UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	**No. 1:21-cr-24-1 (EGS)**
v.	:	
	:	
ROBERT GIESWEIN,	:	
	:	
Defendant.	:	

GOVERNMENT'S SUR-REPLY IN OPPOSITION TO DEFENDANT'S MOTION FOR REVOCATION OF DETENTION ORDER

The government hereby files this sur-reply to the defendant's Motion for Revocation of Detention Order. Defendant's novel claim that he is not alleged to have "committed" destruction of government property under the terms of the bail statute, despite the Grand Jury's finding of probable cause to believe he committed destruction of government property, is belied by the text of the statute, as well as decades of case law recognizing the abolition of any legal distinction between a principal as aider and abettor. The Court should consequently find that this case carries a rebuttable presumption in favor of the defendant's pretrial incarceration.

ARGUMENT

I. There is No Distinction Between Aider and Abettor and Principal in the Bail Statute

Since Congress passed 18 U.S.C. § 2, there has effectively been no distinction between principals and aiders and abettors in federal criminal law. *See*, *e.g.*, *Standefer v. United States*, 447 U.S. 10, 18-19 (1980), citing *Hammer v. United States*, 271 U.S. 620, 628 (1926). Under § 2, "those who provide knowing aid to persons committing federal crimes, with the intent to facilitate the crime, are themselves committing a crime." *Rosemond v. United States*, 572 U.S. 65, 71 (2014). *See also*, *e.g.*, *United States v. Richardson*, 948 F.3d 733, 741-42 (6th Cir. 2020) ("There is no distinction between aiding and abetting the commission of a crime and committing the principal offense. Aiding and abetting is simply an alternative theory of liability indistinct from the

substantive crime"). The defendant's reply offers the Court no reason to depart from this well-established rule, for purposes of 18 U.S.C. § 3142(e)(3) or otherwise.

It follows that an aider and abettor "commits" the offense when it is committed by the principal(s). The case law in this Circuit and others also supports this view. "Under [18 U.S.C. § 2], the acts of the perpetrator *become the acts* of the aider and abettor and the latter can be charged with having done the acts himself." *United States v. Kegler*, 724 F.2d 190, 200-01 (D.C. Cir. 1983) (emphasis added); *see also In re Colon*, 826 F.3d 1301, 1305 (11th Cir. 2016) ("[T]he acts of the principal become those of the aider and abettor as a matter of law"); *United States v. Delpit*, 94 F.3d 1135, 1152 (8th Cir. 1996) (same). If the acts of the principal become the acts of the aider and abettor, the aider an abettor has committed the offense under any reading of "committed."

To find an example of the word "committed" covering an aiding-and-abetting offense, the Court need look no further than 18 U.S.C. § 3142(e)(2), the neighboring subsection to (e)(3). The defendant notes that § 3142(e)(2), in conjunction with § 3142(f)(1)(A), creates a rebuttable presumption for at least some crimes where a prior conviction was predicated on a vicarious liability theory. *See* Reply at 4. Section 3142(e)(2) also predicates the application of its presumption in part on the word "committed." For a rebuttable presumption to apply under § 3142(e)(2), the defendant must be charged with a crime described in § 3142(f)(1) and:

> (A) The person has been convicted of a federal offense that is described in subsection (f)(1) of this section . . . ;
> (B) The offense described in subparagraph (A) *was committed* while the person was on release pending trial for a Federal, State, or local offense; *and*
> (C) A period of not more than five years has elapsed since the date of conviction, or the release of the person from imprisonment, for the offense described in subparagraph (A), whichever is later.

Section 3142(e)(2) (emphasis added). The defendant correctly notes that a rebuttable presumption may apply in situations where, for example, the defendant has previously been convicted of an offense for which the maximum sentence is life imprisonment or death, or of any felony that

involves a minor victim, and that this presumption can arise even if the defendant at issue was convicted of those previous crimes under an aiding and abetting theory. Reply at 4. Subparagraph (B) further clarifies that this rebuttable presumption only applies if the offense *was committed* while the person was on release pending trial. Thus, in this context, Congress intended the word "committed" to cover aiding-and-abetting offenses.

