

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---------------------------|---|------------------------|
| UNITED STATES OF AMERICA, |) | |
| |) | |
| v. |) | |
| |) | No. 21-cr-131-01 (PLF) |
| JASON GERDING |) | |
| |) | |
| Defendant. |) | |
| _____ |) | |

**JASON GERDING’S REPLY TO GOVERNMENT’S MEMORANDUM IN AID
OF SENTENCING**

Jason Gerding hereby submits the following Reply to the government’s memorandum in aid of sentencing in this matter. Mr. Gerding respectfully requests that this Honorable Court follow the recommendation of U.S. Probation and sentence him to a period of probation. Given that Mr. Gerding has been under supervision for over two years without a single violation, counsel recommends one year of probation.

Argument

As of April 18, 2023¹, 285 people had been sentenced to one of the petty misdemeanors for their conduct on January 6, 2021. Of those, only 14.7% received a sentence equaling or exceeding the 45 days of incarceration that the government requests in this case. Each of those individuals had particular aggravating circumstances justifying more severe sentences, either in their misconduct that day

¹ This appears to be the most updated sentencing chart on the government’s website. <https://www.justice.gov/file/1579211/download>

or in their own personal history. Here, the government does not set forth a compelling factual theory as to why Mr. Gerding deserves such a harsh sentence, or that he deserves a sentence of incarceration at all. Instead, it relies upon cases that are easily distinguishable and ignores probation cases that are markedly similar. Given the actual facts of *this* case, the Court should reject the government's recommendation and follow U.S. Probation's recommendation and sentence Mr. Gerding to a period of probation.

A. The government attempts to convince the Court to sentence Mr. Gerding to incarceration even though such a sentence would create an unwarranted sentencing disparity.

The government's discussion of the appropriate sentence for Mr. Gerding begins by imploring the Court not to apply the long-held principle that sentences between similarly situated defendants should not be disparate. This argument attempts to conceal the primary weakness in the government's argument – that Mr. Gerding did very little but enter the Capitol as officers stepped aside. Instead, it attempts to refocus this Court away from the spectrum of offenses for petty misdemeanors and past sentences for those offenses. The reason why is clear – should the Court apply the “avoiding unwarranted sentencing disparity” principle, for petty misdemeanors relating to January 6th, this Court would have to sentence Mr. Gerding to a period of probation.

The government's memo implicitly suggests that sentences of 6 months of incarceration should not be considered disparate from a sentence of probation, even if the conduct is the same. ECF 89 at 12 (“a sentencing disparity between

defendants whose differences arise from legitimate considerations’ such as a ‘difference in types of charges’ is not unwarranted”); ECF 89 at 12 (“3553(a)(6) neither prohibits nor requires a sentencing court ‘to consider sentencing disparity among codefendants’”); ECF 89 at 12-13 (“nothing in Section 3553(a)(6) requires a court to mechanically conform a sentence to those imposed in previous cases, even those involving similar criminal conduct and defendant’s records”; ECF 89 at 13 (“logic dictates that whether a sentence creates a disparity that is unwarranted is largely a function of the degree of the disparity”); ECF 89 at 14 (“Given that narrow range [of sentences for petty misdemeanors], a sentence of six months, at the top of the statutory range, will not create an unwarranted disparity, with a sentence of probation only, at the bottom.” The argument, while novel, provides no authority for the proposition that courts are free to ignore other sentences for similarly situated defenses. More importantly, it fails to state why Mr. Gerding’s case presents “legitimate” differences from other probation cases. The government inferentially concedes that a sentence of incarceration would indeed be disparate from other sentences for petty misdemeanors. The defense asks this Court to refrain from embracing this new sentencing principle and to sentence Mr. Gerding to probation, as that would be in accordance with the spectrum of sentences and conduct in previous January 6th cases.

B. The sentences upon which the government relies

The government nevertheless raises four easily distinguishable cases where the defendant was sentenced to incarceration. Three of the cases are from among

the first January 6th sentencings – prior to the availability of the much larger pool of data that exists now. All four involve defendants with substantially greater culpability than Mr. Gerding.

