

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ZACHARY REHL (3),

Defendant.

Criminal Action
No. 1:21-cr-0175

Washington, DC
October 7, 2022

8:07 a.m.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE TIMOTHY J. KELLY
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government:

ERIK KENERSON

JASON MCCULLOUGH

USAO-DC

555 4th Street, NW

Washington, DC 20001

CONOR MULROE

DOJ-CRM

1301 New York Ave, NW, Suite 700

Washington, DC 20005

NADIA MOORE

USAO-NY

271 Cadman Plaza East

Brooklyn, NY 11201

For the Defendant:

CARMEN HERNANDEZ

7166 Mink Hollow Road

Highland, MD 20777

Court Reporter:

JEFF M. HOOK

Official Court Reporter

U.S. District & Bankruptcy Courts

333 Constitution Avenue, NW

Washington, DC 20001

P R O C E E D I N G S

DEPUTY CLERK: Your Honor, this is criminal matter 21-175, United States of America v. Defendant 3, Zachary Rehl. Present for the government are Jason McCullough, Erik Kenerson, Conor Mulroe and Nadia Moore. Present for the defendant is Carmen Hernandez. Also present by telephone is the defendant, Mr. Rehl.

THE COURT: Good morning to everyone. Before we begin, Ms. Hernandez, we do have your client present by telephone. I just -- I don't know whether I have to -- and obviously you knew he would be present by telephone. I assume he consents to being present by telephone?

MS. HERNANDEZ: Yes, sir. Good morning, Your Honor.

THE COURT: Good morning.

MS. HERNANDEZ: And it is an early morning.

THE COURT: It is an early morning. I appreciate everyone -- I know it's a busy time for all of us, so I appreciate everyone being here so early. It is your motion, Ms. Hernandez, so if there's nothing preliminary from either side, I will hear from you.

And I suppose I should also add -- obviously, Ms. Hernandez, you've already done so, any attorney who approaches the podium to speak may remove your mask. It certainly makes it easier to hear. But on the other hand,

1 if someone has a strong preference to keep their mask on, as
2 long as we can hear you, we can proceed.

3 **MS. HERNANDEZ:** Thank you, Your Honor. Again,
4 good morning. Mr. Rehl's wife and his mother are on their
5 way, but they hit D.C. traffic I believe, so let that be a
6 lesson. And I understand there are two of Mr. Rehl's -- two
7 of the men who wrote character letters for him are supposed
8 to be available if the Court wants to speak with them on the
9 phone. But they weren't able to make it down this time.

10 **THE COURT:** All right.

11 **MS. HERNANDEZ:** So --

12 **THE COURT:** Ms. Hernandez, I apologize for
13 interrupting you, but just before I forget, I think I
14 mentioned this the last time we were together. I still
15 don't think I have an unredacted version of your motion.

16 **MS. HERNANDEZ:** I filed a sealed --

17 **THE COURT:** Oh, you did?

18 **MS. HERNANDEZ:** I filed the sealed version last
19 week I believe.

20 **THE COURT:** Oh, you did, okay. I'll go back --

21 **MS. HERNANDEZ:** So it should be unsealed.

22 **THE COURT:** Okay.

23 **MS. HERNANDEZ:** I can describe the two sections --

24 **THE COURT:** No, I think I know what is in there.
25 As long as I can go back and look at it, then that's fine.

1 I just wasn't sure if -- I didn't realize you had made that
2 correction.

3 **MS. HERNANDEZ:** And one was a sealed matter, but
4 the other one -- and maybe the government will be okay if I
5 discuss that part of it, with the Court's indulgence.

6 (Discussion off the record)

7 **MS. HERNANDEZ:** Your Honor, the other thing that I
8 have not filed is with respect to his two prior counsel.
9 Your Honor, on the record at the first hearing, expressed
10 displeasure with his first -- with Mr. Johnson's timeliness
11 in filing documents and failing to appear and that type of
12 thing. I have a letter from Mr. Rehl, which I can submit to
13 the Court, which he had written at the time. I'm not sure
14 whether that letter actually ever got to the Court from
15 Mr. Rehl at the time. But where he expressed his
16 dissatisfaction, which is why he changed counsel to
17 Mr. Moseley. And I think I can lay out a lot more about
18 Mr. Moseley, I'd rather not do it on the public docket. But
19 he is currently suspended for practice before this Court and
20 before the court of -- the bar of the Commonwealth of
21 Virginia.

