UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

United States of America	*	
	*	
v.	*	
	*	Case No.: 21-CR-00028-APM
Thomas Edward Caldwell, et. al.	*	
Defendants	*	

MEMORANDUM IN SUPPORT OF MOTION FOR REVIEW OF DETENTION ORDER PURSUANT TO 18 U.S.C. §3145(b) AND MOTION FOR RELEASE

Comes now Thomas Edward Caldwell ("Caldwell"), by counsel, and moves this Honorable Court for Review of the Magistrate's Detention Order pursuant to 18 U.S.C. §3145(b) and Motion for Release. In support of said motion, Caldwell states as follows.

FACTS

1. Thomas Edward Caldwell is a 66 year old citizen of the United States and the Commonwealth of Virginia who resides in Berryville, Virginia in Clarke County, Virginia. He is married and has a farm where he and his wife raise stock animals among other pursuits. He has no criminal history, having never been previously arrested, investigated, or charged.

2. Caldwell is a retired Lieutenant Commander from the United States Navy and is classified as a 100% disabled veteran by the Department of Veterans Affairs. In his Navy service, he was awarded 3 Navy Achievement Medals, 1 Meritorious Service Award, and 3 Navy Commendation Medals; he was nominated

for the Bronze Star; and he was awarded the Humanitarian Service Award as a personal Award. He has held a Top Secret Security Clearance since 1979 and has undergone multiple Special Background Investigations in support of his clearances. After retiring from the Navy, he worked as a section chief for the Federal Bureau of Investigation from 2009-2010 as a GS-12. He also formed and operated a consulting firm performing work, often classified, for U.S. government customers including the U.S. Drug Enforcement Agency, the Department of Housing and Urban Development, the U.S. Coast Guard, and the U.S. Army Personnel Command.

3. Caldwell's 100% service-connected veteran disability results from complications associated with service-connected injury. He has been diagnosed with disability to his right shoulder, degenerative lumbar disc disease with bilateral sciatic involvement, chronic right knee strain post meniscal repair, and degenerative joint disease of the left shoulder post modified Bristow repair. In 2010, he had a spinal fusion of the L4, L5, and S1 vertebrae, which has subsequently failed. Moving, sitting for extended periods of time, lifting, carrying, and other physical activities are extremely painful and Caldwell is limited in his ability to engage in them. As a result of his failed spinal fusion surgery, Caldwell has been diagnosed with post-traumatic stress disorder (PTSD) which is often exacerbated by exposure to fluorescent lighting. Caldwell also has a medical

history of sleep apnea, a heart condition to include chest pains, and a degenerative left ankle. He currently is under the treatment of Dr. Thomas Larkin at the Pain Management Institute in Bethesda, MD. and has been from September 14, 2016. Due to excruciating pain and continued deterioration of his spine, Caldwell underwent a discectomy on August 4, 2020 to alleviate the symptom of being unable to lift his right leg. This surgery was performed by Dr. John Caruso of the WVU Medicine Brain and Spine in Martinsburg, WV. His spinal deterioration is continuing and he is under treatment with Dr. Caruso for increased deterioration of the vertebrae in his neck which causes him to regularly suffer numbness, tingling, and shooting pain down his arms. To assist in dealing with his regular and constant pain, Caldwell has consulted with the Blue Ridge Counseling Center. He is also under the care of Dr. Jeffrey Lessar of Winchester, Va., a board certified pulmonologist who monitors his sleep issues and approves his CPAP treatment and monitors and approves sleep medication. Currently he is prescribed, but has not been receiving, oxy-morphone for his spine pain, Lunesta for sleep issues, a CPAP machine, Gabepentin, DHEA, and hydrocortisone.

4. Caldwell was arrested on January 19, 2009 at his house in Berryville, Virginia and has since been detained in the Central Virginia Regional Correctional Facility in Orange, Virginia. Because most of the allegations of the warrant allege activity in Washington, DC, he appeared that day before Magistrate

Joel C. Hoppe in Harrisonburg, Virginia for a Rule 5 determination. The United States was represented by AUSA Christopher Kavanaugh.

5. At that hearing, Caldwell was informed that the Government at that time asserted he is a member of a group called the Oathkeepers, which he has denied. It is reasonably believed the Government, by this time, has confirmed that he not a member of this group. Additionally, Caldwell was informed that the Government at that time asserts he "forced entry" into the United States Capitol. Caldwell denied this assertion and proffers that he was at all times with individuals who will testify that he never entered the U.S. Capitol Building and that his physical limitations would have prevented him from forcibly entering any building or storming past any barrier.

6. Caldwell was also informed that the Government asserts that he destroyed property, disrupted an official proceeding, and entered a restricted area, and that he conspired with others to perform these acts. Caldwell has denied each of these allegations.

7. It is noteworthy that despite reports of over 100,000 photo and video recordings of the incidents on January 6, 2021, the Government has not identified any photo or video that shows Caldwell in the U.S. Capitol Building, on the grounds after overcoming any barrier or other evidence of restriction, in the vicinity of any damaged property, or in any chamber of Congress. Further the Government has not identified any time, place, or specific content of any alleged agreement that Caldwell allegedly

participated in that would meet the definition of a conspiracy.

8. Magistrate Hoppe also informed Caldwell of his right to a preliminary hearing and his right to have one after he was transferred to the District of Columbia. Upon being informed of this, Caldwell, without counsel, expressed his desire to have his preliminary hearing in DC. Unfortunately, the Government has not transferred him to DC and has indicted him on January 27, 2021, thereby eliminating his right to a preliminary hearing.

9. AUSA Kavanaugh, despite having no evidence that Caldwell participated in the destruction of any property, and despite the Amended Criminal Complaint drafted and sworn by FBI Special Agent Michael Palian not mentioning any evidence that placed Caldwell in the Capitol Building or destroying or damaging any property (the Amended Complaint does assert that the others charged in the indictment, Jessica Watkins and Donovan Crowl, were in the Capitol Building but does not specifically identify any destruction of property) asserted that the Government was seeking Caldwell be detained pursuant to 18 USC 3142(f)(1)(A) to the extent is encompassed 18 USC §1361. Transcript p. 16. Kavanaugh clarified that this was the basis for seeking the detention of Caldwell. *Id.*

10. Recognizing the complete lack of evidence to credibly make this argument to the Court, Kavanaugh then asserted that the Government, as a "fallback position" would seek detention under 18 USC §3142(f)(2)(B).

Kavanaugh did not identify any specific fact that supported any obstruction of justice, nor was one ever established in any Criminal Complaint. At best Kavanaugh had a "concern" about future activity with no factual basis identified.

11. Kavanaugh then misrepresented Caldwell's criminal history, claiming that he has a "minimal criminal history" that included being a "fugitive" on several traffic matters. Kavanaugh knew, or should have known, that Caldwell has ZERO criminal history and there does not exist any fugitive traffic matters. It is not lost on Caldwell that traffic matters are not criminal in nature and even if there was a history of unpaid tickets (there are none) these would be civil, not criminal, issues.

12. Finally, Kavanaugh, without any known or verifiable facts, asserted that Caldwell "maintains a leadership position with the Oath Keepers" when no such evidence exists as Caldwell is not a member of the organization, nor has he ever been a member of the organization, and if he were, such membership would be protected activity under the First Amendment.

ARGUMENT

13. From the passage of the Judiciary Act of 1789, 1 Stat. 73, 91, to the present Federal Rules of Criminal Procedure, Rule 46 (a)(1), federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom unless, and until, a conviction permits the unhampered preparation of a defense, and serves to prevent the

infliction of punishment prior to conviction. *See Hudson v. Parker*, 156 U.S. 277, 285 (1895). Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning. *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

14. The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping Caldwell in jail upon mere accusation until it is found convenient to give him a trial. On the contrary, the spirit of the procedure is to enable him to stay out of jail unless, and until, a trial has found him guilty. Without this conditional privilege, Caldwell, and those like him who are also wrongly accused, are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense. *Id*. at 7-8 (J. Jackson concurring).