The defendant moreover misreads the application of the word "involves" in the bail statute. That word must be read in conjunction with "case" in subsection (f)(1) of Section 3142, which reads, "in a *case* that involves—" (emphasis added). The Court should contrast this language to the operative language of § 3142(e)(3), which refers to "probable cause to believe that the person committed—". The language of subsection (f)(1) refers to the entirety of a case, which can and often does include multiple charges and/or multiple types of offenses. A single "case," for example, can include a crime of violence, a nonviolent misdemeanor, a felony with a minor victim, and a crime punishable by life in prison all in a single indictment. In contrast, all the subparagraphs following the word "committed" in § 3142(e)(2) refer to a single "offense." *See* § 3142(e)(2)(A) – (E). The Court must likewise read "committed" in this context and in light of the decades of unambiguous case law explaining that there is no legal distinction between a principal and an aider and abettor. This Court must also presume that Congress knew the law, including case law regarding the lack of a legal distinction between principals and aiders and abettors when drafting the bail statute and that it acted accordingly. *See*, *e.g.*, *Washington Legal Foundation v. U.S. Sentencing Comm'n*, 17 F.3d 1446, 1450 (1994).[1]

[1] The defendant does not grapple with the results that would follow if his interpretation of 18 U.S.C. § 3142(e)(3) were correct. Under the defendant's reading of the statute, there would be no rebuttable presumption of dangerousness and/or risk of flight if someone is charged with aiding and abetting the murder of a Member of Congress or the President (18 U.S.C. §§ 351, 1751); the destruction of a government building by means of explosive, resulting in death (§ 844(f)(3)); the killing of a person with a firearm in a federal facility (§ 930(c)); the killing of a foreign official (§ 1116); the willful destruction of a national defense premises with the intent to obstruct the national

II. The Indictment and Evidence Establish that Gieswein Violated Section 1361

The defendant invites the Court to find that no presumption in favor of detention applies in this case, even the statute provides for the existence of that presumption, by essentially asking the Court to look behind the Grand Jury's probable cause determination. *See* Reply at 5. The Court should not take the defendant up on that invitation. The indictment unambiguously establishes probable cause to believe that the defendant violated 18 U.S.C. § 1361. *See*, *e.g.*, *United States v. King*, 842 F.2d 768, 776 (D.C. Cir. 1973) (return of an indictment "makes conclusive the existence of probable cause to hold the accused for further prosecution").[2] Because the presumption applies to a defendant charged with a felony violation of 18 U.S.C. § 1361 under an aiding-and-abetting theory, and the Grand Jury has found probable cause to charge this defendant with that offense, the Court must apply the presumption.

Even if the Court decides to independently assess the evidence underlying the § 1361 charge in determining whether the presumption applies, that evidence does not aid the defendant's argument that he should be released. "To aid and abet, all that is necessary is to show some affirmative participation which at least encourages the principal offender to commit the offense, with all its elements, as proscribed by the statute." *United States v. Kelly*, 552 F.3d 824, 831-32 (D.C. Cir. 2009). Far from the mere "presence" claimed by the defendant, Mot. at 15, the government's evidence establishes, among other things, that (1) the defendant, aware that others

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defense of the United States (§ 2155); or torture (§ 2340A), to provide just a few examples listed in § 2332b(g)(5)(B).