22 **THE COURT:** I think he was -- if I'm -- just from
23 public reports, I think he's been disbarred in Virginia.

24 **MS. HERNANDEZ:** Yeah, I don't know. But I know
25 he's not eligible to practice in this Court. Right now,

1 there's even a dispute over -- in the Oath Keepers case,
2 over some discovery that may have been produced to him and
3 what he wants to do with it.

4 **THE COURT:** All right. Well, look, you can
5 make -- I think, without going into every chapter and verse
6 about those lawyers, I think for purposes of what you're
7 going to be arguing to me today, I think you can -- I think
8 there's a way to argue that without having to delve into
9 every specific about their status.

10 **MS. HERNANDEZ:** Correct. And while I'd like to
11 think that I'm a very diligent and hard working lawyer, and
12 I've been doing this for a long time, I think there are
13 arguments made that were arguments and facts that were not
14 previously before the Court. So I think that meets the
15 standard for reopening a detention hearing.

16 **THE COURT:** That's going to be your argument.
17 They're going to make an argument that no, no, he had the
18 counsel and that you had this -- not you, but he had this
19 opportunity. I'm here to hear your argument on it, but I
20 understand the argument.

21 **MS. HERNANDEZ:** I mean, if the Court wants me to
22 go heavily into that, I'm happy to. But otherwise, I would
23 pass over that and get to the merits, which is I think more
24 important. But if the Court is going to throw me out of
25 court on that basis, I'm happy to spend a lot of time

1 arguing those points.

2 **THE COURT:** Well, I don't want to presuppose what
3 you should argue. I think -- but I think you can, again,
4 make your arguments about the lawyers not being -- perhaps
5 not -- it seems to me that's a fair argument. And if you
6 want to make it, I'm open to hearing it. But -- and I'd
7 rather focus on the merits. But if you have an argument --
8 and you've laid out some of it in the motion, if you have
9 anything you want me to hear along those lines, or even if
10 you want to submit something afterward that lays out
11 facts -- and you could do it under seal if you think it's
12 appropriate, I'll certainly receive that as well.

13 **MS. HERNANDEZ:** Yeah, I'd rather do it under seal
14 just because I think it's sort of dirty laundry that nobody
15 needs to -- deserves to have displayed.

16 **THE COURT:** Understood. Why don't we -- even just
17 before we begin, how quickly do you think you could --

18 **MS. HERNANDEZ:** I can get that to you by the
19 end -- by Saturday.

20 **THE COURT:** That's tomorrow.

21 **MS. HERNANDEZ:** I've been working seven days a
22 week, as the Court probably is, too, and everyone else here.

23 **THE COURT:** I hear you. We'll just say -- I'm
24 just going to say by Tuesday.

25 **MS. HERNANDEZ:** That's fine.

1 **THE COURT:** Very well.

2 **MS. HERNANDEZ:** So I can celebrate Columbus Day.

3 **THE COURT:** Please proceed.

4 **MS. HERNANDEZ:** Thank you, Your Honor. On that
5 score, part of the problem is even diligent attorneys,
6 because of the volume of discovery in this case, that's part
7 of the -- I mean, the government alleges -- I shouldn't say
8 alleges. It is true that the government produced the MOSD
9 video like I think a week or two before the hearing, the
10 original detention hearing. But that was a production, a
11 large production, that unless somebody was looking for it
12 and was aware of it, I don't even think there was enough
13 time to go through everything.

14 So even if the Court were to say, okay, it's not
15 about the lawyers, it's about when the discovery was
16 produced -- and I can tell you, because I attached an e-mail
17 from Mr. Hull who represents Mr. Biggs to government counsel
18 in March, eight months later -- or whatever number of months
19 that is after June, saying can we have a copy of this
20 because he hadn't found it. As the Court knows, other
21 lawyers and myself have all expressed to the Court the
22 difficulty in plotting through all the discovery.

