the hearing that the Government articulated back on January,

19th. There was an initial appearance on January, 14th on. January, 19th the Government stated that its basis for requesting detention was under 3142(f)(2)(A). There was no objection to that. The magistrate judge proceeded with the hearing; there was no objection at the time to raise a potential issue with the hearing then. And then when this bond review motion came before the Court, it was styled as a motion for modification of the pretrial detention order. So the review we're conducting now is of the order, not whether detention -- the request for detention hearing in the first instance was appropriate.

THE COURT: I think -- but isn't the government's position even if the defendant had argued in front of the magistrate judge that the (f)2 conditions weren't satisfied and had also presented that argument to me, that if the magistrate judge had concluded that the hearing could go forward under (f)(2) that that determination would be unreviewable still even if the argument was preserved?

MR. MEINERO: There's no mechanism, we don't see a mechanism for reviewing the question whether the detention hearing was appropriate.

THE COURT: But I have to decide -- you agree that I am reviewing whether the magistrate judge's decision to order Mr. Curzio's pretrial detention was lawful?

MR. MEINERO: Yes.

THE COURT: That's the question in front of me. The D.C. Circuit has said a precondition to a detention order is a detention hearing under (f)(1) or (f)(2), so why don't I have to decide whether that precondition is satisfied?

MR. MEINERO: Well under 3142(f)(2) and under 3145(b), those provisions provide for reopening the question of the detention, amendment, or revocation of the detention order.

THE COURT: Why wouldn't I be revoking the order on the grounds that the hearing should not have been held in the first place?

MR. MEINERO: Well, as we argued in our pleadings, Your Honor, that just was not an issue that was brought up by the defense. So we argue that any claim now to that effect was forfeited by the defense.

THE COURT: Let's assume --

MR. MEINERO: And, Your Honor, if I may add, if the Court is, if the Court would decide to reopen the question of whether a detention hearing in the first instance was appropriate, we would ask to supplement the record to also ask that the -- or to argue that the hearing was appropriate on the basis of (f)(2)(B) as well as (f)(2)(A).

THE COURT: Let's table that question for a moment because I want to assume hypothetically that the hearing was appropriate under (f)(2)(A), which means that the detention hearing was sought appropriately because there was a risk of

Mr. Cruzio's flight. But I'm now being asked to principally affirm the detention order not because of flight risk but because there are no conditions that could assure the safety of the community, and that strikes me as at least somewhat anomalous, that the purpose of the detention hearing, again, I'm assuming that the detention hearing was properly held under (f)(1)(A), but for purposes of the (g) factors, I am not principally considering whether Mr. Curzio is a flight risk, but whether there's a set of conditions that could assure the safety of the community if he's released. Why isn't that disconnect at least suggestive that if the hearing is for an (f)(1)(A) purpose or that's the reason for the hearing that that limits the question under (g) that I can answer?

A. Well, your Honor, this Court is bound by Singleton; Singleton sets up the two-step process for seeking detention. The first instance or in the -- the first step is whether -- is the question whether a detention hearing is appropriate, and whether there's an appropriate basis to trigger the hearing. When we get to that second part under that second step of the two-step process, Singleton said that assuming a hearing is appropriate, the judicial officer must consider several enumerated factors to determine whether a condition short of detention will reasonably assure future appearance and protect against the danger to the community.

Also a plain reading of the Bail Reform Act shows that

there's absolutely no limitation under the factors under 3142(g). Tying the basis taut, tying what factors the Court must consider to what the basis was for asking for the detention hearing under 3142(f), Congress should have chosen to do so. It could have chosen to say under cases where detention is sought under (f)(1)(A) or (f)(2)(B), the following factors as to dangerousness are to be considered. It could have also said that where detention is sought under (f)(2)(A), the factors to be considered are as to risk of flight or future appearance. But Congress didn't do that, so the plaintiff's reading of the BRA does not limit the government -- or does not limit the Court in considering all of the factors under (g) which includes dangerousness.

THE COURT: Singleton did not address this situation and the only two published Court of Appeals decisions that I'm aware of went the other way. I'm talking about the Third Circuit and the First Circuit holding that you can't consider dangerousness under (g) if the detention sought -- if the detention hearing was sought under (f)(2).

So it seems to me I don't -- obviously I care about the statute primarily, but Singleton to me does not resolve the question before me and what I have is two Court of Appeals decisions who have taken a contrary view to the government's position here. So other than the word must, do you have any other argument or any argument about why those cases were

indirectly decided?