[2] Chief Judge Howell and Judge Kelly have both relied on *King* to determine that a rebuttable presumption applies in a January 6 case where the defendant was charged by indictment with a violation of 18 U.S.C. § 1361 that contemplates a vicarious liability theory, and where the defendant disputed whether he had in fact violated that statute. *See United States v. Nordean*, No. 21-cr-175 (TJK) (3/3/2021 Hr'g Trans. before C.J. Howell at 72-74; 4/19/21 Hr'g Trans. before J. Kelly at 11-12). Copies of transcripts of the relevant portions of those hearings are attached hereto as Exhibit 1. The full transcript both hearings are available on PACER, 21-mj-195 (ZMF), ECF No. 24; 21-cr-175 (TJK), ECF No. 71.

around him were assaulting police officers while moving towards the Capitol façade, aided the crowd's unlawful advance on the building by spraying an aerosol irritant at an officer on the top of the stairway; (2) once the last police line protecting the Capitol building was breached minutes later, the defendant ran towards the building with his baseball bat out and began banging on windows; (3) he redirected other rioters—who were kicking on a door with little chance of successfully breaking it down—towards the window that was in the process of being broken by another rioter; (4) one of the people he redirected towards that window then put what appears to be a 2x4 through a portion of it, finishing the job started by other rioters; and (5) the defendant entered the Capitol through that broken window moments later.

CONCLUSION

For the reasons stated above and in the government's opposition, along with any that may be cited in a hearing, defendant's motion for revocation of detention order should be denied.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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UNITED STATES OF AMERICA,	)	Criminal Action
	)	No. MJ 21-195
vs.	)	
	)	
ETHAN NORDEAN,	)	March 3, 2021
	)	3:05 p.m.
Defendant.	)	Washington, D.C.

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TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE JUDGE BERYL A. HOWELL,
UNITED STATES DISTRICT COURT CHIEF JUDGE

(All parties appearing via video-teleconference)

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ALSO PRESENT: SHAY HOLMAN, Pretrial Services
(Appearing telephonically)

Court Reporter: Elizabeth SaintLoth, RPR, FCRR
Official Court Reporter

This hearing was held via videoconference and is therefore subject to the limitations associated with the use of technological difficulties.

Proceedings reported by machine shorthand, transcript produced by computer-aided transcription.

the intent of the conspiracy -- which it hasn't pleaded -- was to commit a depredation of property, and that Ethan Nordean knew about that and was a party to that agreement; it hasn't alleged that.

So, Your Honor, we think, sort of, vague claims about taking back the Government, and that sort of thing, does not -- it's not an aiding and abetting offense, and it's not even a *Pinkerton* offense.

THE COURT: All right. I am prepared to rule.

There are two pending motions in front of me that remain: The Government's motion to review the Western District of Washington magistrate judge's decision to release the defendant pending trial, which was docketed at ECF No. 6, and the defendant's motion to lift the stay, which is docketed at ECF No. 13.

Under the Bail Reform Act, 18 U.S.C. Section 3145(b), if a person is ordered released by a magistrate judge, the Government may file, with the court having original jurisdiction over the offense, a motion of revocation of the order or amendment of the release conditions. And the district court must make an independent determination whether conditions of release exist that will reasonably assure the defendant's appearance in court or the safety of any other person or the community, under 18 U.S.C. Section 3142(e).

Pretrial release is generally favored, except when a rebuttable presumption applies and, under 18 U.S.C. Section 3142(e)(2), where there is probable cause to believe that the defendant committed an offense listed in 18 U.S.C. Section 2332b(g)(5)(B), for which a maximum term of imprisonment of 10 years or more is prescribed; it covers the felony charge against this defendant under 18 U.S.C. Section 1361, the Court must presume, unless the defendant rebuts the presumption, that no condition or combination of conditions will reasonably assure the appearance of the defendant as required, and the safety of the community. See 18 U.S.C. Section 3142(e)(3) and Federal Rule of Criminal Procedure 46(a).

Once the presumption is triggered, it imposes on the defendant, at a minimum, a burden or production to offer some credible evidence that rebuts it. See *U.S. v Taylor*, a D.D.C. case from 2018.

Here, the grand jury has indicted the defendant, as of today, for a felony violation of 18 U.S.C. Section 1361 and therefore found that probable cause exists to believe he committed this crime. See *U.S. v King*, 482 F.2d 768, jump cite 776, D.C. Circuit 1973, stating: It is well settled that the return of an indictment makes conclusive the existence of probable cause to hold the accused for further prosecution, closed quote.