15. To open a way of escape from this handicap and possible injustice, Congress commands allowance of bail for one under charge of virtually any offense not punishable by death. Federal Rule of Criminal Procedure 46(a)(1) expressly states that pre-trial release is to be governed by the standards set forth in the provisions of 18 U.S.C. §§3142 and 3144.

16. 18 U.S.C. §3142 requires the admission to bail except under extremely tailored exceptions, which as set forth below, are not applicable in this case. *Id*. Absent the Government establishing the requirements of 18 U.S.C.

§3142(e), Caldwell must be released.

17. As set forth in 18 U.S.C. §3142(e), Caldwell's right to pre-trial release is balanced against two risks, the failure to appear for trial, and further danger to himself or the community.

a. There is no risk of flight

18. Caldwell acknowledges that the right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty. *Ex parte Milburn*, 9 Pet. 704, 710 (1835). Caldwell has provided these assurances and will continue to do so.

19. Despite there being little, to no risk of flight, the Supreme Court has acknowledged that admission to bail always involves a risk that the accused will take flight. However, as explained by Justice Jackson, the risk of flight "is a calculated risk which the law takes as the price of our system of justice. We know that Congress anticipated that bail would enable some escapes, because it provided a procedure for dealing with them. Fed. Rules Crim. Proc., 46 (f)." *Stack v. Boyle, supra*, at 8 (J. Jackson concurring)

20. Indeed, it is the merely the duty of the judge to reduce the risk by conditions of bail, if necessary. 18 U.S.C. §1342(c)(1)(B)(xiv). The imposition of conditions, if applicable, is limited to the least restrictive conditions necessary to assure appearance. 18 U.S.C. §1342(c)(1)(B) The consequence of excessive

restriction is a violation of the Eighth Amendment to the Constitution, which says: "Excessive bail shall not be required . . . ."

b. Caldwell poses no danger to himself or the Community

21. There is no allegation that Caldwell is, or has ever been a danger to himself. His extensive medical history and identified limitations demonstrate that he is proactive in seeking treatment for ailments. Caldwell is unaware of any evidence to suggest he poses a risk to himself and is prepared to defend against any such accusation by the Government.

22. There is also no danger to the Community. Outside of his time as a decorated U.S. military officer, Caldwell is a life-long resident of Clarke County, Virginia where he is a property owner. He has no criminal record or any history of violence or breaking the law. In fact, just the opposite; he has been decorated for service in which he has placed himself in harm's way to protect others and the interests of the United States.

23. Further, there is no credible allegation in the indictment that Caldwell has ever engaged in any violent behavior. Caldwell recognizes that the Government has the ability to craft indictments in an effort to give the appearance of wrongdoing and to forum shop. However, given the existence of 100,000 photos and video images from the U.S. Capitol on January 6, 2021, (https://www.cnet.com/news/fbi-posts-fresh-photos-of-capitol-hill-suspects/ "In a

joint press conference with the Department of Justice on Tuesday, FBI Washington Field Director Steven D'Antuono said the bureau has received leads including more than 100,000 pieces of digital media"), the Government has not identified one which shows Caldwell in the Capitol Building or taking any action to obstruct an official proceeding, destroy government property, or being in a restricted building or grounds after overcoming barriers, as alleged in the indictment. It has not produced any evidence demonstrating Caldwell took any of the action as describe in paragraph 19 of the indictment, to include no evidence of Caldwell coordinating any specific operation, using a walkie talkie app or creating a channel on it, travelling into Virginia with anyone other than his wife, wearing or bringing or contributing any paramilitary gear, forcibly storming past any barricades, entering the Capitol Building, or concealing non-existent evidence after the fact.

24. The Government has failed to produce any such evidence because none exists. It is believed that at this time, the Government has obtained confirmation that Caldwell was not in the Capitol Building. Disturbingly, it is also believed that the Government possessed this information at the time it sought the indictment and proceeded despite knowing that Caldwell was never in the Capitol Building.

25. The importance of this lack of evidence is underscored in that the Government opposed Caldwell's release at the Rule 5 hearing based on the charge

the Caldwell had destroyed Government Property in violation of 18 USC §1361, as will be discussed in greater detail below. Caldwell asserts that this charge was brought against him merely as a vehicle to assist in denying his release for vindictive purposes as the Government has never possessed any identifiable information that places Caldwell in the Capitol Building, let alone destroying any property.

26. Further, while not attempting to try the matter at a bail hearing, the Government's mention of an alleged Facebook posting stating the word "inside" provides no basis to suggest Caldwell actually posted the message, or was engaged in doing anything other than merely relaying news that was circulating through the crowd that some people were inside. While the Government's conclusions show a very active collective imagination, the Government does not provide any evidence to suggest that Caldwell was previously a risk to the Community, or that he will be one should he be released on bail.

27. The Government is also aware that its premature reliance on alleged photos and electronic messages on social media have not been vetted for accuracy and they cannot show clear chains of evidence. Candor to the Court suggests that the Government acknowledge the limitations of their evidence against Caldwell, at least to the extent that there is no evidence that suggests that he is a danger to himself or to the community at large.

c. Bail should be granted in accordance with 18 U.S.C. §3142(b)

28. 18 U.S.C. §3142(b) states:

> **The judicial officer shall order the pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court,** subject to the condition that the person not commit a Federal, State, or local crime during the period of release and subject to the condition that the person cooperate in the collection of a DNA sample from the person if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135a),[1] **unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.**

(emphasis added). As noted above, there is nothing in Caldwell's history or the charges, or any evidence provided by the Government, that suggests that Caldwell will not appear as required or that he will endanger the safety of any other person or the Community. He has represented his desire to clear his name at the Rule 5 hearing (Exhibit A, pg 14, ln 4-7), and he has privately retained counsel.

29. In opposing bail, as in *Stack v. Boyle, supra*, the Government asks the Court to depart from the norm by assuming, without the introduction of evidence, that Caldwell "is a pawn in a conspiracy and will, in obedience to a superior, flee the jurisdiction." There is no basis for such an ask.

30. Further, by the express terms of the indictment, Caldwell is alleged to have participated in a conspiracy with an objective that has already been frustrated or is complete. According to paragraph 18 of the indictment, "[t]he purpose of the

conspiracy was to stop, delay, and hinder Congress's certification of the Electoral College vote." The Court can take judicial notice that the Electoral College vote has occurred. The alleged conspiracy is complete. There is no allegation of a conspiracy for future action.

31. Given that the alleged conspiracy is complete, there is no other allegation that suggests any planned or future illegal activity. There is no basis to support an opposition to bail as any apprehension of future action that could danger the community has no support in fact is based wholly in unsubstantiated and illogical conjecture. The Court should grant bail and release Caldwell on his personal recognizance or an unsecured bond.

d. **Bail should be granted in accordance with 18 U.S.C. §3142(c)**

32. 18 U.S.C. §3142(c) states, in part:

> If the judicial officer determines that the release described in subsection (b) of this section will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, **such judicial officer shall order the pretrial release of the person** subject to conditions. (emphasis added)

Again, the emphasis and focus is release of Caldwell subject to the least restrictive conditions that permit the Court to be assured of Caldwell's appearance and the safety of the community.

33. When the Court evaluates conditions to ensure the appearance of Caldwell and the safety of the community, it must do so in the context of 18 U.S.C.