MR. MEINERO: The Hemler line of cases, Your Honor, you're correct appear to arrive at a different conclusion. However, it is not a Circuit Court decision. It's a decision from the Southern District of Florida Holmes. And there was an unpublished decision from the Tenth Circuit that supports our reasoning.

And we simply don't think that the reading in the Hemler line of cases of the DRA is the best plain meaning interpretation of the statute.

THE COURT: Let's assume again that I've concluded that the hearing was appropriately held and that under (g), both the magistrate judge and now I appropriately look at not just (f)(2) related questions, but all (g) questions.

Obviously I read the papers before the last hearing. I had an understanding of the government's argument about why there was no set of conditions that would assure the safety of the community if Mr. Curzio were to be released before trial.

But I wanted to ask you, Mr. Meinero, if you had anything you'd like to add to the argument that was made before. It seems to me that there was at least additional information proffered to the magistrate judge that I didn't have. And I invite you now to, you can give me your whole argument if you'd like or just the parts that you want to highlight that we did not discuss before.

MR. MEINERO: Yes, Your Honor. We relied on everything we mentioned before. But it seems that the most significant fact we had not mentioned before that had come out of the hearing before the magistrate judge was the undisputed fact that Mr. Curzio was in a white supremacist gang while he was incarcerated in the Florida penal system, correction system. It is a gang with a reputation for violence and that fact speaks very strongly to Mr. Curzio's dangerousness.

THE COURT: Is there any evidence in the record that he remains a member of that gang?

MR. MEINERO: Your Honor, if I'm correct, it came out in the detention hearing that Mr. Curzio still has tattoos that are affiliated with the gang. I know Mr. Curzio argued -- counsel for Mr. Curzio argued that he's no longer an associate of the gang, but if he has those tattoos that would seem to belie that assertion.

In any event, his association with the gang while in prison, and that was just up to two years ago, because he was just released two years ago or a little over two years ago, February of 2019, that recent association, undisputed recent association with any violent gang that operates within and outside the Florida correction system is a fact that speaks to his dangerousness.

THE COURT: Thank you Mr. Meinero. Mr. Balarezo, I'm happy to take these issues in any order you'd like. I think --

from my perspective, I think this is the following order I'd like you to address the arguments first. Whether I'm permitted at this stage at all to consider whether the detention hearing was appropriately held.

Then second, even if I couldn't do that in theory, why you didn't and I don't mean you, I mean why Mr. Curzio didn't waive the 3142(f) argument by presenting it not to the magistrate judge nor to me. So this is not a situation where it was not merely not presented to the magistrate judge, but the argument was not presented to me. So there's a two-step waiver.

And then third, even assuming that there was an appropriate hearing under 3142(f)(2), whether I'm limited to considering just flight risk or dangerousness questions that we've been talking about.

And then finally fourth, as to dangerousness, so again assuming that we get there, if you have anything more you'd like to add to what was argued before and in particular what you would respond to what Mr. Meinero just argued about Mr. Curzio's gang affiliation. And you should unmute yourself.

MR. BALAREZO: Very well, thank you.

Your Honor, first I'll address the issue of the waiver or the, if I may, I want to answer number two, I believe, instead of number one.

THE COURT: Sure.

MR. BALAREZO: It's true that Mr. Curzio did not

argue before the magistrate judge and that it was not argued before you whether or not the hearing was initially proper. However, because this Court's review is de novo, the Court is starting from a clean slate and the Court should be able to consider. Although you, the Court itself, raised the issue. The Court should be able to consider that argument that the hearing was not properly held.

There is no prejudice to the government. There's no sandbagging of the Court as I think one of the government's cases has indicated. There's no reason why the Court should not be able to consider. This is not a matter, like, as if we were in trial where an objection was not made and then it has to wait for an appeal. This is something that the Court can consider brand new. So we do believe that the Court can consider it now, even though the Court raised it. We are making the objection at this time and the Court should look into it.

With respect to the -- whether or not the Court should consider the (g) factors, our argument, as the Court well knows, is that the hearing -- the detention hearing was not proper from the initial matter. It would not make sense if the Court is only considering risk of flight factors -- a serious risk of flight factors to not consider danger to the community factors in holding him.

I believe the Himler line of cases and also the Gibson

line of cases indicate that the Court may consider that but in setting conditions of release, not in determining whether or not to hold Mr. Curzio. So to the extent that the Court has to follow the 43 factors, it should be limited in how it can consider. That's our position.

I hope I'm making myself understood. I apologize, I'm a little under the weather.

