

**UNITED STATES DISTRICT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA)

v.)

Case No. 21-cr-398 (BAH)-1

JAMES BURTON MCGREW,)

Defendant.)

**REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION OF
DETENTION ORDER**

John M. Pierce
355 S. Grand Avenue, 44th Floor
Los Angeles, CA 90071
Tel: (213) 262-9333
jpierce@piercebainbridge.com

*Attorneys for Defendant James Burton
McGrew*

INTRODUCTION

Curiously absent from the Government's 27-page opposition to the Mr. McGREW's Motion for Reconsideration of Detention Order is any reference to the demand by the government that Mississippi Probation Officer Allison Long violate Mr. McGREW's probation in that state as part of its effort to keep him detained in this matter. Ms. Long refused to do so.

Also absent from the government's opposition is the fact that PO Long does not object to Mr. McGREW being released to live with his family member in a second state while this matter remains pending. Ms. Long intends to take no action with regard to the charged offenses in this case until there is a judicial determination of guilt – if there is ever such a determination. If Mr. McGREW's term of probation in Mississippi ends before there is an outcome in this case, he will be discharged.

In addition, after her communication with the government in this case, PO Long determined that she had, in fact, received medical records from Mr. McGREW on May 18, 2021. The records, now filed under seal by the government, show he was admitted into the VA Hospital in Biloxi as of April 28, 2021, at 8:00 a.m., his mother having taken him there late at night on the 27th as claimed in Mr. McGREW's motion. He was discharged on May 13. Presumably the government will now acknowledge that Mr. McGREW's claims in that regard have always been truthful, he was hospitalized with a life-threatening condition – and could have been easily arrested at that time -- and any government insinuations or inferences to the contrary in the Opposition are false.

Those records show that Mr. McGREW was diagnosed upon admission with a potentially life-threatening condition that can occur to individuals who have suffered traumatic injury resulting from a past crush or blast trauma, such as the IED attack on the Mr. McGREW's armored Humvee in Iraq. The particular condition, if left untreated, can severely damage the kidneys. Mr. McGREW was suffering from near complete kidney failure when admitted – just as he told his Probation Officer and the defense has informed this Court.

I. The Government's Opposition Fails to Deal with its Demonstrated Lack of Urgency to Arrest Mr. McGREW For More Than Three Months While Knowing How to Find Him.

The government has come forward to oppose Mr. McGREW's release on the basis that doing so would result in a threat to the safety of the community. But the government must reconcile that claim with its willful inaction for nearly 90 days when it had all the evidence upon which it now relies, knew how to find Mr. McGREW, but did nothing to take him into custody to alleviate that threat.

The ulterior motive is transparent. The government wants to keep Mr. McGREW in custody because it believes in doing so Mr. McGREW will relent and express a willingness to plead guilty to a felony given the harsh reality of detained defendants being unable to get their cases to trial.

This is antithetical to the foundation of the Bail Reform Act which expressly provides that pretrial release on conditions is the norm, and detention pending trial is to be an extremely narrow exception.

The legislative history of the Bail Reform Act states:

"[T]here is a small but identifiable group of particularly dangerous defendants as to whom neither the imposition of stringent release conditions nor the prospect of release can reasonably assure the safety of the community or other persons. It is with respect to this limited group of offenders that the courts must be given the power to deny release pending trial."

S. Rep. No. 225, 98th Cong., 1st Sess. 6-7 (1983), reprinted in 1984 U.S. Code Cong. & Ad. News 1, 9 (Supp. 9A). (Emphasis added.)

Not "all dangerous defendants", but only "particularly dangerous defendants" should be detained.

The standard for allowing release of "dangerous defendants" is on conditions that "*reasonably assure*" the safety the community. The combination of conditions need not be shown to offer any "guarantee" regarding the safety of the community. The standard assumes that "dangerous" defendants will be released, and that the "danger to the community" can never be completely eliminated by the condition or combination of conditions imposed by the Court.

