IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	
	)	
v.	)	**Case No. 1:22-cr-00404**
	)	**Hon. James E. Boasberg**
ISREAL JAMES EASTERDAY,	)	
Defendant.	)	
	)	

REPLY IN SUPPORT OF MOTION FOR REVOCATION OF DETENTION ORDER

The government opposes Mr. Easterday's release essentially on a single ground, that his "actions at the Capitol alone make him a serious risk of danger to the community." Gov't Opp'n, ECF No. 17 at 11. Under the circumstances of this case and in light of the requisite factors set forth in 18 U.S.C. § 3142(g), the government is wrong. Specifically, the government has failed to meet its burden to establish by clear and convincing evidence that no conditions of release exist that would reasonably assure the safety of the community.[1]

In light of Mr. Easterday's youth, lack of criminal history, lack of substance abuse history, family support including the identification of a third party custodian approved by pretrial services, lawful conduct over the past two years since January 6, and his demonstrated cooperation with law enforcement to turn himself in, release conditions plainly exist that will reasonably address any conceivable risk of danger to the community. Indeed, the government has been aware of Mr. Easterday's identity and alleged involvement in the January 6 riot since 2021, but declined to arrest him at that time "[f]or other reasons." *See* Gov't Ex. C, ECF No. 17-2 at 11:7-9. The government also identified Mr. Easterday as a person suspected of spraying a

[1] The government concedes that Mr. Easterday does not pose a risk of flight. *See* Gov't Opp'n, ECF No. 17 at 5 n. 3, and 8.

chemical irritant at a law enforcement officer by April 2022. *Id.* at 11:7-20. The government cannot credibly claim now that Mr. Easterday's release would pose an unmanageable risk of danger to the community that it accepted for almost two years.[2]

I. Pepper Spray is Not a "Dangerous Weapon" For Purposes of the Bail Reform Act.

The government's opposition fails to contest the argument that pepper spray does not constitute a "dangerous weapon" for purposes of the Bail Reform Act. *See* Def. Mot. Revocation, ECF 16 at 7-11 (citing *Bond v. United States*, 572 U.S. 844, 861 (2014), among other cases). That forfeits the argument, *see, e.g.*, *United States v. Pole*, 2021 WL 5796518, at *6 (D.D.C. Dec. 7, 2021) (holding government forfeited argument by failing to raise it in opposition to defendant's motion), and at the very least distinguishes this case from others in which courts have authorized detention based in part on "possession … of a dangerous weapon" under § 3142(f)(1)(E).

II. Mr. Easterday's Alleged Offense Conduct is Insufficient to Satisfy the Government's Burden to Establish the Unavailability of Any Release Conditions that Will Reasonably Assure the Safety of the Community.

In response to the substantial information in the record that Mr. Easterday's release would pose no actual danger to anyone, the government's opposition wrongly implies that pretrial detention is warranted solely because of Mr. Easterday's alleged conduct on January 6,

[2] As counsel noted at the status hearing on January 13, 2023, the period of time between the filing of the motion for revocation of the detention order and the conclusion of the hearing on the motion is excluded from the Speedy Trial clock. *See United States v. Van Smith*, 530 F.3d 967, 969 (D.C. Cir. 2008) (holding that pretrial motions toll clock under STA); *United States v. Nordean*, 2022 WL 2375810, at *4 (D.D.C. June 20, 2022) (tolling applies to any pretrial motion "including motions about a defendant's pretrial detention"); *see also United States v. Stubblefield*, 643 F.3d 291, 295 (D.C. Cir. 2011) (noting that tolling from pretrial motion filing is "automatic" and occurs without district court findings).

2021. Indeed, the government maintains that "even without the other Section 3142(g) factors, the nature and circumstances of Easterday's offenses are extreme and weigh heavily in favor of detention." *See* Gov't Opp'n, ECF No. 17 at 9. The government similarly argues that "Easterday's actions at the Capitol *alone* make him a serious risk of danger to the community." *Id.* at 11 (emphasis added). As discussed below, Mr. Easterday's alleged conduct is less extreme than the government suggests, and is certainly less culpable than the alleged conduct of other January 6 defendants who have been released pending trial.

But more importantly, alleged past criminal conduct by itself is insufficient to warrant pretrial detention under the Bail Reform Act when divorced from an evaluation of the risks that may exist from release. In other words, pretrial detention based on the ground of dangerousness is not authorized as "punishment" for alleged past criminal conduct no matter how well established, *United States v. Salerno*, 481 U.S. 739, 747 (1987), but is permitted only as the result of "a judicial officer['s] evaluat[ion] [of] the likelihood of *future dangerousness*" if a defendant were released. *Id.* at 751 (emphasis added). That's because the bail determination is not designed to serve as a preliminary assessment of a defendant's guilt or innocence of the crimes charged.

