

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

UNITED STATES OF AMERICA)

v.)

DARYL JOHNSON)

No. 1:21CR00407

**DEFENDANT'S SUPPLEMENTAL MEMORANDUM IN AID OF
SENTENCING**

The defendant, by and through counsel, respectfully submits this brief supplement to his memorandum in aid of sentencing (Dkt. # 59).

1. The United States filed its Sentencing Memorandum (Dkt. # 57) highlighting several cases in support of its argument for a sentence of 90 days incarceration. Mr. Johnson distinguishes those cases as detailed below:

No. 21-cr-138-JEB. Aaron Mostofsky (8 months)

2. This defendant pled guilty to 18 U.S.C. 231(a)(3). He had no criminal record. However, he also pled guilty to stealing government property (a bullet proof vest and a shield) and entering and remaining in a restricted building. He forcibly entered the U.S. Capitol, stole government property (bullet proof vest and riot shield), and joined a crowd chasing Officer Goodman up the interior steps of the Capitol. *See*, 21cr138 JEB, Dkt. # 100. This defendant participated in a broadcast interview while inside the Capitol - seeking to justify his conduct that

day. Perhaps most importantly, his sentencing guidelines were calculated to be 12 to 18 months. *See*, Ex. 1. He was sentenced to eight months, four months less than the low-end of his guideline range.

Jeffrey Smith, 21-cr-290-RBW; Frank Scavo, 21-cr-254-RCL; Mark Simon, 21-cr-67-ABJ

3. In the first instance, it should not be overlooked that the United States is arguing that these cases are factually similar to Mr. Johnson's case. But each of these men was allowed to plead guilty to a misdemeanor, while Mr. Johnson was required to plead to a felony. The felony plea will come with life altering circumstances not suffered by the others. Looking beyond that consideration, Mr. Johnson submits that there are factual differences that certainly were important sentencing factors when each of these men was sentenced.

Jeffrey Smith, 21-cr-290-RBW (90 days)

4. Smith pled guilty to a six-month misdemeanor and was sentenced to 90 days incarceration. He had no criminal record. However, he removed iron benches that law enforcement had placed against doors to prevent rioters from entering the Capitol. He further assisted the crowd in forcing the doors open. He facially confronted officers – inches apart – and told them to “stand down” and warned, “We’re getting in there one way or another.” The officers were soon physically assaulted although it was unclear whether Smith joined in the assaults. While videotaping the carnage, he cheered and encouraged rioters yelling, “let’s f.... go

patriots.” He sent electronic messages writing that he was a “Patriot” who stormed the capitol, “there was “no way in hell I was going to drive 38 hours from San Diego and not walk right through the front of the capit[o]l building.” His purpose was “To send a message that Americans are[n’]t going to take a fraudulent election;” These were statements describing what he did as opposed to commentary on what occurred. Finally, *he was not candid with law enforcement* during his interview and minimized his involvement in the Capitol riot. *See*, 21-cr-290 RBW, Dkt. # 36 (government sentencing memo).

Frank Scavo, 21-cr-254-RCL (60 days)

5. Like the preceding defendant, Scavo also pled guilty to a six-month misdemeanor. He was sentenced to 60 days incarceration. Also, like Smith, he posted statements describing what he did as opposed to commentary on what occurred. He was there to stop the count – and in fact posted a play-by-play account detailing his march to and entry into the Capitol, culminating with the statement “It’s going down....” “PENCE IS OUT OF CAPITOL.” He continuously videotaped the assaults he observed throughout the day. Scavo also recorded a video of himself saying, “This is top-secret s***. We’re in the Capitol. Stormed the f***ing Capitol of the f***ing United States at 58 years old. What the f*** is wrong with America?” As he roamed the halls of the Capitol, Scavo also

stated, “Your own personal tour of the freaking Capitol. We f***ing took it back. Took it back.”

6. On February 7, 2021, Scavo changed his profile picture on Facebook to a political cartoon that was published in a local Scranton newspaper. The cartoon *portrayed Scavo driving a bus* named the “Sedition Express” to the Capitol on January 6. Scavo was clear about his intent to overthrow the government. *See*, 21-cr-254 RCL Dkt. #37 (government sentencing memo).

Mark Simon, 21-cr-67-ABJ (35 days)

7. Like the preceding defendants, Simon also pled guilty to a six-month misdemeanor. He was sentenced to 35 days. Simon’s conduct is very similar to Mr. Johnson’s. However, Simon entered the court system with some experience.

8. Simon is a 50-year-old man with a lengthy criminal history that includes convictions for assault with a deadly weapon as recently as February 19, 2020; carrying a loaded unregistered firearm on February 19, 2019, vandalism on September 26, 2019, possession of a controlled substance on June 28, 2019, possession of marijuana for sale on February 7, 1992; transportation of Marijuana on March 26, 1998 and disorderly conduct February 4, 1992. Simon was no stranger to being placed on probation and is equally no stranger to probation violations and having his supervision revoked. The defendant admittedly struggles with a longstanding narcotics addiction. He admittedly supported his drug habit by

selling “Donald Trump Hats.” *See*, 21-cr-67 ABJ, Dkt. # 32 (government sentencing memo). Simon’s 35 days of incarceration comes as no surprise.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was served on the United States via the Court’s CM/ECF System on this 27th day of May 2022.

/s/

Christopher M. Davis