The government knew on March 3 that Mr. McGREW had gone inside the Capitol, took videos of himself and his actions while inside. The government had access to the CCTV video of the same areas of the Capitol at the same times. In the aftermath of learning this information, and having him positively identified by co-workers, they interviewed his former girlfriend, her parents, staff members at the residential treatment center, and his Mississippi Probation Officer – but took no steps to arrest him for nearly 90 days, all while the supposed "danger" he posed to the community went unaddressed.

If would have been simple – “standard operating procedure” – to ask PO Long to summon Mr. McGREW to an in-person meeting as part of his probation and arrest him at that meeting. Federal agencies do that very thing all the time.

The government never took that basic, ordinary, common law enforcement step to take Mr. McGREW into custody. Yet now the government claims Mr. McGREW cannot be allowed to live and work with a close relative on terms of supervised release while this case is pending because doing so would create a “danger to the community.” These representations are disingenuous nearly to the point of absurdity.

II. The Court Should Be Circumspect in The Degree to Which it Allows the Government to Expand the Record Previously Made Before the Magistrate Judge in Arizona

The government’s Opposition at page 19 notes that “both parties” are putting before the Court information that was not presented to Magistrate Judge Boyle in Arizona at the time of the defendant’s detention hearing in that court.

While that is true to a degree, it is also true that the parties do not approach this issue in a similar position.

Nearly six months have passed since that detention hearing. The defendant has now come before this Court to pursue relief under § 3145(b), and has presented new evidence discovered by defense counsel, as well as proffered conditions of pretrial release never before considered by this court to mitigate concerns previously expressed regarding risk of flight and dangerousness.

The defendant is offering to this Court evidence and information it did not previously possess – particularly the video showing Mr. McGREW handing a police baton back to a US Capitol Police Officer, and the officer saying, “Thank You.” That

video eviscerates the government's claim that Mr. McGREW is a danger to the community based on his actions on January 6.

The government never actually produced that video in discovery to Mr. McGREW. Defense counsel found out about the video only because it was produced to a defendant in a different case.

The government, on the other hand, in the very act of seeking detention represented to Judge Boyle that Mr. McGrew was a flight risk and a danger on June 4. It then made a record before that court which it represented a sufficient evidentiary basis to meet its burdens as set forth in the § 3142(e).

At the time the government made that record – five months after the protest/riot -- it had access to ALL the videos it wants this Court to see and consider now. But it did not make those videos available to Judge Boyle, nor were they produced to the Mr. McGREW.

Counsel for Mr. McGREW is aware that this Court has taken the position in other cases that the Court may consider new evidence offered by the parties in a proceeding brought pursuant to § 3145 – though there is no clear authority in this Circuit on that question.

Nevertheless, the government made a record in Arizona using evidence the government believed supported a finding by “clear and convincing evidence” that Mr. McGREW was a danger, and by a preponderance of the evidence that he was a flight risk.

The government's desire to supplement the record now, as the government seeks to do with its Opposition, is a tacit admission that the record made earlier in

Arizona was actually deficient and Mr. McGREW has been wrongfully detained for nearly 6 months.

There should be no need for the government to supplement the record from the Arizona hearing unless the government believes the evidence presented to Magistrate Judge Boyle is not sufficient to withstand scrutiny in this Court now that it has been thoroughly examined by Mr. McGREW's defense counsel.

The government was either justified in seeking Mr. McGREW's detention on June 4, 2021, -- or it was not. The government should not need to supplement the record nearly six months later, and the Court should resist the government's effort to do so.

III. Factual Errors in The Government's Opposition

A. Mr. McGREW Never Touched the Ladder and the Government's Claim that He Did Warrants Further Attention.

There are two glaring factual errors in the government's Opposition brief, both of which call into question the "good faith" of the government's Opposition.

At p. 10 of the Opposition the government claims:

In fact, as depicted below, prior to reaching the front of the tunnel, the defendant assisted other rioters in moving a ladder forward towards the entrance of the tunnel.

Below this paragraph is a still image from a video taken from a side-angle showing Mr. McGREW and what appears to be an eight-foot-long fiberglass ladder commonly found at construction sites. The ladder is being held above the heads of the crowd on the steps leading to the Lower West Terrace archway entrance to the Capitol.