THE COURT: No, no, you are. It seems to me that there are several waiver issues. First, there's the question of whether the hearing should have been held at all under 3142(f)(2), and whether that was preserved. And then there's the second question of even if that was preserved, whether you also preserve the argument that my consideration under (g) is limited to flight risk.

As the motion came to me, it was essentially arguing that the magistrate judge incorrectly determined that there was no set of conditions that would assure the safety of the community and that was really what was attacked. No argument that that was an inappropriate thing to consider and no argument that the hearing should have happened at all in the first place.

So there's multiple waiver issues going on. And the fact that my review is de novo doesn't seem to get me all the way there to review these issues because I think the Court of Appeals often reviews legal determinations by district courts de novo, but that doesn't absolve a party of raising the

question before the Court of Appeals in their opening brief for example. Even a question that's reviewable de novo, a non-jurisdictional question that's reviewed de novo. So other than the fact that my review is de novo, what is it about this proceeding that allows me to look at questions that Mr. Curzio not only didn't present to the magistrate judge, but didn't present to me until I raised them?

MR. BALAREZO: Your Honor, I think that in order for the Court, as the Court itself questioned the government, the Court does have a right in this proceeding, does have the authority to review whether or not the hearing was held, the initial detention hearing was proper.

And let's assume that the hearing was not proper initially. And that the Court would go ahead and just assume that it was proper because the issue was not raised, then that would not be consistent with the application of law. So we believe that's why the Court should have the opportunity to review the entire matter from the beginning.

THE COURT: So as to the ultimate question that the magistrate judge focused on or at least the parties have focused on here which is whether there is a set of conditions that could assure the safety of Mr. Curzio's community, can you respond to Mr. Meinero's argument about Mr. Curzio's gang affiliation at least while he was in prison. And just more generally why you believe that and what the set of conditions

would be that you believe would assure the safety of the community if Mr. Curzio was released pretrial?

MR. BALAREZO: Your Honor, as the Court well knows by now, Mr. Curzio was incarcerated for an attempted first degree murder charge, that occurred in 2012. I believe he was released two years ago.

My understanding from speaking with Mr. Curzio is that while he was in jail, in prison, he was attacked multiple times by other inmates, both attempted stabbings and also attempted assault where somebody tried to hit him in the head with a lock. And the reasons for those attacks was because he was quote/unquote unaffiliated with anyone in the jail.

The only reason he became a member, if you will, of that particular gang was for his own protection. There's no indication that since he was released in 2019 that he has continued to be part of that gang. There's no law enforcement reports that I'm aware of. There's no indication that he attends meetings, that he does anything with the gang. He has disavowed them. He has said that the only reason he did it was for his own survival.

The government mentioned that he has tattoos. Tattoos as you know are permanent fixtures. Mr. Curzio does not have the means to have any tattoos removed. Just because he still has tattoos on his arms does not mean that he's a member of the gang. Additionally, I don't believe in the transcript that we

received of the hearing before the magistrate, that there was any evidence tying those tattoos to the gang. It just said that he was a member of the gang and that he had tattoos, but I don't believe there was as connection made. So the fact that he still has tattoos on his arms does not indicate membership in the gang.

THE COURT: Assuming hypothetically I were to conclude that Mr. Curzio could be released before trial, what conditions do you believe would be appropriate for me to impose on him as essentially a condition to his pretrial release?

MR. BALAREZO: Your Honor, given the nature of his offenses which are misdemeanor offenses where he was present in the Capitol on January the 6th, and given that the affidavit that was presented to the Court does not indicate any particular action by Mr. Curzio himself, as far as having been throwing things at officers or spraying things at officers or anything of that nature. The affidavit only talks about the crowd in general, does not say anything specific about Mr. Curzio. He was arrested because he was present in the Capitol building.

We believe that the least restrictive conditions would be release on personal recognizance to appear here for whatever hearings or to appear on Zoom for whatever hearings. There's no indication that he has continued to engage in any violent conduct. There's no indication that he's tried to overthrow

the government. There's no indication that he seeks to do anything or will not adhere to the Court's authority. So we believe the least restriction would be release on personal recognizance.

THE COURT: Thank you, Mr. Balarezo.

Mr. Meinero, happy to have you rebut as much or as little as you like.

MR. MEINERO: Sure, Your Honor.

First, as a factual matter I just want to be clear what the transcript hearing showed to clarify with this the issue of the tattoos. The tattoos were documented in and photographed by the Florida Department of Corrections. Those tattoos included swastikas with the symbol Nazi Germany, SS paramilitary force in the back of those arms. Those are symbols associated with this particular white supremacist gang the Unforgiven in Florida.