Nor are potential sentencing guidelines a valid consideration given the government's agreement that detention is not warranted based on risk of flight. *See* Gov't Opp'n, ECF 17 at 7 (quoting S.D. Fla. hearing and order of detention). Potential punishment following conviction is marginally relevant to whether a released defendant would have an incentive to not appear at future proceedings, but has no bearing on the prospect of future dangerousness.

As the D.C. Circuit explained in *United States v. Munchel*, 991 F.3d 1273 (D.C. Cir. 2021), the danger posed by a defendant on January 6, 2021, to others in the community or even to our democratic institutions is not enough to justify pretrial detention given that "the specific circumstances of January 6 have passed." *Id.* at 1284. Instead, the task under the Bail Reform Act is to determine whether the defendant "pose[s] a threat of committing violence *in the future*." 991 F.3d at 1284 (emphasis added).

To be sure, the court also distinguished between those who were merely present at the Capitol on January 6, and those who actively destroyed property or assaulted law enforcement officers, or planned or conspired to do so. *Id.* But the dangerousness inquiry remains "factbound," and consideration of past conduct is only relevant at this stage to determine the risk a defendant may pose in the future if released. *See id.* at 1283 ("Whether the defendant poses a threat of dealing drugs, for instance, may depend on the defendant's past experience dealing, and her means of continuing to do so in the future.") (citation omitted). As another district court put it, "[t]he [Bail Reform Act], by its nature, is always looking forward. To be sure, the Court should consider past behavior in assessing the likelihood of prohibited behavior in the future, but the Government needs to show that there is a serious risk that these potential harms exist going forward." *United States v. Madoff*, 586 F. Supp. 2d 240, 250 (S.D.N.Y. 2009).

Other than Mr. Easterday's alleged conduct on January 6, the only other evidence the government points to is Mr. Easterday's participation in 2020 in a counterprotest in Louisville, Kentucky, in which he marched with others while carrying a firearm. *See* Gov't Opp'n, ECF. No. 17 at 6, 10. Yet the government concedes that it "does not contend that the conduct in the photograph [cited in its position] was illegal . . . ." *Id.* at 11. Nor is there any indication that Mr.

Easterday was not legally permitted to be where he was protesting or that he was not legally permitted to carry the firearm. This incident therefore does not support the government's claim that Mr. Easterday's release at the present time would pose a danger to the community.

In sum, the government's opposition entirely fails to establish that "a serious risk [of dangerousness to the community] exists going forward" from the potential release of Mr. Easterday. To the contrary, in light of all of the other information relevant to the bail determination, Mr. Easterday's alleged conduct on January 6 appears to be isolated and aberrant, and does not outweigh the substantial balance of the evidence that Mr. Easterday's release would pose no danger at all.

III. The Cited Cases By the Government In Which Detention Was Ordered Are Extraordinarily Different than the Circumstances of this Case.

In support of detention in this case, the government cited to a number of other cases that are entirely dissimilar from this one. In each of these cases, the defendants' conduct – before, during, and after the rally – differed drastically from Mr. Easterday's. Specifically, unlike Mr. Easterday, the defendants in these cases engaged in prior planning, came to the Capitol wearing tactical gear, brought weapons with them to the rally, committed repeated acts of physical violence towards law enforcement officers, and boasted of their behavior on January 6 well after the events of that day:

- *United States v. Brockhoff*, 1:21-cr-00524 (CKK). Brockhoff was alleged to have been standing on a landing above law enforcement officers and "wielding a fire extinguisher and spraying its contents on the officers below him [at least two times]." *See* Memorandum (Dkt. No. 38) 3. Additionally, Brockhoff is alleged to have thrown a wrench at a police officer below him. *Id.* at 3-4. After striking the officers, he is alleged to have "clambered through a broken window" into the Capitol, taken a police officer's riot helmet, forced his way into a secured conference room with other protestors by kicking at the exterior of the door until there was a hole large enough for him to reach his arms through to open the door from the inside, directed other protestors on the best

method to enter the room, and ransacked the office (including tearing open a box and taking Senate stationary). *Id.* at 4. The Court also found that his actions indicated he was "a leader in some ways" on January 6. *Id.* at 10-11.