What the government knows because it has seen the video is that this still image – in two dimensions – does not clearly reflect those relative positions of the ladder and Mr. McGREW to each other. Rather than “assisting” with the ladder in any fashion, Mr. McGREW is actually 3-4 feet away from the ladder – it is on his left as he is facing the Capitol building.

As shown in the still image, Mr. McGREW had climbed onto the backs of others in the crowd in an effort to move forward – as the video shows happened -- and his torso is almost entirely above the heads of the rest of the crowd.

The government claims the still image shows Mr. McGREW “*assisting other rioters*” in moving the ladder “*towards the entrance to the tunnel*”.

A participant video taken from behind Mr. McGREW, focused on the archway and the scrum of protesters on the steps just outside the archway, shows the ladder traveling both up towards the archway entrance, and then back down away from the archway entrance – all the time being held over the heads of the crowd.¹

The video shows that at the time of the still image capturing Mr. McGREW submitted by the government, the ladder was moving backwards away from the archway, not towards the archway as claimed by the government. Even if Mr. McGREW had touched the ladder – which he did not -- the Opposition still mischaracterizes the episode it relies upon by claiming Mr. McGREW was supposedly helping move the ladder forward, when at that moment in time captured in the still image the ladder was going the opposite direction.

¹ The participant video is being submitted to the Court and counsel for the government in a separate filing consistent with the Court’s normal practice.

Moments earlier, the same video shows the ladder being passed towards the entrance. The ladder enters the frame of the video from Mr. McGREW's right, while he is looking to his left. It is behind Mr. McGREW and out of his line of sight.

During that sequence of events Mr. McGREW was standing on the ground, and not on the backs of other protesters. The ladder is passed to his right side and behind him – between Mr. McGREW and the Capitol building -- by individuals higher up on the stairs, meaning the ladder is high above the Mr. McGREW's head and the heads of those around him.

He never touched the ladder as it was being passed forward by the crowd towards the archway entrance, contrary to the government's written claim.

The government has all the video evidence of this scene from multiple angles. All of these FACTS are made plain therein.

B. Mr. McGREW's Trip to Mexico Was a Day-Trip – Both Departing and Returning on May 23.

On page 15 of the Opposition, the government states:

On May 23, 2021, the defendant exited the country and traveled to Mexico. The defendant returned on May 24, 2021.

Travel outside the United States is always a matter of concern to courts in detention matters. Mr. McGREW's trip to Mexico was referenced – without explanation -- by Magistrate Judge Boyle in his justification for detaining Mr. McGREW in Arizona.

But rather than play straight with the facts, the government takes the opportunity to introduce an inaccurate inference.

Without knowing the underlying facts, the phrasing of the Opposition could lead a reader to conclude that Mr. McGREW traveled to Mexico and spent the night, and returned the following day.

Mr. McGREW's motion acknowledged the trip to Mexico on May 23, and that he was detained while crossing back into the United States at the San Ysidro Port of Entry. Mr. McGREW stated this was a day trip, the only purpose of which was to visit Tijuana for the first and only time before moving away from the San Diego area as already planned.

The misrepresentation made in the Opposition is established by the Affidavit of TFO Good dated May 28, 2021, submitted in support of an application to search Mr. McGREW's cell phone. Paragraph 88 of that Affidavit states:

Your affiant learned that on **May 23, 2021**, at **10:06 PM** PST, MCGREW applied for entry into the United States from Mexico via the San Ysidro Port of Entry driving a Truck.

Exh. "A", Affidavit of TFO Good, p. 28.

As Mr. McGREW's motion stated, he was detained by Customs and Border Patrol Officers for several hours before being released to enter the United States.

He did not "return" from Mexico on the 24th as the government's Opposition disingenuously claims. He did not stay overnight in Mexico – the inference suggested by the language chosen by the government. He was returning to the United States on the night of May 23 as stated in the motion, and was detained for several hours by U.S. government officials at the border, and was not released until the morning hours on the 24th.

Is it too much for a defendant to ask – and a Court to expect – for the government to recite facts accurately as reflected in Affidavits submitted by government agents?