§3142(e) should the Government oppose his release. As explained below, neither of the applicable provisions of 18 U.S.C. §3142(e) can be applied to oppose release, and if they could, release is required as conditions could be set to assure the appearance of Caldwell and the safety of the community.

i. There is no rebuttable presumption against bail under 18 U.S.C. §3142(e)(2)

34. 18 U.S.C. §3142(e)(2) only applies a rebuttable presumption against release in the event of an accused with a prior conviction or an accused who commits a subsequent criminal act while on release pending trial. Caldwell has no prior convictions or charges, and no rebuttable presumption is applicable under this statute.

ii. There is no rebuttable presumption against bail under 18 U.S.C. §3142(e)(3)

35. 18 U.S.C. §3142(e)(3) applies a rebuttable presumption in the event an accused is charged with certain crimes as set forth in subsections A through E. Caldwell is not charged with any of these crimes. Subsection C identifies 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. Although Caldwell is charged with a violation of 18 U.S.C. §1361 and that statute is listed in §2332b(g)(5)(B), Caldwell asserts the allegation is insufficient to raise a rebuttable presumption.

36. First, upon evidence at any hearing for review of his detention, the Government will be unable to show that Caldwell was in the Capitol Building or that he damaged any property. Second, the indictment states that Caldwell entered the Capitol with "Crowl and Watkins, together and with others…" The Government will be unable to provide any evidence to support this naked and false accusation. Third, the Government will be unable to provide any evidence that Caldwell participated in any activity in the Capitol Building or that Caldwell caused any damage "to the building in an amount more than $1,000."

37. Rule 7(c)(1) requires that the indictment be a plain, concise, and definite written statement of the essential facts constituting the offense charged. With regard to Count Three, no facts are charged and the indictment only states the bare legal conclusion that there was damage to the building that purportedly amounts to more than $1,000. There is no identification of any specific property allegedly damaged by Caldwell nor any allegation of the extent of such damage.

38. Caldwell does not quibble over technicalities. 18 U.S.C. §1361 provides different punishments based upon the amount of damage, only one of which may give rise to a rebuttable presumption under 18 U.S.C. §3142(e)(3)(C). Absent some evidentiary showing with respect to Caldwell's participation in the destruction of evidence and the value of that destruction, the Court cannot apply the rebuttable presumption of 18 U.S.C. §3142(e)(3). Again, as noted in *Stack v.*

Boyle, supra, since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of bail.

39. Congress, in passing 18 U.S.C. §3142(e)(3), clearly desired to only make certain acts of property destruction subject to a rebuttable presumption. In order for the presumption to apply, the Government must establish the factual prerequisite for its application. If the Government is asking the Court to apply the presumption based solely on the indictment, the request must denied as the Government is asking the Courts to depart from the norm by assuming, without the introduction of evidence, that Caldwell entered the Capitol and destroyed property valued in excess of $1,000. To infer from an indictment alone a need for a rebuttable presumption is an arbitrary act. *See Stack v. Boyle*, 342 U.S. at 5-6.

iii. Should the Court find it necessary to impose conditions of bond, the Court may do so without hearing

40. If the Court determines that, in granting bail, it should impose conditions as authorized in 18 U.S.C. §3142(c), it may do so without hearing as the requirement of a hearing established in 18 U.S.C. §3142(f) is not triggered.

A. There is no charge of an offense identified in 18 U.S.C. §3142(f)(1)

41. No hearing is required because the Government has not charged an offense listed in 18 U.S.C. §3142(f)(1). At the Rule 5 hearing, the Government asserted that 18 U.S.C. §3142(f)(1) is applicable to Caldwell's release as it asserts that Caldwell is charged both with a crime identified in 18 U.S.C. §2332b(g)(5)(B)

because that statute lists violations of 18 U.S.C. 1361 for which a penalty of 10 years or more may be imposed, and a crime of violence. With regard to whether the indictment properly sets forth an applicable charge under 18 U.S.C. §2332b(g)(5)(B), Caldwell adopts and reasserts the arguments set forth above with respect to the application of a rebuttable presumption under 18 U.S.C. §3142(e)(3).

42. Additionally, Caldwell is not charged with a "crime of violence" as that term of art is understood in U.S. law and is applied in 18 U.S.C. §3142(f)(1). First, under standard statutory interpretation principles, all offenses listed under 18 U.S.C. §2332b(g)(5)(B) are distinct from "crimes of violence" because "crimes of violence" and 18 U.S.C. §2332b(g)(5)(B) are separately set forth in 18 U.S.C. §3142(f)(1)(a). Because of this, they must be treated as distinct; otherwise the statute is redundant and the listing of 18 U.S.C. §2332b(g)(5)(B) is surplusage. However, words in a statue are presumed not to be surplusage. *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 385 (2013)

43. Additionally, the Bail Reform Act defines "crime of violence" as follows:

> (A) an offense that has an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another;
>
> (B) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense; or
>
> (C) any felony under chapter 109A, 110, or 117….

18 U.S.C. §3156(a)(4). The crimes at issue here do not fit within the definitions of "crime of violence" set out in § 3156(a)(4).

44. At the Rule 5 hearing, the Government limited its discussion of purported crimes of violence to 18 U.S.C. §1361, which states, in part:

> Whoever willfully injures or commits any depredation against any property of the United States, or of any department or agency thereof, or any property which has been or is being manufactured or constructed for the United States, or any department or agency thereof, or attempts to commit any of the foregoing offenses…

A violation of this statute does not require the use or threatened use of force. The conditions of §3156(a)(4)(A) are not met as the use of force is not an element of the offense of violating 18 U.S.C. §1361.

45. Further, none of the other charged counts, by their nature involve a substantial risk of physical force against a person or property. The conditions of §3156(a)(4)(B) are not met. By its terms, the conditions of §3156(a)(4)(C) are not met.

B. No hearing is required under 18 U.S.C. §3142(f)(2)

46. Under18 U.S.C. §3142(f)(2), a hearing may be held:

> upon 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 prospective witness or juror.

47. Should the Government seek a hearing, the request should be denied. Where the government seeks pretrial detention on the ground that no condition or combination of conditions will reasonably assure the appearance of defendant as required, it has the burden of establishing by a preponderance of the evidence that the defendant will flee before trial if released or, by clear and convincing evidence, that he presents a danger to the community. *United States v. Vortis*, 785 F.2d 327, 328-29 (D.C. Cir.), *cert. denied*, 479 U.S. 841 (1986).

48. There is nothing in the indictment or criminal complaint that suggests that Caldwell will flee. He has lived in Clarke County, Virginia his whole life except for periods of time in which he was in the United States Navy. His ties to the community, assertions of innocence, ownership of real property, and historical background, to include the clearances he has held with respect to sensitive and classified information of the United States, all negate the specious and conclusory allegations asserted by the Government.

49. Additionally, there is no evidence presented that suggests that Caldwell poses any risk of obstruction or threat to any witness or juror. Mere allegations, bereft of facts, that simply set forth legal conclusions regarding unspecified conspiracies and agreements that allegedly took place at some unidentified place and unidentified time and involved unidentified individuals, coupled with the lack of any evidence to place Caldwell in the Capitol Building on

January 6, 2021, do not establish a serious risk that warrants a hearing. Release should be granted either under 18 U.S.C. 3142(b) or (c).

50. The "clear and convincing evidence" with respect to a defendant's danger to the community required by § 3142(f)(2)(B) means something more than "preponderance of the evidence," and something less than "beyond a reasonable doubt." *See Addington v. Texas*, 441 U.S. 418, 431 (1979). To find danger to the community under this standard of proof requires that the evidence support such a conclusion with a high degree of certainty. Mere speculation or statements of an AUSA's concern, as reflected in the Rule 5 hearing, is insufficient to meet the standard.

iv. The Court can impose conditions that will reasonably assure Caldwell's appearance as required and the safety of any other person and the community

51. In determining whether there are conditions of release which will reasonably assure the appearance of the person as required and the safety of any other person and the community, the Court shall take into account the available information concerning (1) the nature and circumstances of the offense charged; (2) the weight of the evidence against the defendant; (3) the defendant's history and characteristics; and (4) the nature and seriousness of the danger to any person or to the community which would be posed by the defendant's release. See 18 U.S.C. § 3142(g) (emphasis added).