- *United States v. Fitzsimons*, 1:21-cr-00158 (RC). Fitzsimons had a long history of strongly held political beliefs leading up to January 6, including confronting a state representative in a grocery store parking lot and making multiple irate calls to his congressional representative's office referencing "civil war and election fraud." *See* Memorandum (Dkt. No. 38) 1-2. On January 6, Fitzsimons put out a call on social media for "able bodies" to attend the rally, wore "a white butcher coat," and "engag[ed] in a series of violent actions" to at least two officers: "reaching out and attempting to grab at officers," one of which sustained a shoulder injury; "attempt[ing] to drag" an officer into the crowd; charging into the tunnel entrance on the Lower West Terrace by "flailing his arms and striking officers"; and pulling a mask off an officer. *Id.* at 2-3. When he returned home, he was vocal about his participation in January 6 by calling into a local town meeting and giving a statement to a newspaper. *Id.* at 3.

- *United States v. Gieswein*, 1:21-cr-00024 (EGS). Gieswein came Washington, D.C. a day before the rally, joined other supporters, and gave an interview stating that he was there to "keep President Trump in." Memorandum (Dkt. No. 29) 4. On January 6, Gieswein was wearing "camouflage fatigues, a tactical vest, and a helmet" and goggles, and carried a baseball bat and an aerosol spray. *Id.* at 5. He joined a march with members of the Proud Boys that morning. *Id.* at 5-6. He later pushed a metal barricade directly into the bodies of law enforcement officers, deployed aerosol spray at the officers on three separate occasions (both inside and outside the Capitol), banged on a window of the Capitol building and encouraged other protestors to break or enter through a window. *Id.* at 7-8. Once an officer grabbed Gieswein to arrest him, he resisted arrest and tried to punch a U.S. Capitol Police Officer. *Id.* at 10.

- *United States v. McAbee*, 1:21-cr-00035 (RC). McAbee coordinated with another individual to travel to Washington, D.C. for the rally, where they discussed items to bring with them, such as a firearm magazine, a knife, and brass knuckles. Memorandum Opinion (Dkt. No. 166) 4-5. On January 6, McAbee wore black gloves with hard metal knuckles and a black tactical vest. He also appeared to carry a black baton at some point. *Id.* at 8. He was "an active participant in the assault" against at least two officers where he forcibly dragged an officer into a violent mob of protestors who ultimately punched, kicked, and hit him, causing serious injuries, including "a laceration on his head which required staples to close." *Id.* at 8-10. The Court found that "[i]t is especially concerning that Mr. McAbee so willingly engaged in this confrontation with law enforcement officers when he himself was employed as a sheriff's deputy, sworn to uphold the law." *Id.* at 38. He further expressed pride in his conduct on January 6. *Id.* at 39.

None of these cases bear a likeness to this one. Moreover, the government's opposition makes no effort to distinguish the cases cited in Mr. Easterday's Motion for Revocation. *See* ECF 16 at 12-13. Those cases are far more like this one, and support release here.

In particular, Judge Chutkan's opinion authorizing pretrial release in *United States v. Michael Foy*, 1:21-cr-108, ECF 44, weighs strongly in favor of release in this case. Mr. Foy is charged with very similar charges to those at issue in this case, namely violations of 18 U.S.C. §§ 231, 111(a)(1) and (b), 1752(a)(1) and (b)(1), and 40 U.S.C. § 5104(e)(2)(F), as well as a charge that is not at issue in this case, obstruction in violation of 18 U.S.C. § 1512(c). Judge Chutkan's opinion notes that such charges are "unquestionably serious and deeply troubling," as they are based "not for [Foy's] mere presence at the U.S. Capitol on January 6, 2021, but for his alleged participation in violent confrontations with uniformed officers.…" *See* 1:21-cr-108, ECF 44 at 6. The evidence of Mr. Foy's involvement is also strong. *Id.* at 7.

But, as in this case, Mr. Foy has no criminal history, and no evidence indicated advanced planning to participate in a violent assault or membership in a militia group. *Id.* at 8. Nor, as in this case, did Mr. Foy "promote or celebrate the events of the day or his own actions after the fact." *Id.* at 9. Accordingly, in the absence of a "clearly identified" future threat now that "the specific circumstances of January 6 have passed," *id.* (quoting *Munchel*, 991 F.3d at 1283-84), the Court concluded that conditions existed that authorized pretrial release.

The recent release of Scott Miller, 1:22-cr-412, also strongly weighs in favor of release in this case. *See* ECF 19 (order setting conditions of release on Dec. 30, 2022). Mr. Miller's charges are similar to Mr. Easterday's with the addition of a charge for theft of government property. ECF 14. Unlike Mr. Easterday, Mr. Miller was a member of the Proud Boys on January 6, 2021

(although he subsequently resigned as a member). But, like Mr. Easterday, he was not apprehended until two years after January 6 and there was "no evidence that Mr. Miller [was] anything but a law-abiding citizen for the past two years." *See* ECF 12 at 2 (Def. Mot. Pretrial Release).