Now those were photographed by the Department of Corrections. I'm not sure, I can represent based on that that he still has the tattoos, but that's what came out during the detention hearing.

But when he was arrested by the FBI, he had a pendant that was described as being a sort of a Thor's-hammer type of pendant that's associated with white power prison gangs.

So the assertion that during the original detention hearing that he was no longer an associate of this gang is belied by

the pendant at least, and that he may still have these tattoos; but I cannot represent he actually has the tattoos.

Again, our argument is that the issue about whether the detention hearing was appropriate in the first instance has been waived by the defense. If the Court wants to consider de novo the question of whether a hearing was appropriate, then we would like to supplement our basis by saying that (f)(2)(B) was also an appropriate basis to ask for a detention hearing.

THE COURT: Before I decide, can you just summarize what the proffer would be. In particular, would the evidence relate to conduct before Mr. Curzio's arrest or before January and including January 6th or would it relate to this criminal matter?

MR. MEINERO: They would relate to this criminal matter. You're talking about (f)(2)(B), sir?

THE COURT: Yes.

MR. MEINERO: The circumstances of this criminal matter, the traveling 800-miles to disrupt an official proceeding, a legal proceeding, and looking at the language that is used in (f)(2)(B), a serious risk that such person will obstruct or attempt to obstruct justice, that is very similar to the conduct for which Mr. Curzio is now charged under 40 U.S.C. (f)(1)04(E)(2)(D), that includes an intent to -- conduct with an intent to impede, disrupt or disturb the orderly conduct of a session of Congress or the House of Congress.

He's also charged with 18 U.S.C. 1715(A)(2). That prohibits conduct with the intent to impede or disrupt the orderly conduct of government business or official functions, impedes or disrupts the orderly conduct of government business or official functions. So that is in the same vein.

THE COURT: I apologize, Mr. Meinero. You agree that the inquiry under 3142(f)(2)(B) about whether even a hearing should be held is whether there's a risk of future obstruction, not merely whether there's evidence of past obstruction. So the government would have to have argued or argue in the future that the risk of future obstruction is because Mr. Curzio engaged in past obstruction?

MR. MEINERO: Well, there is still an open issue now of whether the kind of conduct we saw happen on January 6th may occur again. Because there are numerous reports, intelligence reports made public about the possibility, or chatter of something like this happening again. So based on the prior conduct as well as the situation we're now seeing, there is a risk of future obstruction.

THE COURT: Do you have any evidence that Mr. Curzio engaged in the kinds of conduct that we are seeing in other cases in this Court where defendants have tried to get people to take down social media posts to hide evidence of what happened on January-6th or to otherwise impede, I'm speaking generally, impede either investigations about what happened on

January-6th or their own involvement. Is there any evidence that Mr. Curzio took such steps after January-6th?

MR. MEINERO: After January-6th, no.

THE COURT: Thank you, thank you, Mr. Meinero.

Mr. Balarezo, is there anything you would like to respond to? I will take a brief recess. I know that Mr. Curzio has raised his hand. Obviously if we were in court you would be able to confer, Mr. Curzio, with Mr. Balarezo. I am reluctant to allow you to simply speak without conferring with him first. I think that would be the most prudent course. It may be that that's what you want to do.

Mr. Balarezo, why don't you go ahead and say what you were going to say. It may then make sense to allow you and Mr. Curzio to go into a breakout room as you did before, as I understand it, to confer and then we can come back if there's something you'd like to tell us all.

MR. BALAREZO: Yes, Your Honor. I'd like to address first the issue of the Thor's-hammer that the government mentioned. My understanding from Mr. Curzio is that that is a symbol of his religion. And at this point I don't have the name, if you will, of his beliefs, but I think that's probably what he wanted to talk to me about. Because he said that that was just a symbol of his belief. So I don't think that is a continued proof or evidence that he was a member of the gang at the time of his arrest.

Now with respect to the government saying that they're going to move now on (f)(B)(2) grounds that he traveled 800 miles to D.C. to obstruct Congress, that is evidence of his obstructive conduct or his future obstructive conduct, that would basically mean that anybody with a car and a couple of dollars for gas would be a risk to do that.

You have to remember that January-6th was a singular event that was in part triggered by the President of the United States, other individuals who exhorted individuals to go to the Capitol.

Mr. Curzio is not using that as a defense because we know it's not a defense, but just as an explanation as to why he was there. The fact that there may be chatter about other individuals or other groups possibly planning similar events does not inure to Mr. Curzio's detriment here.