52. Proof of three of the four charges against Caldwell require, among other things, the Government establish that Caldwell was in the Capitol Building and he overcame barriers in order to enter. As the Government is in possession of evidence that clearly establishes that Caldwell at no time entered the Capitol Building, and given his physical condition that makes it impossible for him to have forcibly taken any action, the circumstances of the offenses charged, as they relate to Caldwell, weigh heavily in favor of release. Moreover, as they specifically involve alleged actions at the U.S. Capitol Building, the Court could impose as a condition of release that Caldwell not travel to the U.S. Capitol and attempt to make entry.

53. With regard to the nature and circumstances of any alleged conspiracy, the Court must be mindful that an indictment is neither proof, nor evidence. The Court must also, given the strong policy in favor of release, view the nature and circumstances of the offenses charged in the light other non-criminal activities that can be, or are, consistent with the same fact pattern. Assuming, without conceding that Caldwell had conversations with Crowl and/or Watkins, the likelihood that such conversations involved non-criminal coordination or planning to attend a legal rally protected under the First Amendment is not negated by the known facts stated in the indictment. There is no allegation of any recorded conversation or phone call, no specific date on which any alleged

conspiracy was formed, no words of agreement or assent, no record of any alleged duration or objective of a conspiracy involving Caldwell. The Government has asserted that hundreds of citizens entered the Capitol Building but has not been able to place Caldwell there, nor have they alleged any specific communications that specifically identify any illegal activity or purpose.

54. The failings of the nature and circumstances of the offenses charged with regard to Caldwell also speak to the lack of weight with regard to evidence against him. There is no recording or statement of specific words that allegedly were used to define or form any alleged agreement. There is no evidence of any assent on the part of Caldwell. There is no evidence that places him in the Capitol Building so that he could obstruct and proceeding, or cause damage to property. There is no evidence that he "stormed" past a barricade or otherwise entered a restricted area. The lack of evidence also favors release.

55. Caldwell's history and characteristics also favor release. A decorated, disabled veteran who is disabled from efforts defending the country and the Constitution is unlikely to engage in the alleged conduct. He has been vetted and found numerous times as a person worthy of the trust and confidence of the United States government, as indicated by granting him Top Secret clearances. His medical conditions also favor release as he needs to address these and they demonstrate that Caldwell has no ability to engage in behavior that places the

community at risk.

56. Also, there is no evidence that the community would be placed in any danger if Caldwell is released. He is a retired 66 year old disabled veteran with serious physical problems. Given his presumption of innocence, and the failure of the Government to allege any factual basis for any concern over future activity (the purpose of the alleged conspiracy has been rendered moot), there is no concern for Caldwell's release.

57. Nevertheless, should the Court find that 18 U.S.C. §3142(b) does not apply, conditions exist that could be imposed that will provide assurances that Caldwell will not flee and that the community will not be at risk. 18 U.S.C. §3142(c) identifies fourteen conditions (i through xiv) that the Court may consider in determining the least restrictive conditions necessary to meet the objectives of pretrial release.

58. Caldwell asserts that most potential conditions are not applicable to Caldwell: i (he is not a juvenile who can be placed in another's custody), ii (he is retired), iii (he is not in need of education), v (there is no alleged victim or identified witness), vii (he is 66 years old and not in need of a curfew), viii (there is no allegation of potential use of any weapon), ix (there is no allegation of any concern of abuse of alcohol, drugs, or other controlled substance), xi (there is no need to seek security as his property is illiquid), xii (cash or surety bond creates

unnecessary burdens and potentially violates equal protection), xiii (no need to return to custody).

59. Pursuant to condition iv, the Court could consider placing a restriction on Caldwell's travel and prohibit him from entering the Capitol Building pending the results of trial.

60. Pursuant to condition vi, the Court could require that Caldwell report on a regular basis to a designated pretrial services agency.

61. Pursuant to condition x, the Court could require that Caldwell continue with his prescribed course of treatment with his various medical providers.

62. Pursuant to condition xiv, the Court could impose other conditions but Caldwell avers that such imposition is unnecessary and would exceed the least amount of restrictions necessary to ensure the goals of release.

Wherefore, pursuant to 18 U.S.C. §3145(b), having been ordered detained by a magistrate judge, Caldwell seeks revocation of the order and that he be released upon his own recognizance or unsecured bond as authorized in 18 U.S.C. §3142(b); or, in the alternative, that he be released pursuant to 18 US.C. §3142(c) subject to the condition he not enter the U.S. Capitol Building, that he regularly report to pretrial services, and that he continue all medical treatment as prescribed by his attending physicians; and for such other relief as the Court deems just and

proper.

Respectfully submitted by,

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By Counsel

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CERTIFICATE OF SERVICE

I certify that on this 8th day of February, 2021, I electronically filed the foregoing Memorandum in Support of Motion for Review of Detention Order Pursuant to 18 U.S.C. §3145(b) and Motion for Release using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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/S/
Thomas K. Plofchan, Jr., Esq.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

****

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THOMAS EDWARD CALDWELL,

Defendant.

CASE NO.: 5:21-MJ-00004
January 19, 2021
Rule 5 - Initial Appearance
Zoom Videoconference

Before:
HONORABLE JOEL C. HOPPE
UNITED STATES MAGISTRATE JUDGE
WESTERN DISTRICT OF VIRGINIA

****

APPEARANCES:

For the Plaintiff:

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Mary J. Butenschoen, Transcriber

PROCEEDINGS TAKEN BY ELECTRONIC RECORDING; TRANSCRIBED USING COMPUTER-AIDED TRANSCRIPTION.

(Proceedings commenced 3:41. p.m.)

THE COURT: Good afternoon. Ms. Dotson, would you please call the case.

THE CLERK: Yes, Your Honor. This is Criminal Action Number 5:21-MJ-4. *United States of America v. Thomas Edward Caldwell.*

THE COURT: Mr. Kavanaugh, is the government ready to proceed?

MR. KAVANAUGH: Yes, we are, Your Honor. Good afternoon.

THE COURT: Good afternoon. And Ms. Lorish, is the defendant ready to proceed?

MS. LORISH: He is, Your Honor. Thank you.

THE COURT: We're here for your initial appearance and then also an identity and removal hearing, and that's because you've been arrested on an arrest warrant on amended complaint out of the United States District Court in the District of Columbia. So there are several things I need to go over with you, and I'll advise you of some rights and the nature of the charge against you, and then explain your right to an identity hearing and production of the warrant.

I will need to ask you some questions, and your answers do have to be under oath, so would you please raise your right hand.

THOMAS EDWARD CALDWELL, SWORN

THE DEFENDANT: I do.

THE COURT: Okay. You may put your hand down.

Now, the first question is: Can you read, write, and understand English?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. Now, let me advise you of several rights. You do have the right to be represented by an attorney in this case. You can hire an attorney of your choosing, or, if you can't afford to hire an attorney, then I will appoint an attorney to represent you and that will be at no cost to you. Now, you can consult with your attorney at every stage of this case both in and out of court. And I would appoint an attorney to represent you in this removal hearing. And if you are to go to the District of Columbia to answer the charge, or the charges against you, you would have a different attorney appointed to represent you in that case.

But do you understand your right to be represented by an attorney?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: All right. And would you like the Court to consider -- consider appointing an attorney to represent you?