Should the expectation be heightened when the issue pending before the Court is the liberty of an accused defendant – whether he will be released or detained pending trial?

IV. The Government Confirms That Mr. McGREW Handed a Police Baton Back to a U.S. Capitol Police Officer.

While the parties do not describe the circumstances in identical fashion, the Government does concede that Mr. McGREW did hand a police baton to a U.S. Capitol Police Officer, who responded to Mr. McGREW by saying “Thank you.”

The defendant then returned the baton and the officer stated, “Thank you,” to which the defendant gestured, presumably to another officer, stating, “Tell him to quit hitting people, give it to him, he’s right behind you.”

Exactly how Mr. McGREW came into possession of the baton is a matter that can be argued over during the hearing.

But, regardless of what that circumstance was, the FACT that Mr. McGREW handed the baton back to the officer, with the response from the Officer being “Thank You” undercuts the government’s claim that releasing Mr. McGREW would entail an unacceptable threat to the community based on alleged “violent” conduct by him on January 6.

V. Other Defendants Charged In Connection With January 6 Have Been Released On Conditions of Supervised Release Notwithstanding Similar – and Even Worse – Allegations of Violent Conduct.

An increasingly difficult proposition confronting this Court and other District Judges in this judicial district is the desire to maintain a level of consistency in decision making with regard to questions of detention across dozens of cases and defendants. Similar alleged offense conduct is presented in dozens of cases, while every defendant is entitled in an individualized and particularized determination on the question of detention or release pending trial.

This Court has served in the unique position of having to have made dozens of decisions as to pretrial release or detention for defendants when reviewing the outcome of initial detention hearings in other districts. The factual circumstances presented to this Court across that wide cross-section of cases have spanned the spectrum of allegations of violent action.

Mr. McGREW's counsel has done a quick review of cases where defendants charged with violent conduct and offenses have been released on terms and conditions of pretrial release. Descriptions of the alleged violent conduct – primarily taken from affidavits of the law enforcement officers submitted in support of criminal complaints -- for several of these released defendant are as follows:

1. United States v. Taylor, 1:21-cr-392-RCL:

Taylor wore a knife in his tactical vest, and with a group of others he pushed through a line of law enforcement officers. Taylor joined the crowd of rioters pushing against the police line. Taylor posted to a social media site "I was pushing through traitors all day today." He started a Telegram chat group called the "DC Brigade" to organize a group of "fighters" to travel with weapons to Washington, D.C.

2. United States v. Jackson, 21-cr-00395 TJK

The defendant is observed on video repeatedly striking a U.S. Capitol Police officer with his fist while attempting to forcefully enter the building. The defendant is also observed repeatedly striking a group of both U.S. Capitol and Metropolitan Police Department uniformed officers with a metal baseball bat. Released on conditions of pretrial release.

3. United States v. Sanford, 21-cr-00086 PLF

The defendant threw what appears to be a fire extinguisher at a group of officers, with the object hitting an officer on the head, and then hit another officer on the head. The object then ricocheted and struck a third officer in the head.

4. United States v. Cua, 21-cr-00107 RDM

The defendant posted on his social media account, "I stormed the capital with hundreds of thousands of patriots... Yes. We physically fought our way in." The defendant is seen on video, on the senate floor, asking, "where is Nancy..." The defendant is also seen outside the Senate Chamber doors, in a physical altercation with USCP plain clothes officers, still holding a baton in his hand. The defendant is captured on video shoving a USCP Officer in front of the door to the Senate Chambers.

5. United States v. Gossjankowski, 21-cr-00123-PLF:

The defendant tried to forcefully and violently gain access to the U.S. Capitol, entering a covered area leading to an entrance, assisting with passing a clear ballistic shield overhead, possessing a handheld Taser, activating the Taser multiple times, and pushing himself through the crowd of violent individuals towards the police line.

6. United States v. Klein, 21-cr-00236 JDB

KLEIN resisted officers, attempted to take items from officers, and assaulted officers with a riot shield.