So I don't believe that those particular factors really shed any light on whether or not the government can move forward on (f)(2)(B). Now if I could just speak with him briefly I would appreciate it.

THE COURT: Please do. Ms. Lesley, could you please put Mr. Balarezo and Mr. Curzio in a breakout room.

THE DEPUTY CLERK: Yes, Your Honor.

THE COURT: We'll wait here until you come back.

MR. BALAREZO: I'll try to keep it quick, Your Honor.

(Pause.)

MR. BALAREZO: Your Honor, as I suspected, the issue was with the necklace that was taken from him at the time of his arrest. Mr. Curzio subscribes to the religion that's called Odinism which is a celebration of the Scandinavian Viking life and beliefs. And it had nothing to do with his prior membership in the gang.

He has tried in the past, or he wanted to get the tattoos on his arms removed, however, he did not have the funds to do so. He pointed out that it's very cheap to get tattoos in prison, but that it's very expensive to get them removed, and that's what his situation is right now. He disclaims and disavows any membership in the gang and any of those beliefs.

THE COURT: Thank you, Mr. Balarezo.

As I indicated in the beginning, I want to take a recess. I will consider the arguments that have been presented this morning then I intend to rule on Mr. Curzio's motion orally when I come back. So we'll do that in just a second.

It's not clear to me that this is necessary because the detention hearing that we're obviously focused on has already been held, but just for the sake of good housekeeping; Mr. Balarezo, am I right or would you state for the record that Mr. Curzio consents to having proceeded this morning by videoconference?

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

THE COURT: Thank you and, Mr. Meinero, I assume the

government does as well?

MR. MEINERO: Yes, Your Honor.

THE COURT: Okay, so we'll take a brief recess. What I will likely do is I'll let Ms. Lesley know when I'm 30 seconds or a minute from rejoining so everyone has a heads up. So we're in recess now, thank you.

(Recess at 10:30.)

(Proceedings resumed at 10:38 a.m.)

THE DEPUTY CLERK: We are now back on the record.

THE COURT: Thank you. I've considered the parties' arguments and the papers including the supplemental information that was filed and I will make the following findings today.

Mr. Curzio has been charged by information with four misdemeanors. First, entering and remaining in a restricted building violation of 18 U.S. Code Section 1752(a)(1). Second, disorderly or disruptive conduct in a restricted building in violation of 18 U.S. Code Section 1752(a)(2). Third, violent entry and disorderly conduct in a Capitol Building in violation of 18 U.S. Code Section 1504(e)(2)(A). And fourth, parading, demonstrating or picketing in a Capitol Building in violation of 18 U.S. Code Section 5104(E)(2)(G).

On January 19th, 2021, the United States requested a detention hearing under 18 U.S. Code Section 3142(f)(2), then a detention hearing was held before a magistrate judge in the Middle District of Florida. The magistrate judge after

analyzing the Section 3142(g) factors determined first by clear and convincing evidence that no combination of pretrial release conditions could reasonably assure the safety of the community against Mr. Curzio. And second, by a preponderance of the evidence that no combination of pretrial release conditions could reasonably assure that Mr. Curzio would appear in this matter as required.

Mr. Curzio then moved this Court under 18 U.S. Code Section 3145(b) to vacate the magistrate judge's Pretrial Detention Order. This Court held a hearing on that motion on February, 19th. At the hearing the Court asked the parties to supplement -- to submit supplemental briefing on three issues. First, whether a magistrate judge's decision to hold a detention hearing under 3142(f)(2) can be reviewed by the District Court under the defendant's 3145(b) motion. Second, whether the Court during a detention hearing held under Section 3142(f)(2) is limited to consider only whether the defendant is a flight risk or whether the Court can also consider the danger of the defendant would pose to the community if released. And third, whether Mr. Curzio forfeited his right to challenge the appropriateness of the detention hearing or the consideration of dangerousness under 3142(g) when he failed to raise either issue before the magistrate judge or this Court.

As to the issues that we discussed this morning, I think it's likely that Mr. Curzio forfeited his argument that the

detention hearing was improper under Section 3142(f)(2) under the party representation principle. Courts rely on the parties to frame issues for decision and serve as neutral arbiters as matters the parties present.

Here Mr. Curzio failed to raise the arguments I've already mentioned when the magistrate judge conducted his initial detention hearing. He failed to brief the issues in his 3145(b) motion in this Court, and he failed to raise the issues that I raised sua sponte during the February-19th motions hearing. The issues were, therefore -- instead were raised by me sua sponte and may have been forfeited.