In *United States v. Mazzacco*, 21-cr-54 (TSC), the defendant entered through smashed doors, made social media posts blaming Antifa for January 6th, and then deleted those public posts in an attempt to obstruct justice. ECF 28 at 2. The defendant also reportedly walked around the entire Capitol perimeter, thus aware of the full blown attack against officers that were trying to defend the Capitol. ECF 28 at 2. Mazzacco even took a selfie in front of a group of rioters breaching a door. ECF 28 at 4. He also entered into a semi-sensitive room called the Spouse’s Lounge. ECF 28 at 5. After January 6th, he posted a photo with the caption, “The capital is ours!” ECF 28 at 7. When the FBI interviewed him, he attempted to hide the GoPro videos that he had recorded. ECF 28 at 5.

The government also relies upon *United States v. Hemenway*, 21-cr-49 (TSC). The defense agrees that Hemenway’s actions were similar to Mr. Gerding but unlike Mr. Gerding, the defendant there had a prior conviction for a serious felony – Sexual Battery. Similarly, Hemenway’s codefendant Robert Bauer has a substantial criminal record. ECF 33 at 11. Bauer has two convictions relating to manufacturing methamphetamine and described himself as a “distributor of marijuana to kids in the community.” It stands to reason that Msrs. Hemenway and Bauer would not have been sentenced to periods of incarceration had their records been similar to Mr. Gerding.

Strangely, the government also relies upon *United States v. Paul Westover*, 21-cr-697 (JEB). Westover's conduct is simply not comparable to Mr. Gerding. He "stormed past a group of police officers, which he described as 'the front line,' after he witnessed another rioter forcibly remove a bike barricade." ECF 43 at 4. It was determined that he was indeed on the front line, joined by seditious conspirators and Proud Boys Joe Biggs and Ethan Nordean. He entered Speaker Nancy Pelosi's suite after ominously shouting "We're coming, Nancy!" ECF 43 at 6. He and others continued to chant "Nancy" in the Speaker's Suite, then he and his compatriots smashed the sign for the Suite and photographed themselves celebrating their accomplishment. ECF 43 at 8-9. Westover also deleted most of the evidence from his phones and social media posts in an effort to destroy evidence. ECF 43 at 12.

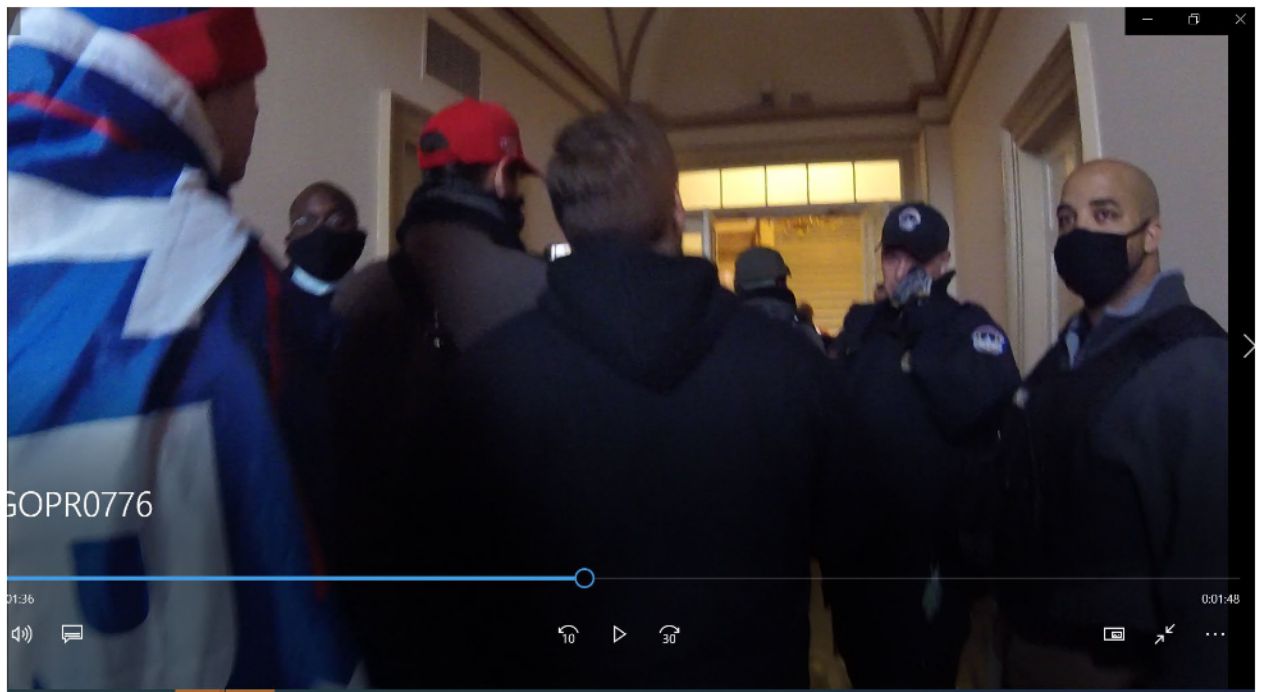
In contrast, Mr. Gerding did not delete his very limited social media activity and readily provided his GoPro videos of January 6th when asked. He and his wife entered the Capitol by walking through a door that was opened by police without any violence or destruction of property. And they entered into only public areas before quickly leaving. They did not witness any violence or destruction of property and did not disobey any orders to leave.