23 But here we are, and we're here because the
24 government is so kind to me to have given us the gift of
25 another guilty plea yesterday. But I will say this on that

1 score, I'll try not to be too snide, Your Honor, but I grew
2 up in New York, so it's almost -- it's by nature. This is
3 the second plea agreement in this case. I'll refer to it as
4 the immaculate plea. I've been doing federal criminal
5 defense most of my entire career, almost my entire career.
6 It's rare that the government allows a defendant to plead
7 guilty to a conspiracy that doesn't say this was the
8 agreement, and I entered into it with Joe, Bill and
9 whomever. Like Mr. Donohoe's plea, this is I didn't know
10 what the -- there was apparently a plan between
11 Mr. Tarrio -- the allegation has been in the indictment and
12 here, there was apparently a plan between Mr. Tarrio, Biggs
13 and Nordean that was formed on the evening of January 6th.
14 I wasn't informed of it, Mr. Donohoe wasn't informed of it.
15 I attached a text message where Mr. Rehl was not informed of
16 it, but it must have been about this. Again, it's a rare
17 occurrence in federal -- in the annals of federal criminal
18 law.

19 I say that only because I don't think that plea
20 affects or should affect the Court's decision as to
21 Mr. Rehl. Both because nothing in that plea agreement says
22 I entered into an agreement with Mr. Rehl to do X, Y and Z
23 or Mr. Rehl was aware of X, Y and Z. And secondly, because
24 as the Court knows, a detention determination is individual
25 to the person. I've pointed to the Court, because I -- you

1 know, while Judge Mehta's rulings are not precedent to this
2 Court, I understand that to the extent that he's got the
3 other major conspiracy with similar charges, that the Court
4 is aware of the rulings. And from the start, Judge Mehta
5 has distinguished among the defendants, a number of
6 defendants charged with selective -- with seditious
7 conspiracy. And the most serious charges have been released
8 from day one, including Mr. James who was the first to plead
9 guilty -- Mr. James in the Oath Keepers case, who was the
10 first to plead guilty to seditious conspiracy. He was out
11 before he pled guilty, and he has remained out. And
12 that's -- and he admitted in his statement of offense
13 that -- there's an admission by him that he stockpiled
14 firearms, I believe with Mr. Rhodes, mostly after I think
15 January 6th. So it's not as if his conduct is less serious
16 than what is alleged against Mr. Rehl.

17 And one more point about the Bertino plea. I
18 would expect the government would come in here and concede
19 Mr. Rehl should be released, because Mr. Bertino not only
20 pled guilty to seditious conspiracy, but he's pleading
21 guilty to a being a felon in possession of multiple
22 firearms. They seized those firearms I believe back in
23 March when they first searched his home and he had not yet
24 pled guilty, yet he's been out all this time.

25 So if we're talking about fairness, treating like

1 things alike, Mr. Bertino's been out since March with guns
2 in his house. Mr. Rehl, when the government searched his
3 home, had not a single firearm there nor was he alleged to
4 have firearms here.

5 **THE COURT:** Obviously, Ms. Hernandez -- I'll just
6 point out the obvious, that I obviously didn't have the
7 opportunity to make a detention decision with regard to
8 Mr. Bertino until yesterday. What I said at the time, and
9 what I've said regarding -- well, I guess there is -- what
10 I've said in other cases, consistent with what I've said in
11 other cases, which is, look, you would have to concede that
12 taking responsibility for your actions and agreeing to
13 cooperate is something I can consider when determining
14 whether someone -- the future threat someone poses; isn't
15 that fair?

16 **MS. HERNANDEZ:** Well, the federal statute says
17 when someone pleads guilty or is convicted, he is -- he
18 shall be sentenced -- he shall be detained, not sentenced;
19 we wait a little while for sentencing. He shall be detained
20 unless there are exceptional circumstances.

21 **THE COURT:** Well, clear and convincing evidence
22 that he will not -- that the defendant will not pose a
23 danger to the community or any other person or flee.

24 **MS. HERNANDEZ:** Mr. Donohoe pled, cooperated and
25 the man is in jail. Mr. Bertino, with guns, plead yesterday

1 and has been out since March.

2 **THE COURT:** Mr. Donohoe -- just for the record,
3 Mr. Donohoe, as I recall, no party -- he did not ask to
4 be -- there was no detention decision for me to make.

5 **MS. HERNANDEZ:** I understand. I believe it was
6 part of the plea agreement.

7 **THE COURT:** Maybe so.

8 **MS. HERNANDEZ:** And I understand and I'm glad that
9 the ultimate decision here is Your Honor's. But I'm just
10 pointing out what may be an inconsistency in the
11 government's position.

12 **THE COURT:** I understand your argument. I'm just
13 trying to provide further context as to why I might have
14 made certain decisions, and pointing out that in other cases
15 I didn't have a decision to make.