Ultimately, I don't think that matters because in my view the magistrate judge's decision to hold the detention hearing under Section 3142(f)(2) is reviewable first. When a defendant files a 3145(b) motion, I review a magistrate judge's detention order de novo. The government urges the Court about the narrow interpretation of the term detention order to meet only the evaluation of the Section 3142(g) factors. Government has failed to point me to any case law supporting such a narrow interpretation. And considering that other courts in this District regularly evaluate whether a detention hearing was proper in ruling on a Section 3145(B) motion, and that the Court of Appeals has made clear in the United States v. Singleton that absence the presence of one of the 3142(f) circumstances, detention is not an option.

I find that the issue is reviewable and must, therefore, determine whether the government made an initial showing that Mr. Curzio is a flight risk. The reason that I ultimately conclude that it doesn't matter whether Mr. Curzio has preserved this argument or not is because I believe that the government in this case made a showing that the hearing was appropriate under Section 3142(f)(2). And the magistrate judge did not err by holding a detention hearing under that provision.

The government at the detention hearing presented sufficient evidence that Mr. Curzio was a flight risk to warrant a hearing, including the demonstration that Pretrial Services struggled to find anyone that could verify Mr. Curzio's address, the fact that Mr. Curzio is facing years in prison, and the fact that Mr. Curzio traveled to D.C. to commit the actions that the government accuses him of undertaking.

I, therefore, conclude the magistrate judge was correct to conduct a hearing under Section 3142(f)(2).

I should note that in my view that is the standard for assessing whether the government had made a showing; to have a 3142(f)(2) hearing is not the standard of whether in consideration of the 3142(g) factors there are a set of conditions that could assure the defendant's appearance.

And I think the appropriate standard is whether the government has shown that absent a hearing and some set of

conditions or detention that there's a risk of flight, that is not the same as having to convince the magistrate judge that there's no set of conditions that could be applied to assure the defendant's appearance.

Having said all of that, and having determined that the detention hearing was proper, I turn to whether I can evaluate the question of dangerousness during a detention hearing held under Section 3142(f)(2). Although other courts including the First and Third Circuits have found that when a detention hearing is held solely under Section 3142(f)(2), the Court cannot consider dangerousness.

I agree with the Tenth Circuit and its unpublished opinion and the Southern District of Florida in concluding that the plain text of the statute does not contain such a limitation. The plain language of Section 3142(f) pertains only to what triggers the requirement that a detention hearing be held. It does not dictate what a court must consider during that detention hearing. Instead those restrictions are provided by Section 3142(g), which tasks the Court with determining "whether there are conditions of release that will reasonably assure the appearance of the person as required in the safety of any other person in the community." Section 3142(g) contains no language limiting the consideration of those factors to hearings held only under subsection (f)(1), subsection (f)(2) or vice versa.

I, therefore, conclude that either (f)(1) or (f)(2) is satisfied, and as I've said here, I believe (f)(2) was satisfied, that I'm required to examine all of the Section 3142(g) factors without regard to which subsection initially led the magistrate judge properly in my view to hold the detention hearing.

So that gets us to the Section 3142(g) questions which as we all know where the government and Mr. Curzio focused all of their attention originally in this matter.

And after considering the parties' arguments and the filing and representations at this hearing and the hearing on February 19th and the entire record, I make the following findings. First, I must consider the nature and circumstances of the charged offense. As for that factor, Mr. Curzio is correct to point out that he is charged with only four misdemeanors. And the government has conceded that none of the charges against Mr. Curzio qualify as crimes of violence or at least the government has not argued to the contrary.

The statement of facts supporting the arrest warrant and complaint do not attribute any violent or destructive conduct to Mr. Curzio, although there was certainly violent and destructive conduct occurring in and outside of the Capitol on January, 6th. The government is correct to point out the statutory offenses do not accurately encompass the seriousness of Mr. Curzio's conduct.

This isn't a case where the defendant is alleged to have simply trespassed into an empty government building or explored a restricted area in a reckless way. Instead, Mr. Curzio and a mob that accompanied him entered the U.S. Capitol while a joint session of Congress was meeting to certify the results of the Presidential election. Many of the rioters entered the Capitol for the express purpose of interrupting those proceedings. Thus, Mr. Curzio's participation in storming the Capitol on January 6th is far more serious than the statutory offenses charged. His participation demonstrates disregard for the rule of law, a democratic process, and a peaceful transition of power.