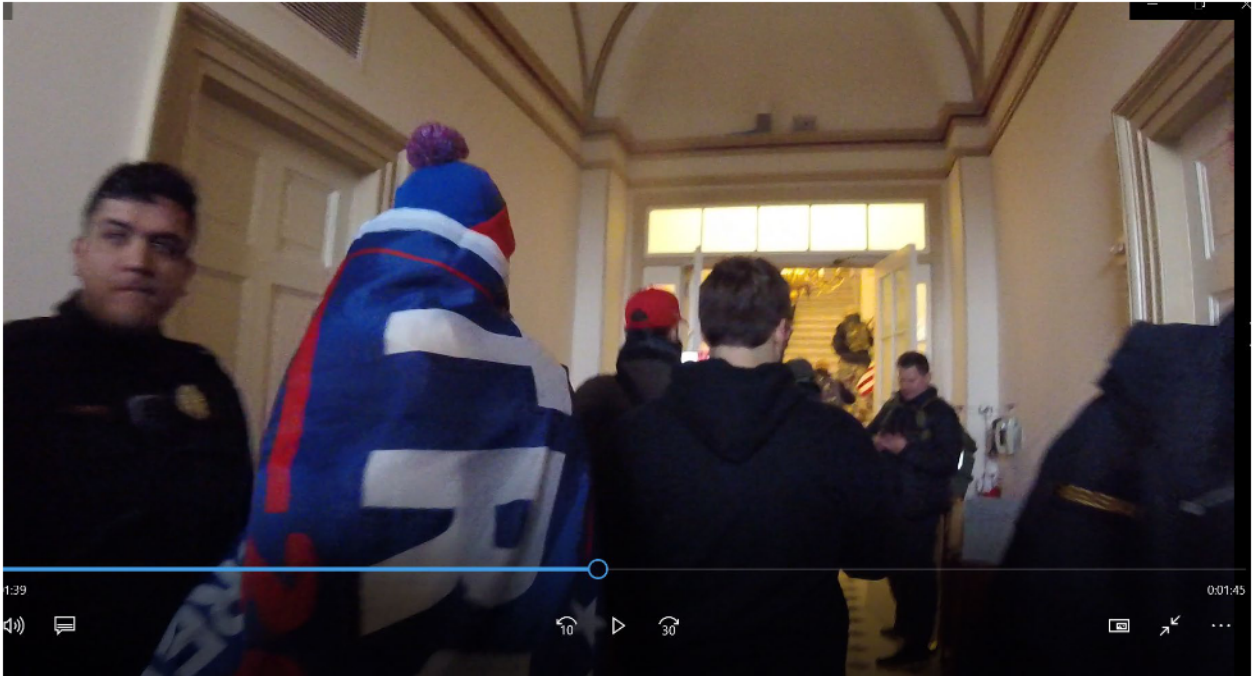
C. Other relevant sentences for petty misdemeanors.

This Honorable Court has sentenced five individuals after pleas to petty misdemeanors for their roles in the January 6th attack on the Capitol and the sentences have ranged between probation and 45 days incarceration. Mr. Gerding's

conduct is by far most akin to that of Valerie Ehrke, who received a term of probation.