IV. Mr. Easterday's Alleged Offense Conduct Was Relatively Brief and Isolated.

As opposed to other protestors who arrived at the rally the day before, on January 5, and were at the Capitol for prolonged periods of time on January 6, Mr. Easterday's conduct was temporally limited. According to Special Agent Martin's testimony at the detention hearing in the district of arrest, "it appeared based on the video that [someone in the crowd outside an entrance to the Capitol] handed a chemical irritant container [to Mr. Easterday]." *See* Gov't Ex. C, ECF No. 17-2, at 3:17-19. Mr. Easterday then allegedly sprayed a nearby US Capitol Police Officer for approximately 10 seconds. *Id.* at 3:24-4:4. The actual spray cannister was not recovered, *id.* at 14:1-5, but in the video it appears to be a small canister that was emptied into the air outside of the Capitol in the direction of a law enforcement officer in less than 10 seconds.

At a separate trial, U.S. Capitol Police officer J.P. testified that he was "[m]aced in the eye" by the person now identified as Mr. Easterday, and that it "hurt." *See* Gov't Ex. B, ECF No. 17-1 at 48:16. Officer J.P. was wearing a mask over his mouth and quickly turned away, and was otherwise able to continue his duties. Gov't Ex. C, ECF No. 17-2 at 14:17-24. Mr. Easterday was alleged to have subsequently been inside the Capitol for approximately 12 minutes. *See* ECF No. 17-2 at 4:8-11.

The transcript of the detention hearing in the Southern District of Florida also makes clear that Mr. Easterday was extraordinarily cooperative when he learned that he was being sought by the FBI. First, he called the general number for the FBI field office in Kentucky and provided information that was given to the assigned case agent. Gov't Ex. C, ECF No. 17-2 at 15:6-23. As a result, the case agent was able to call Mr. Easterday and learn his location and cell number. *Id.* at 16:6-10, 17:9-10. Mr. Easterday also offered to do a Zoom call with the agent. *Id.* at 17:1-2. And finally, when agents called Mr. Easterday to tell him that they had an arrest warrant, Mr. Easterday came to shore, was cooperative, and turned himself in to the arresting agents without incident. *Id.* at 17:19-25, 18:1, 20:13-15.

V. The Government Has Failed to Rebut the Evidence that Mr. Easterday Poses No Danger to the Community.

As noted in Mr. Easterday's Motion to Revoke the Detention Order, the clearest evidence that Mr. Easterday does not pose a danger to the community is his conduct over the past two years since January 6, 2021. The attached letters from family members and close friends further support the conclusion that Mr. Easterday poses no danger to the community if released. *See* Def. Ex. 1 at 1-17.

Mr. Easterday's family describes him as a hard-worker, genuine, compassionate, and even a naïve due to his sheltered upbringing. *See generally, id.* This was only reiterated by the friends he made while sailing in Florida. One of the best examples of Mr. Easterday's inherent good-nature is when he saved an elderly man's life (Shaun Allan Denham) and his boat during Hurricane Ian by jumping into the water and tying his boat to a dinghy to ensure he would not be dragged out to sea. *Id.* at 12-15.

Importantly, each of these letters have stated how out-of-character Mr. Easterday's conduct was on January 6, and how both Mr. Easterday and his family feel ashamed of his alleged involvement in the events of that day. *Id.* If released, Mr. Easterday would not be returning home to an environment that condones the events of January 6; instead, he would be in a supportive network that expects and requires him to abide by the conditions of release.

VI. Conclusion.

For the foregoing reasons, the government has not met its burden of demonstrating that there are no conditions or combination of conditions that will assure the safety of the community. We respectfully request that the Court authorize Mr. Easterday to be released pending resolution of this case.

Respectfully submitted,

ISREAL JAMES EASTERDAY

By counsel,

/s/ Geremy C. Kamens
Geremy C. Kamens
Va. Bar No. 41596
Federal Public Defender
Office of the Federal Public Defender
1650 King St, Suite 500
Alexandria, VA 22314
703-600-0848
703-600-0880 (fax)
Brittany_Davidson@fd.org

Brittany Davidson
Va. Bar No. 90660
Assistant Federal Public Defender
Office of the Federal Public Defender
1650 King St, Suite 500
Alexandria, VA 22314
703-600-0817

703-600-0880 (fax)
Brittany_Davidson@fd.org