Although, Mr. Curzio is not accused of violence or property destruction he chose to move with a large group through the halls of the Capitol in a disorderly fashion. In fact, the government proffers that the large group that Mr. Curzio was with kicked chairs and threw unknown substances at Capitol Police officers. It is difficult for Mr. Curzio to argue that he didn't know that violence and destruction were occurring around him, and after being ordered to vacate the premises, Mr. Curzio apparently remained in the Capitol defying police officers.

I, therefore, conclude this factor weighs somewhat in favor of detention, but in favor of detention.

As for the history and characteristics of Mr. Curzio, this

is the second factor. I find this factor was heavily in favor of detention. Mr. Curzio has provided the Court with little reason to find that his history and characteristics don't weigh in favor of detention, besides the fact that he's currently employed in Florida.

In his motion, he appears to argue that he has extensive ties to the community in Summerfield, Florida but he has failed to give even one example of such tie. This statement is conclusory and does little to convince the Court that he is not a danger to the community or perhaps even a flight risk. Although that is not the basis which I'm concluding that detention is appropriate here.

By contrast, the government has proffered significant evidence that this factor should weigh in favor of Mr. Curzio's pretrial detention. First, he was convicted in Florida State Court of attempted first degree murder, a very serious and violent crime. Second, the government has proffered and Mr. Curzio has not disputed, in fact, I think he's conceded today, that while in prison for his attempted first degree murder conviction, he was a member of the Unforgiven, a violent white supremacist gang operating both in and out of the prison system.

To be sure Mr. Curzio now claims that he is not currently a member of any gang, right wing, fringe groups or any other violent organizations. But the government responds that he

both still has tattoos relating to Nazi imagery including swastikas and symbols of the Nazi SS paramilitary force. But as Mr. Curzio notes, tattoos are permanent and they may represent nothing more than his prior gang affiliation in prison.

I think more importantly, when Mr. Curzio was arrested by the FBI he was discovered to have a Thor's-hammer pendant which the government argues is a symbol associated with white power prison gangs. The Court recognizes that Mr. Curzio was representing that it is actually a symbol Odinism, his current and new religion. But what I have before me is someone who was convicted of first degree attempted murder, who was admittedly a member of a white supremacist gang, and at a minimum evidence on both sides as to whether he continues to be a member of that gang. And added to that, the government asserts that Mr. Curzio is a recreational drug user who regularly uses marijuana. In front of the magistrate judge at least, Mr. Curzio did not dispute this accusation.

Based on all of this evidence, I believe Mr. Curzio's history and characteristics weigh in favor of detention.

As to the third factor, the weight of the evidence. The weight of the evidence against Mr. Curzio as to the charged offenses is strong. The government has proffered an affidavit from a Capitol Police officer attesting to the fact that Mr. Curzio was in the Capitol and remained inside of the

building despite being ordered leave.

Furthermore, according to the Government, when Mr. Curzio was arrested he spontaneously stated to the arresting FBI officer that he was present in the District for the riot, that he entered into the Capitol Building, that he knew he was not supposed to be there and that police officers in the building told him to leave. A command which he did not follow.

And before me Mr. Curzio acknowledges that he entered the Capitol and did not leave when officers ordered him to do so. Although, he does insist since that he entered the building because the Capitol doors were already opened and that he remained after being offered to leave because the crowd was blocking the exits. The evidence presented thus far sufficiently demonstrates that Mr. Curzio was a willing participate in a disruptive crowd that unlawfully entered the Capitol and that he remained in the Capitol after being ordered to leave.

The Government has put forth strong evidence that Mr. Curzio committed the crimes of which he is accused and, therefore, this third factor weighs in favor of detention.

Finally as to the fourth factor, Mr. Curzio's disregard for the violence occurring around the Capitol, his failure to follow police orders that day, his prior conviction for attempted first degree murder, and his prior at least affiliation with a white supremacist gang known for violence,

indicate Mr. Curzio does pose a danger to the community if he's not retained pretrial.

Mr. Curzio's argument that he is no longer a gang member or that he failed to follow police officers to leave the Capitol because the building was so filled with rioters that he could not find the exit do little to assuage my concerns that Mr. Curzio will pose a threat to the community if released pending trial. The fourth factor, therefore, weighs in favor of detention.

For all of these reasons, upon consideration of the evidence presented, the factors set forth in 18 U.S. Code Section 3142(g), and the possible release conditions set forth in 3142(c), I conclude that clear and convincing evidence supports -- I find that there's clear and convincing evidence that defendant's pretrial release would constitute an unreasonable danger to the community, and that no condition or combination of conditions can be imposed that would reasonably assure the safety of the community for Mr. Curzio to be released pending trial.