Most importantly, Mr. Gerding was permitted to enter the Capitol building – the doors literally opened and five officers stepped aside. As can be seen on Mr. Gerding’s GoPro videos, he said thank you to several of them as he walked in.





Although Ms. Ehrke was only inside the building for about a minute, that was by happenstance. *United States v. Valerie Ehrke*, 21-cr-97 (PLF) ECF 20 at 3. Ehrke walked into the building and heard a high-pitched alarm and felt tear gas. She was stopped however when the police began to push the crowd she was in back and the officers ultimately succeeded in pushing that crowd outside. The Gerdings would have done the same if similarly encountered. Ehrke walked in through open doors and did not have officers step aside as she entered.

In contrast, the individuals incarcerated by this Court for petty misdemeanors engaged in significantly worse conduct. In *United States v. Jeremiah Caplinger*, 21-cr-342 (PLF), the defendant was sentenced to 35 days incarceration. Caplinger prepared himself for battle before January 6th. On December 29, 2020, he shared a post entitled “Operation Occupy the Capitol” with a #WeAreTheStorm. ECF 46 at 13. He wore body armor in preparation for violence. ECF 46 at 3. Once

at the Capitol, he scaled walls and encouraged others to attack. ECF 46 at 3. He entered deep into the Capitol, reaching both Speaker Pelosi's Suite and the Senate Floor corridor. And after leaving, he ominously posted "I choose violence." In the subsequent days, Caplinger made posts about how things would get worse and gave interviews to media outlets bragging about his participation. And even after he entered a plea, Caplinger tweeted false conspiracy theories about January 6th. Caplinger also used drugs, violating his conditions of pretrial release.

In *United States v. Robert Warmus*, 21-cr-417 (PLF), the defendant received a period of 45 days incarceration. This was justified both by his presence in the "first wave of rioters to breach the Capitol Building on its west side" and encouraging others to assist rioters in the breach. ECF 36 at 2. Warmus also eluded an officer who was trying to detain him inside the building. After January 6th, he destroyed evidence, deleting all of his January 6th content from his phone and changing his phone number. He also engaged in a harassment-of-police-for-entertainment spectacle that he posted on YouTube – while he was on pretrial release.

Vaughn Gordon received a period of home detention after pleading guilty to the Parading offense. *United States v. Vaughn Gordon*, 21-cr-99 (PLF). Gordon made statements before January 6th welcoming violence, encouraging those on Facebook to "rise up and take back our nation." ECF 46 at 9. He encouraged others to join him in Washington where he would "be in front without fear of death or consequence." He stated, "I am going with more than just numbers. I fully expect this to get ugly." ECF 46 at 9. Once at the Capitol, he joined a group of rioters that

pushed past police officers. ECF 46 at 3. He spent an hour inside the building and had to be forcibly removed by officers. He also bragged to others about his participation in public.

In *United States v. Daniel Peart*, 21-cr-662 (PLF), this Court sentenced the defendant to a period of home detention. His misconduct far surpassed Mr. Gerding – it included urinating near the Capitol Reflecting Pool. He personally witnessed rioters push against officers before entering the Capitol, climbing scaffolding and witnessing assaults against the police. ECF 34 at 5-6. Peart repeatedly refused to leave the Capitol. ECF 34 at 10-11. And when inside, Peart was heard yelling “Where are the senators?!!” and specifically calling out Mitt Romney. ECF 34 at 9. When asked if he was there to harm anyone, he told the FBI that he didn’t “know what would have happened if [he] had seen Mitt Romney.”

Mr. Gerding had no intention to hurt anyone inside the Capitol building and was not seeking to encounter anyone in government. He protested outside the Capitol until the doors were opened – and then he walked through the Capitol for a brief period. Unlike many others convicted of Parading, he did nothing to disrespect the officers, the building or its occupants. He did not come prepared for violence – he came with his wife, indicating precisely the opposite intent. He did not make boastful posts after the incident and did not spread lies about January 6th through social media or anywhere else. He is sincerely contrite and remorseful.

CONCLUSION

For the reasons stated above, Mr. Gerding respectfully requests that the Court impose a period of probation and complete a period of community service. Mr. Gerding also requests that a fine not be imposed in light of his obligation to pay \$500 restitution.

Respectfully submitted,

A.J. KRAMER
FEDERAL PUBLIC DEFENDER

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