7. United States v. Blair, 21-cr-186-CRC

After being pushed by a Capitol Police Officer using a baton, Blair turned to face the Officer by squaring up his body to that of the Officer while holding a lacrosse stick attached to the Confederate flag with two hands and started shouting, “what’s up mother****r, what’s up, what’s up bitch?” Blair thrust the stick at Officer K.P towards the chest area, striking him. When arrested, the officers found a silver knife and duct tape in BLAIR’s backpack.

8. United States v. Leffingwell, 21-cr-00005 ABJ

The defendant attempted to push past Capitol Police Officers. When he was deterred from advancing further into the Capitol building, the defendant punched one officer repeatedly with a closed fist.

9. United States v. Coffee, 21-cr-00327 RC

Coffee used a crutch to assault law enforcement officers, at a time and location where of the Capitol grounds where many officers were injured by the crowd where Coffee took his actions.

10. United States v. Owens, 21-cr-00286 BAH

Owens struck a federal officer on the head with a skateboard, causing him a concussion, as well as an injured finger.

On October 26, 2021, Judge Amy Berman Jackson released defendant Thomas Sibick – detained since February – who his charged with having assaulted U.S.

Capitol Police Officer Michael Fanone, one of the officers who testified before Congress.

IV. Sufficiency of Plan for Release on Conditions

Counsel for Mr. McGREW purposely opted to not include in a public filing the specifics of the plan for pretrial release because of the media attention being paid to these cases. But the details are being being provided to Pretrial Services. As they would do in any other case, Mr. McGREW's counsel will work with Pretrial Services to address any issues or questions that might arise with respect to the proposed details for Mr. McGREW's release. The Pretrial Services Officer will then make a confidential report and recommendation to the Court and Counsel.

Mississippi Probation Officer Ms. Long communicated to Mr. McGREW's counsel that it would be necessary under Mississippi law for him to return to Mississippi if released for such time as she would need to confirm with the second state that Mr. McGREW could reside in that second state will under probation in Mississippi. This is normally a formality, but the process cannot begin until Mr. McGREW returns to Mississippi. As a result, the anticipated proposed release plan would be for Mr. McGREW to temporarily reside in Biloxi, Mississippi with his mother until PO Long completes the agreement with the second state for Mr. McGREW to reside there with his relative, where he will be employed full time.

As noted above, Ms. Long is fully agreeable to the proposal for Mr. McGREW to live in the second state, and with the relative being suggested, as both those conditions have previously been considered by her with regard to Mr. McGREW.

It would certainly be anomalous for this Court to focus on probation issues in his past as a basis to continue to detain Mr. McGREW in light of the fact that the Probation Officer in the state that currently has him under supervision would not seek to place him into custody based on the allegations made here.

CONCLUSION

Based on the Motion made by Defendant JAMES McGREW, this Reply, and the record made by the Government in the District of Arizona, the Defendant requests that this Court Order him released on terms and conditions of pretrial release as submitted to the United States Pretrial Services Office for this District.

Dated: October 26, 2021

/s/ John M. Pierce

John M. Pierce
355 S. Grand Avenue, 44th Floor
Los Angeles, CA 90071
Tel: (213) 262-9333
jpierce@piercebainbridge.com

*Attorneys for Defendant James Burton
McGrew*

CERTIFICATE OF SERVICE

I hereby certify that, on March 18, 2021, this motion and the accompany declaration was filed via the Court's electronic filing system, which constitutes service upon all counsel of record.

/s/ John M. Pierce
John M. Pierce

EXHIBIT A

From: **Long, Allison** <ALong@mdoc.state.ms.us>
Date: Mon, Oct 25, 2021 at 11:01 AM
Subject: James McGrew
To: 808shipleylaw@gmail.com <808shipleylaw@gmail.com>

Hello, I have in my notes that McGrew reported on 5/14/21 & was advised to bring back the hospital paperwork. He wanted to transfer to TN at that time but wanted to stay in FL while the transfer was being investigated. I uploaded the paperwork on 5/18. I will be emailing Ms. Sun. I apologize for any inconveniences!!!!

Allison Long, PPA III
MS Dept. of Corrections
198 Lameuse Street
Biloxi, MS 39530
Phone- 228.374.5533
Fax- 228.374.5526