THE DEFENDANT: I was talking to counsel a moment ago, and I don't know -- I don't know whether her interaction with me, you know, foregoes that.

THE COURT: Well, so I would appoint Ms. Lorish, who you spoke to --

THE DEFENDANT: Oh, okay.

THE COURT: -- Federal Public Defender. I would appoint her --

THE DEFENDANT: Yes, sir.

THE COURT: -- to represent you if you want.

THE DEFENDANT: Yes, Your Honor. Thank you so much. This is all new to me. I'm sorry, I didn't quite understand.

THE COURT: That's okay. And let me just ask you some questions about your financial circumstances to see if you would qualify for appointment of counsel, okay?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Are you currently working?

THE DEFENDANT: No, sir. I'm on disability, sir.

THE COURT: Okay. And about how much -- about how much do you earn through that and any other source per month?

THE DEFENDANT: About -- I think about $5,000.

THE COURT: Okay. And is that through disability and other -- and other payments?

THE DEFENDANT: Yes, sir. I have my retirement from the United States Navy, sir.

THE COURT: Okay. And do you have any money in a bank account?

THE DEFENDANT: I do, Your Honor. Most of the moneys

that are available to my wife and I are tied up in trust, so they are in trust accounts. We do have some checking account money.

THE COURT: All right. About how much unencumbered money do you have in liquid cash?

THE DEFENDANT: Your Honor, I'm not trying to be evasive. I actually don't know because my wife handles the money. I -- I recently lost my father, and we settled the estate, so I'm saying we've got at least $50,000 in the checking account right now.

THE COURT: Okay. All right. And do you own any other significant property, such as a residence or a vehicle?

THE DEFENDANT: We do, Your Honor. We -- we own part of the farm that I grew up on. That is also in trust.

THE COURT: Okay. All right. And do you --

THE DEFENDANT: I have a vehicle. It's about a 2008 Highlander. And I had a collector automobile which was damaged by the FBI today, so I don't know how much it's really worth.

THE COURT: All right. And do you have any significant debts?

THE DEFENDANT: No, sir. No, sir.

THE COURT: All right. Well, I tell you, I don't -- Mr. Caldwell, I don't think that you would qualify for appointment for counsel because it sounds like you have sufficient assets to be able to hire a lawyer to represent you.

Ms. Lorish is here, and as a member of the Federal Public Defenders office I know that -- I imagine she would want to be here to make sure that your rights are protected during this hearing, and I'm certainly going to make sure they are protected as well.

What I would do is appoint Ms. Lorish in, essentially, an advisory capacity for this hearing, and but I think you would have to -- you would have to hire a lawyer in the District of Columbia if you're to go there to answer the charges against you.

All right. Ms. Lorish --

THE DEFENDANT: All right, Your Honor.

THE COURT: Ms. Lorish, do you agree to proceed that way?

MS. LORISH: I'm happy to provide advice to Mr. Caldwell today, yes, Your Honor.

THE COURT: Okay. All right. And Mr. Caldwell, alternatively, you could hire a lawyer for that hearing if you wanted to, but if you are comfortable proceeding with Ms. Lorish in an advisory capacity we can go ahead.

THE DEFENDANT: I'm very comfortable, Your Honor. Thank you.

THE COURT: Okay. Now, you also have a constitutional right to remain silent, which means that you cannot be required to make any statements about your case.

Now, if you already have made any statements to law enforcement or a police officer, you don't have to make any more. If at some point in the future you want to agree to questioning by law enforcement, you can have your attorney present during that questioning and consult with her, and you can stop that questioning at any time.

Now, you should talk with your lawyer about your case, but if you talk to anybody else about your case your statements could be used against you to prosecute you.

Now, do you understand your right to remain silent?

THE DEFENDANT: I do, Your Honor.

THE COURT: Now, you also have a right to consular notification. And I don't know whether this has any application to you, but I need to advise you of it anyway. And this right is for a defendant who is not a United States citizen. You can ask the United States Attorney to notify the consulate of his nationality when he's been arrested.

Do you understand that?

THE DEFENDANT: Yes. Yes, Your Honor, I do.

THE COURT: All right. Now, Mr. Kavanaugh, you need to advise the government -- and I know you're aware of this, but the government is required to adhere to its disclosure obligations in *Brady v. Maryland* and its progeny to provide any evidence that is favorable to the accused.

MR. KAVANAUGH: Yes, Your Honor. Thank you.

THE COURT: All right. Now, in just a moment I'm going to go over the complaint, the amended complaint, and the charges against you. I do want to advise you that you do have the right to have this hearing, this identity and removal hearing and your initial appearance, all in person at the courthouse, which means we would all just assemble in a room in the courthouse and have this exact same hearing that we're having right now. But you can also agree to waive that right to an in-person hearing and proceed by video if you want to.

But do you understand that you have that right to an in-person hearing?

THE DEFENDANT: Yes, sir. Yes, sir, I do.

THE COURT: All right. And do you want to waive that right to an in-person hearing and proceed by video today?

THE DEFENDANT: I believe that on advice of my counsel that we would like to go ahead and waive that and proceed.

THE COURT: All right. Well, then I will accept that waiver, and we will proceed today by video.

THE DEFENDANT: Yes, Your Honor.

THE COURT: Now, have you received a copy of the amended complaint in this case?

THE DEFENDANT: Just handed to me moments ago, Your Honor.

THE COURT: Did you have any time to go over it with

Ms. Lorish before the hearing?

THE DEFENDANT: She did -- before I got the copy before me, Your Honor, she did give me the highlights or lowlights, if you will. So I am aware of the charges but I'm not totally --

THE COURT: Hold on. And so what I'm going to -- I'm just going to go over those with you, and I'll kind of give you the gist of it. Then I'm just going to ask you if you understand what the amended complaint alleges, or what it says you did. But I'm not going to ask you whether you agree or disagree with anything that it says, and I would advise you not to make any statements about it, okay?

THE DEFENDANT: Yes, Your Honor.

THE COURT: So the amended complaint charges you with six federal offenses. I'll go over those offenses in a moment, but I thought what I would do is just give you the gist of the affidavit first. And it sounds like Ms. Lorish may have done this as well.

But what the affidavit alleges is that you were a member of a paramilitary organization called the Oath Keepers and that there are several other people who are also charged in the amended complaint who are a member of that group as well, and it's Mr. Crowl and Ms. Watkins. And that in December and January there was communications, primarily through Facebook and other meetings like that, about an Oath Keepers gathering

in -- one in Virginia and then going into Washington, D.C. on January 6 with a plan to storm the U.S. Capitol and disrupt the House of Representatives and the Senate while they were conducting their business to certify Joe Biden as President of the United States.

And then the complaint goes on to discuss events that happened on January 6 in or around the Capitol. And it alleges that you and other members of the Oath Keepers and many other people forced entry into the United States Capitol and that property was damaged and law enforcement officers were assaulted and members of the House of Representatives and Senate, and also Vice President, were forced to leave the joint sessions for their safety and move into secured locations to, essentially, get out of the way of you and other folks who had forced their way into the Capitol.

Now, that's sort of the gist of the allegations. And from those allegations there are several charges that the complaint levels against you. And two of those charges are conspiracy type charges. A conspiracy is, essentially, an agreement between two or more people to do something illegal, and then there has to be step or steps taken in furtherance of those conspiracies.

So the first charge is a general conspiracy under Section 371.

Now, the second one is a conspiracy to impede someone

who is involved in a -- make sure I follow this exactly right. Essentially, a conspiracy to prevent by force or intimidation or threat someone who is engaged in discharging the duties of his or her office.

Now, the next charge is destruction of government property, and I think it's alleged in the affidavit that the destruction of property was over a value of a thousand dollars.