For purposes of the detention hearing then, this finding of PC for a felony 1361 charge is important since this crime does trigger the rebuttable presumption of detention under the Bail Reform Act, Section 3142(e)(3)(C).

The defendant in his papers disputed that conclusion; but the statutory directives are clear because the potential penalty of not more than 10 years under 1361 satisfies the 10-year threshold of 10 years or more under 3142(e)(3)(c) for a listed offense under Section 2332b(g)(5), so the rebuttable presumption does apply.

The parties also dispute whether 1361 qualifies as a "crime of violence" that warrants a detention hearing under 3142(f)(1)(A). That dispute is somewhat beside the point despite all of the papers spent on it in briefing, since the felony 1361 charge not only qualifies for a rebuttable presumption under 3142(e)(3) but, also, for a hearing under 3142(f)(1)(A).

In any event, to my mind, a felony 1361 charge does qualify as a crime of violence under the elements clause which defines "crime of violence" as an offense that has as an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another; see 8 -- 18 U.S.C. 3156(a)(4)(A).

The conduct of locally injuring or committing any depredation against any property of the United States seems

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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UNITED STATES OF AMERICA

v.

1-ETHAN NORDEAN
2-JOSEPH RANDALL BIGGS,

Defendants.

- - - - - - - - - - - - - - - - - - x

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

Washington, D.C.
Monday, April 19, 2021
12:00 p.m.

TRANSCRIPT OF ORAL RULING
HELD BEFORE THE HONORABLE TIMOTHY J. KELLY
UNITED STATES DISTRICT JUDGE

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Proceedings recorded by machine shorthand; transcript produced by computer-aided transcription.

said that that is the correct standard.

Now, the Government mainly seeks to detain Nordean and Biggs under 18 United States Code Section 3142(e)(3)(C) which provides a rebuttable presumption of detention if there is probable cause to believe that they committed, quote, An offense listed in Section 2332b(g)(5)(B) of Title 18, United States Code, for which a maximum term of imprisonment of 10 years or more is prescribed, closed quote. The grand jury found probable cause to believe that they committed such an offense. 18 United States Code 1361, destruction of government property, is the offense charged in Count 4 of the superseding indicted -- indictment, and it is specifically enumerated in 18 United States Code 2332b(g)(5)(B)(i). Count 4 charges both defendants with the felony variety of that offense, as it alleges that they, quote, Together with those known and unknown aided and abetted others known and unknown to forcibly enter the Capitol and thereby caused damage to the building in an amount more than $1,000, closed quote. That felony offense carries a maximum sentence of 10 years in prison. And under Circuit precedent, the return of that indictment, quote, Makes conclusive the existence of probable cause to hold the accused for further prosecution, closed quote. That's United States v. King, 482 F.2d 768 at 776, a D.C. Circuit case from 1973. Thus, the defendants are eligible for

detention and the rebuttable presumption arises, at least in the first instance.

Now, defendants made a few arguments suggesting that pretrial detention is unavailable to the Government as a matter of law here because Count 4 is defective in some way or because the evidence against Nordean and Biggs as to Count 4 is weak. And just a few points on that. The statute says there is a rebuttable presumption of detention only if there is, quote, Probable cause, to believe -- closed quote, to believe that the defendants committed one of the enumerated offenses which, as everyone here knows, is a relatively low standard. And, as I mentioned, King says that the return of an indictment charging the offense, quote, Makes conclusive the existence of probable cause to hold the accused. Now, I don't see anything obviously defective with Count 4 as a matter of law, despite the defendants' arguments, and whether the Government ends up being able to prove felony destruction of property, whether directly or on an aiding and abetting theory, against these defendants really isn't the question before me here today. In light of the text of the statute, though, and King, I think pretrial detention is clearly available to the Government, and the rebuttable does -- presumption does arise under 18 United States Code Section 3142(e)(3)(C).

But I'll also point out that defendants are also