Mr. Curzio's Section 3145(b) motion is, therefore, denied and it is ordered that Mr. Curzio shall remain detained pending trial. I will issue a written order to be filed shortly to that effect.

Having resolved that motion, since we are all together and, Mr. Balarezo, I understand that you may have to consult

with Mr. Curzio about whether you want to seek further review of my order, but I think it would be efficient for us to discuss next steps whether you and Mr. Meinero or Ms. Ravindra have discussed at all discovery in this matter, protective orders and the like. Mr. Meinero, why don't we start with you.

First of all, of course if there are any questions or clarifications that the parties need about my order which again I will not issue a written opinion. My findings are stated orally, but I will issue an order denying the motion this afternoon. But if there are questions about my findings or my thinking about the decision I made today, I'm happy to discuss those first. But I do think it would be helpful for us to talk about where this case goes from here.

Mr. Meinero?

MR. MEINERO: Your Honor, I do not have questions about the order.

Regarding discovery, the government has not yet provided discovery. Although we may provide some limited discovery before our next hearing date a week from Friday. We are still negotiating the parameters of a protection order with the Federal Public Defender service that can hopefully be standard for all defendants. Once we get that protection order filed, we'll be able to provide more discovery.

We have not yet tendered a plea offer to any of the defendants, including Mr. Curzio. We may be in a position to

do so before the next hearing, but we have not done so yet.

THE COURT: Thank you. Mr. Balarezo.

MR. BALAREZO: Your Honor, we obviously would like to get discovery sooner rather than later. I would object to the government negotiating with the Federal Public Defender with respect to a protective order that may affect -- that would affect my client.

I think if anything has to be done it should be negotiated with us. I understand the reasons why they may be doing it, but we're dealing with Mr. Curzio here not the Federal Public Defender. So I would love to get discovery. I'll speak to Mr. Meinero as soon as possible about a possible discovery agreement and/or any sort of disposition of this matter prior to trial.

THE COURT: Thank you. I think that -- well, I don't want to speak for the government. My sense is what they're trying to do is work out the general contours of the protective order with FPD because they represent a number of different defendants. And then obviously they would have to bring those general contours to each individual defendant's counsel, but I don't think it's appropriate for me to get into the middle of those discussions or negotiations or certainly what you and Mr. Meinero would discuss as it relates to Mr. Curzio.

So I think for present purposes, the parties may continue to have those negotiations or discussions or whatever they are.

And we will be back together in less than two weeks for a teleconference at which we will discuss whether there are any updates.

Are there any other issues we should discuss this morning, counsel?

MR. MEINERO: Your Honor, the last thing that the government would like to raise is the issue of tolling under the Speedy Trial Act. And we ask that there be tolling until the next hearing date -- in light of the issues we just discussed, the complex nature of discovery, the ongoing discussions about our protection order and so we ask in the interest of justice that the Speedy Trial Act be tolled until March 19th.

THE COURT: Thank you, Mr. Meinero. Mr. Balarezo.

MR. BALAREZO: Again, given my client's detention, we would object to any tolling of the Speedy Trial Act and request a speedy trial.

THE COURT: Thank you, Mr. Balarezo.

I may have already tolled the Speedy Trial Act through March 19th because we knew that that status conference was coming up. But if I did not, I will do so. I believe that as a result of the complicated nature of the discovery questions, the need for a protective order, the possibility of plea negotiations and the like, that at a minimum it is in the interest of the public and the ends of justice to suspend the

running of the Speedy Trial Act between today's date, March, 9, and the next status conference in this case which is currently scheduled for March-19th just 10 days from today.

Thank you for raising that Mr. Meinero. Anything else from the government's perspective?

MR. MEINERO: No, sir, thank you.

THE COURT: Mr. Balarezo?

MR. BALAREZO: No, Your Honor, thank you.

THE COURT: Okay, thank you. We will speak on the 19th. Good day.

MR. MEINERO: Thank you, Your Honor.

(Videoconference adjourned at 11 o'clock a.m.)

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CERTIFICATE

I, Crystal M. Pilgrim, Official Court Reporter, certify that the foregoing is a true and accurate transcript, to the best of my ability, of the proceedings remotely reported in the above-entitled matter.

Please Note: This hearing occurred during the COVID-19 pandemic and is, therefore, subject to the technological limitations of court reporting remotely.

/s/Crystal M. Pilgrim, FCRR, RMR Date: April 9, 2021