Fourth charge is the obstruction of an official proceeding. What that alleges in a little bit more detail is that someone tries to corrupt the -- obstruct or influence or impede any official proceeding. That sort of conduct is prohibited.

And then there's a charge of entering a restricted building or grounds, and the affidavit provides that the Capitol and the area around it were restricted grounds at that time.

And then finally, there's a charge for violent entry and disorderly conduct on the Capitol grounds.

Mr. Caldwell, do you understand kind of the gist of the charges against you?

THE DEFENDANT: I certainly do, Your Honor.

THE COURT: All right. And Mr. Kavanaugh, what are the penalty ranges for those charges?

THE DEFENDANT: I'm sorry, you broke up there, Your Honor. One more time there, please, sir.

THE COURT: And this is a question for the Assistant United States Attorney. He's going to announce the penalty ranges for the charges.

MR. KAVANAUGH: Your Honor, I'm only going to go one-by-one through these. The first is the conspiracy in violation of 18 U.S.C. Section 371. That's a conspiracy to obstruct justice. The penalty for that is a term of imprisonment of up to five years, a fine of $250,000, up to three years of supervised release, and a $100 special assessment.

As to Count Two, a conspiracy to impede or injure an officer without lawful authority in violation of 18 U.S.C. 372, that is punishable by a term of imprisonment of up to six years, punishable by a fine of up to $250,000, three years of supervised release, and a $100 special assessment.

For a violation of 18 U.S.C. 1361, destruction of government property and greater than $1,000, that is punishable up to a term of ten years to prison, a $250,000 fine, three years of supervised release, and a $100 special assessment.

As to Count Four, the obstruction of an official proceeding in violation of 18 U.S.C. Section 1512(c)(2), that is punishable for a term of imprisonment of up to 20 years, a fine of $250,000, a term of supervised release of up to three years, and a $100 special assessment.

Count Five is a misdemeanor, a Class A misdemeanor,

in violation of 18 U.S.C. 1752(a), restricted -- entering a restricted building or grounds. That is punishable up to one year in prison, a $100,000 fine, one year of supervised release, and a $25 special assessment.

And last, Count Six, a violation of Title 40, United States Code, Section 5104(e)(2). This is a petty offense misdemeanor, a Class B misdemeanor, for violent entry and disorderly conduct on the Capitol grounds, punishable up to a term of imprisonment of six months, a fine of $5,000, up to $5,000, supervised release is not available, and a special assessment of $10.

THE COURT: Do you understand that those are the statutory maximum penalties that are associated with the offenses?

THE DEFENDANT: I sure do, Your Honor.

THE COURT: All right. Now, you have several options for how to handle your case at this point, and that's because you've been arrested in the Western District of Virginia on charges out of the District of Columbia. You can require the government to prove that you're the person named in the complaint and the arrest warrant, that you are Thomas Edward Caldwell, and you can require the government to produce the warrant.

Alternatively, you can agree that you're the person named in the warrant and the complaint, and then you would need

to go to the District of Columbia to answer these charges.

Do you understand that you do have that right to identity hearing and production of the warrant?

THE DEFENDANT: Yes, sir. Yes, sir. And, Your Honor, I am the person named, and I look forward to my opportunity in D.C. to prove that every single charge is false.

THE COURT: Okay. All right. Well, so in that case, you will go to the District of Columbia to answer these charges.

I do need to advise you of a couple of additional things, and one is that under Rule 20 of the Federal Rules of Criminal Procedure you do have the option of keeping the charges here in this district, but there would be a couple of things that would have to happen first. The United States Attorneys in both districts would have to agree to the transfer of the charges to this district, and you would have to agree to plead guilty to the charges, and I'm just -- I just have to advise you of that rule.

Do you understand that rule?

THE DEFENDANT: I do understand that rule, Your Honor.

THE COURT: Okay. And then additionally, you do have the right to have a preliminary hearing and a detention hearing. Now, at a preliminary hearing the government would

have to present evidence to show that there is probable cause for the charges to go forward. You could see and hear the witnesses against you and have them cross-examined by your attorney, and your attorney could also present evidence on your behalf.

Mr. Caldwell, do you understand that you do have that right to a preliminary hearing?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. And now you can have that here or you can have that at the District of Columbia.

MS. LORISH: Your Honor, I believe Mr. Caldwell intends to have that hearing when he gets to the District of Columbia.

Is that correct, Mr. Caldwell?

THE DEFENDANT: That's correct, Counselor.

THE COURT: All right. And then the other thing that we need to address is whether you're going to be released or detained in this -- in this case.

THE DEFENDANT: Yes, Your Honor.

THE COURT: And we can have that hearing in this district or you can reserve your right and have that in the District of Columbia.

MS. LORISH: Your Honor, I believe Mr. Caldwell intends to seek release today from this district, and I'm happy to present arguments on his behalf based on the conversation I

had with him beforehand. Although I think it is the government's burden in this case, so perhaps it would be appropriate for them to go first.

THE COURT: All right. Mr. Kavanaugh, what is the government's position?

MR. KAVANAUGH: Your Honor, we are seeking that the defendant be detained pursuant to 3142(f)(1)(A). That 18 U.S.C. 1361, the destruction of government property, is a crime of violence for purposes of the Bail Reform Act.

THE COURT: All right. And Mr. Kavanaugh, do you want to have the hearing today? Are you ready to go forward?

MR. KAVANAUGH: We are prepared to proceed by proffer today, Your Honor, that's correct.

MS. LORISH: Can I just clarify what statute the government was alleging is a crime of violence? Was that 40 U.S.C. 5104?

MR. KAVANAUGH: No, 18 U.S.C. 1361.

MS. LORISH: Okay, thank you.

THE COURT: And Mr. Kavanaugh, is there any other grounds for --

MR. KAVANAUGH: Your Honor, there would be a fallback grounds under these circumstances, and that would be under 18 U.S.C. 3142(f)(2)(B), that in the event of the defendant's release there is a concern that he would obstruct justice. And I can provide some of the additional information in support of

that, but that is, generally speaking, the evidence that the government has that Mr. Caldwell has deleted or destroyed some of the evidence that is part of this case. I believe that may have been recovered by the federal government, but, in particular, Facebook messages, that the defendant had made relating to the Capitol riots.

THE COURT: Okay. Ms. Lorish, is there any objection that the government proceed by proffer?

MS. LORISH: There's no objection to the proceeding by proffer. Thank you, Your Honor.

THE COURT: All right. And Mr. Caldwell, what that means is that the prosecutor would proffer or just present what he believes the evidence would be related to the detention hearing rather than call an agent to testify as to that evidence. For a detention hearing, proffers are permissible.

MS. LORISH: Your Honor, if I may, just for Mr. Caldwell's benefit, if you were to delay and ask for the agent to be present instead of proceeding by proffer, you would be sitting in custody until early next week realistically until the agent could be ready, or at least the end of this week.

THE COURT: The government would -- would be -- and really either side would be entitled to a continuance of a detention hearing if requested.

All right. Mr. Kavanaugh?

MR. KAVANAUGH: Yes, Your Honor. I'm going to be

proceeding largely on the affidavit, as well as I may be able to supplement some of what the government has learned pursuant to the search warrant that was this morning. Particularly, I'm going to go through the factors of 18 U.S.C. 3142(g), and I'll start with the nature and circumstances of the offense charged.

As an initial matter, one of the offenses charged, the one of the destruction of government property, is a crime of violence. But more importantly, the nature of the offense, obviously, is very much directed at the fabric of our democracy, the attempt of insurrection and to overthrow what was occurring and to stop what was occurring on January 6 of 2020 -- or '21.

These events threatened the safety of the members, the staff, the police. Five people died, including one Capitol police officer, Your Honor.

THE COURT: Is it the destruction of government property or is it the destruction of an official proceeding that the government contends is a crime of violence?

MR. KAVANAUGH: Your Honor, it's the destruction of government property. As the Count Two, the conspiracy, we're not moving forward on the basis of that is a crime of violence.

THE COURT: I'm looking at Count Four, which -- let's see, okay.

All right. So destruction of government property. That just concerns property, though, right?

MR. KAVANAUGH: Yes, Your Honor. And under the definition of 3156, where the crime of violence definition is, that it can require force against a person or property of another. So property is in fact included. It doesn't necessarily have to be a person for purposes of the Bail Reform Act.

THE COURT: Okay. (Inaudible).

MR. KAVANAUGH: And I'm sorry, Your Honor, I think I may have been talking over you briefly there. I didn't hear you due to the Zoom. So I apologize about that.

Your Honor, these -- the government's point of view is that these are very much the hallmarks of serious federal crimes. There indicated that there was planning that was involved, that there was interstate travel, and many of the individuals were wearing military uniforms, and that it's -- it is very much likely that additional charges are going to be on the table in these cases, such as the Federal Riot Act's edition and others.

The weight of the evidence here is very much strong. The defendant admitted in Facebook messages to storming the Capitol multiple times, and at one point in time stated that he was inside the Capitol. Or "inside," specifically.

He was captured on video outside of the Capitol shouting insults to members of Congress and calling them traitors saying that every single person inside the building

was a traitor. And this is just before they stormed the Capitol.

There is cell site analysis that places his wife, who was with him, in the vicinity of the Capitol during the time of the attack, and Mr. Caldwell made numerous Facebook messages about the planning for the events in advance of January 6 of 2021.

Third and finally -- or third is the history and characteristics of the individual, Mr. Caldwell. And the government admits that he does have minimal criminal history and that appears that -- all I am aware of is that it appears to be several traffic matters that are in fugitive status, but that is the only evidence that I have regarding his criminal history. But regarding his characteristics is that it is -- the government alleges that he maintains a leadership position with the Oath Keepers, which, as the Court noted in the affidavit, is a paramilitary organization with antigovernment ideology that advises its members not to follow government laws and rules that it disagrees with or what it considers to be unconstitutional.

Fourth is the nature and seriousness of the danger to any person of the community posed by the defendant's release. And here, I'm focusing mostly on the defendant's danger to the community in light of his Facebook messages. Mr. Caldwell exhibited no remorse or contrition for his conduct and

considers himself and fellow co-conspirators to very much be patriots for storming the Capitol and attempting to harm elected members of Congress that were inside and stopping the election certification.

He supported storming Capitols at the local level in states, and by his own statements admitted to being such an instigator and was willing to participate in those as well.

These same messages reflect his willingness to engage in political violence, or as he referred to was hunting at night. Specifically, on January 1, the defendant sent a Facebook message to one of his co-defendants recommending a room at the Comfort Inn in Boston for January 5 through January 7 and wrote: "This is a good location and would allow us to hunt at night if we wanted to."

These -- and also there is evidence that Watkins and Crowl, his co-defendants, were with him this weekend before they turned themselves in.

During the -- some of the subsequent -- the search warrant that occurred today, the government located about four or five new weapons that were located at his -- at his residence, and as well as evidence in his Facebook that he and his fellow co-conspirators were attempting to use encrypted messages and means to communicate with one another and deleting those messages in Facebook.

For all of these reasons, on these factors under

3142, the government respectfully requests that the -- by clear and convincing evidence that there are no conditions or combinations of conditions of release that could ensure the safety of the community and that the defendant would return to court as required.

There were a couple of other Facebook messages that I wanted to draw the Court to that were included in the affidavit. Specifically, on January 6 the defendant said, "We need to do this at the local level. Let's storm the Capitol in Ohio. Tell me when."

He posted a video with -- quoted that said this was before the assault, "Before the assault." And that was when he was on video stating that, "Every single" -- expletive -- "in there is a traitor. Every single one."

He said in advance on December 31 of 2020, he replied in a Facebook comment that, "It begins for real on January 5 and 6 in Washington, D.C. when we mobilize in the streets. Let them try to certify some crud on Capitol Hill with a million or more patriots in the streets. This kettle is set to boil."

And then last and finally that I wanted to bring to the Court's attention, is that on January 6 he received a message that all members are in the tunnels -- all the members of Congress are in the tunnels under Capitol, and he was told to seal them in, and he had posted a Facebook message that replied "Inside," indicating that he was inside the Capitol

Hill, inside the Capitol. And other members were encouraging him and others to take it over and that the legislators were three floors down in the tunnels.

So that is some of the evidence that would be expected at trial that we submit goes to the strength and the nature of the -- the nature and circumstances of the offense that's charged here.

So for all of these reasons, Your Honor, in light of the factors of 3142, we ask that the defendant be detained.

And I provided this to counsel as well. In the event that the Court disagrees and finds that the government has not met its burden, then we would respectfully request that the Court stay any release order to allow U.S. Attorneys Office in D.C. to file an appeal. They have asked for me to ask the Court for that as well.

That's all I have, Your Honor.

THE COURT: Ms. Lorish, what does Mr. Caldwell have to say?

MS. LORISH: Thank you, Your Honor.

Well, first, I would just note for the Court that, of course, the government's intent to file a motion to stay in the event this Court would grant release is not a relevant consideration under the Bail Reform Act.

THE COURT: No, I don't think --

MS. LORISH: -- evaluate the criteria before it and I

think that the criteria support release.

As an initial matter, we disagree with the government that 18 U.S.C. 1361 is a crime of violence making this a presumption offense. To be a crime of violence there has to be an element of the physical -- that requires the physical use of force against person or property. There's simply no element that requires the physical use of force in this statute. Willful injury could occur in any number of mechanisms, and we would disagree that the element requires physical use of force, and, therefore, it would not be a crime of violence and disagree that it's a presumption offense.

Even if it were a presumption offense, the Court should start by considering the nature and circumstances of the offender that, you know, Mr. Kavanaugh glossed over today. Mr. Caldwell has no record of criminal history. Therefore, any guns he possessed, there's been no allegation he possesses them unlawfully. At least that was referenced here today. He doesn't have any felonies. He just has the traffic offenses that Mr. Kavanaugh suggested he has.

In addition, he's a veteran. He's a United States Navy veteran who was discharged honorably. He is not just a veteran that was honorably discharged. He was injured during combat in his service to our country. On that note, he has extensive injuries, including spinal injuries. He currently has medical prescriptions to take medicine related to those

injuries four times a day due to his damaged spinal cord. He was not allowed by the arresting agents to bring those medications with him to the jail. He also has to use a CPAP machine to allow him to be able to breathe at night. Of course, this Court is well familiar with sleep apnea. Without that CPAP machine, he is at risk of not being able to breathe while he sleeps, and he was also not allowed to bring the CPAP machine with him when he was arrested today.

As this Court may know, there are currently at least 50 confirmed cases of COVID-19 at the jail where Mr. Caldwell is being held. The United States Marshals have informed counsel, you know, in our office about all -- numerous federal inmates who are currently being held at Central Virginia Regional Jail who have COVID. Mr. Caldwell, being 66 years old, qualifying as obese given his body mass index, and with sleep apnea is at significant risk of catching COVID-19 because he's at a jail where there is an outbreak. And, also, he's at significant risk of having a serious case and not having the medical attention that he would feed while he's incarcerated. So that's all relevant to the nature and circumstances of the offender.

With respect to the seriousness of the offense, of course the allegations the government suggests are quite serious. At this point they are allegations, and I would note for the Court that they do not suggest that Mr. Caldwell

himself committed any acts of violence. They do not -- they almost entirely are based on statements that were made, statements that are not alleged to have been criminal. None of the Facebook messages have been alleged as inciting any kind of violence, or the government hasn't charged him with unlawful speech. And in fact, the allegations that have been alleged are all currently lawful speech that was used. I believe according to NPR this morning, 70 percent of Republicans believe that the election was fraudulent, so Mr. Caldwell is certainly not alone in expressing his views concerning the election in this case.

So I think given that backdrop, the fact that there hasn't been any allegation that he himself participated in violence, and given the nature of the evidence which is largely -- could be considered blustering on Facebook, that the Court should weigh the factors in favor of the release given the potential seriousness of having Mr. Caldwell incarcerated right now given the outbreak at the jail.

Thank you, Your Honor.

THE COURT: Mr. Kavanaugh, anything else?

Mr. Kavanaugh, anything else?

MR. KAVANAUGH: Yes, Your Honor, I apologize.

Two things, Your Honor, is that number one, in the case of *United States v. Khatallah*, which is 316 F.Supp 3d 207 at page 213, and that's a D.C. district case from 2018, the

Court there found that 1363, which is another destruction of property crime that is very similar to 1361, satisfies the elements clause under 924(c), and that we think the conclusion should be the same the to 1361, as it very much tracks the same language. The only difference is, is that it includes the -- by depredation, which the definition of which is to attack or plunder, which also to the government's view indicates force. But second is that even if it doesn't qualify as a crime of violence under the elements clause, any offense could be --

(Background noise)

I apologize. I apologize.

Under the Bail Reform Act, specifically, the residual clause under the Bail Reform Act, 3156(a)(4)(B) which involves any other offense that by its nature involves a substantial risk of -- that physical force against a person or property of another may be used, that is still viable, still viable, notwithstanding that in the Supreme Court that the *Davis* court found that the residual clause in 924(c) was unconstitutional.

In support of that still being viable, because it's in a pretrial context, the government can point to a case called *Watkins* out of the Second Circuit, which was after *Davis* and said that it's still viable. And the cite for that is *United States v. Watkins*, 924 F.d 152. So just to respond to the argument that it does not constitute a crime of violence, we think it absolutely does.

MS. LORISH: Your Honor, if I may briefly respond on behalf of Mr. Caldwell.

THE COURT: Sure.

MS. LORISH: I just would of course note that Mr. Kavanaugh is only citing out of district and out of circuit precedent for his assertion. And it's a serious conclusion whether or not Mr. Caldwell is subject to presumption offenses or not. And I think the weight of the authority here, and as the Court has noted, the statute that they are relying upon for a crime of violence really has to do with a property offense, which is pretty inconsistent with the notion of a crime of violence across the case law.

And then the residual clause, while it has not yet been struck down out of this particular statute, the Fourth Circuit has certainly struck it out of every other similar statute, and there's no reason to think that the same conclusion wouldn't bear here.

So thank you, Your Honor.

MR. KAVANAUGH: And Your Honor, I apologize. I don't mean to quibble with Ms. Lorish, but there absolutely is reason to think that there would be a different conclusion reached here, precisely because it doesn't address a prior conviction. It's in a completely different context, and that's exactly what the Second Circuit said in *Watkins*, which is why we think the residual clause is still viable. But still that we think that

this qualifies under the elements clause.

THE COURT: Well, what I'm going to decide is first whether the charged offenses warrant holding a detention hearing under 3142(f)(1). Alternatively, under (f)(2) on the motion of the government or upon Court's own motion there can be a detention hearing where the defendant presents a serious risk of flight; or a serious risk the person will obstruct or attempt to obstruct justice.

I do have some questions about whether any of the cited offenses are crimes of violence. And the one that the government has highlighted, the destruction of property (indiscernible) have some questions about that. But I think that there is a basis for holding a detention hearing, and that's on the (f)(2)(B), the serious risk a person would obstruct or attempt to obstruct justice. And where I come down here is just the government's proffer and the information in the affidavit. Ms. Lorish certainly expressing views about how the election was conducted is -- you know, that's not a criminal offense. The affidavit details quite a lot of activity to recruit people and travel to -- organize and travel to the District of Columbia to thwart the certification of the lawfully elected President of the United States. And it really -- you know, the conduct and the statements of Mr. Caldwell and the others, it really just is pure lawlessness and contempt for laws of this country. And counts of a very

serious matter. Going into the Capitol, you know, hundreds, probably more than that, people storming the Capitol forcing the Vice President and every legislator in our country, every federal legislator of our country, to flee for their safety. It is a crime of the utmost serious because it threatens our very -- very foundations of our country. And I think it really shows serious contempt for the laws of this country, and I just -- with that in mind, it's hard to imagine that someone who it's alleged that's engaged in that conduct, you know, would adhere to conditions of release that a magistrate judge would issue. So I think there's a serious risk of obstruction of justice.

Mr. Kavanaugh highlighted that the government has information that Mr. Caldwell had deleted some evidence, potentially deleted some evidence in this case, and certainly whether that happened or not will have to play out over time, but there's some information before the Court that that has happened. And just given the allegations in the complaint about mobilization of many people, the weapons found, which Mr. Caldwell certainly has a lawful right to have them, but -- at this time, but the potential weapons found with statements after the storming of the Capitol about moving on to State Capitols, it's -- I do think that evidence before me would show that Mr. Caldwell does present a danger to the community and a risk that he would obstruct justice.

So I think with those in mind, I think I do have to detain Mr. Caldwell. I'm certainly sensitive to Mr. Caldwell's medical issues, and I think it would be incumbent upon the Court to make sure that the Marshals are aware of those medical issues and make sure that they make the jail aware of them so that he can be provided with necessary medical care while in the jail.

THE DEFENDANT: Your Honor, may I say something on my behalf?

THE COURT: You certainly may. Mr. Caldwell, what I would advise you to do is that I can put you and Ms. Lorish in a separate, you know, private breakout room and you-all can talk further, and then she can relay whatever concerns you have. And I just want to do that to protect your rights, okay?

THE DEFENDANT: That would be great, Your Honor. I would ask for that at this time, please.

THE COURT: Okay. Ms. Dotson, could you please do that?

THE DEFENDANT: Thank you, Your Honor.

THE COURT: Yes, sir.

(A recess was taken.)

MS. LORISH: Thank you, Karen.

Thank you, Your Honor. I don't believe that Mr. Caldwell has anything else to add at this time.

THE COURT: All right. Mr. Caldwell, was there

anything else?

THE DEFENDANT: No, sir, Your Honor. Thank you very much. And thank you for considering bail.

THE COURT: All right. Well, then Mr. Caldwell, I am going to enter a detention order, and I'll also enter an order that you would be committed to the District of Columbia to answer the charges against you. And Ms. Dotson, can you contact the Marshals and just make sure that they are aware of Mr. Caldwell -- and perhaps, Ms. Funkhouser, this would be a job for you to contact the Marshals to make sure they are aware of Mr. Caldwell's medical needs. And if there are any issues, I'd certainly like to know about them, okay?

THE CLERK: Okay, yes, sir.

MS. FUNKHOUSER: Yes, sir, Your Honor.

THE COURT: All right. Is there anything further to take up in this case today?

MR. KAVANAUGH: No, Your Honor.

MS. LORISH: No, Your Honor.

THE COURT: Okay. Thank you-all, and take care.

MS. LORISH: Thank you.

THE COURT: All right.

(The proceedings concluded at 4:34 p.m.)

CERTIFICATE

I, Mary J. Butenschoen, do hereby certify that the foregoing is a correct transcript of the electronic recording in the above-entitled matter.

_____/s/_____01/22/2021
Mary J. Butenschoen, Transcriber