16 **MS. HERNANDEZ:** I understand. I mean, I
17 understand that the government often makes exceptions for
18 their cooperators. They have an immense amount of
19 discretion. But, again, I appeal to the Court's sense of
20 justice in -- because Your Honor gets to see everything. In
21 the detention decision, it's up to the Court, it's not up
22 to -- well, in almost every decision, the government gets to
23 say their piece. But it's up to the Court to make a
24 decision.

25 So to Mr. Rehl. As I've -- as the Court well

1 knows, Mr. Rehl -- and the Court found at the first hearing,
2 is a lieutenant, not at the top of the pyramid. Apparently
3 now we have two pleas which claim that there was some plan
4 hatched by the top three that was not made known to anybody
5 else so far. And there is, as I say, record evidence from
6 the text messages that that night Mr. Rehl was not with
7 Mr. Biggs, was not with Mr. Nordean, and Mr. Tarrío was not
8 in town and there was no communication. And there's a text
9 message after I think Donohoe sends out a text -- I call
10 them texts, I think they're Telegram messages, where he says
11 the plan is to -- they have a plan or whatever. And
12 Mr. Rehl says: Well, if the plan is still to gather our 10
13 people and meet at the Capitol, that's great, that's what
14 I'll do. And that is in fact what he did, Your Honor.

15 But to get back, Mr. Rehl is not alleged to have
16 forcibly entered the Capitol. All the other defendants are
17 alleged except for, well, Mr. Tarrío who wasn't at the
18 Capitol at all. But Biggs, Nordean, Donahue and Pezzola are
19 all alleged in the indictment to have forcibly entered the
20 Capitol. Mr. Rehl enters at 2:57. The allegation in the
21 indictment is that he entered the Capitol. The word
22 forcible is not there. And it's clear, because by the time
23 he enters, there are crowds of Americans entering the
24 Capitol at the same time. I believe he entered at the same
25 time as several members of the Philadelphia Proud Boys,

1 three or four members -- I believe four, and Mr. Finley who
2 is the president of I want to say the West Virginia Proud
3 Boys.

4 So they all entered at that point, at 2:53 in the
5 afternoon. The proceedings were over. They were aware
6 because, you know, everyone's audiotaping and videotaping
7 everything that day. They were aware -- and you can hear in
8 the background, they were aware that Vice President Pence
9 had left the building. They were aware the proceedings had
10 been over. And there's a conversation, and there's also FBI
11 302s by people who have been interviewed saying we decided
12 to go -- someone says they're curious about what happened
13 inside, let's go in, and that's when they decide to go in.

14 **THE COURT:** Ms. Hernandez, just to -- this is
15 hardly the most important point here, but I did notice in
16 your submission you mentioned the same point about Vice
17 President Pence. I don't think he ever -- maybe I've got my
18 facts wrong, but I don't think he ever left the building or
19 left the premises there. Anyway, not that --

20 **MS. HERNANDEZ:** I think it's a state secret.

21 **THE COURT:** Not that it really matters, but --

22 **MS. HERNANDEZ:** My understanding is he had left
23 the -- he was somewhere -- I don't think -- I don't know,
24 but I don't think we've ever been told where he was. He was
25 taken to some secure facility, possibly within the Capitol,

1 is my best understanding of the facts.

2 **THE COURT:** Okay.

3 **MS. HERNANDEZ:** But the point is that the word
4 that went out among the crowd -- and that's something I
5 think, Your Honor, is important on what's going on here.
6 There was a lot of information, as the Court could imagine,
7 going through the crowd, because people were listening in to
8 news reports, and because misinformation flows through the
9 crowd. And I'm talking about Mr. Rehl, because as the Court
10 knows -- because I've made this argument before, I
11 frankly -- and I've told the government so this is nothing
12 new. I find the prosecution of Mr. Rehl for seditious
13 conspiracy to be grotesque. Here's a young man who served
14 his country. He's married. He has no prior convictions for
15 any kind of violence. He participated in multiple
16 demonstrations as I quoted from a Secret Service analysis.
17 That comes from a public filing where some entity issued a
18 FOIA request and got some information back from the Secret
19 Service, and that was posted online.

20 The Secret Service refers to the -- they say we
21 know the Proud Boys have been at multiple rallies where
22 the -- I'm not quoting, I'm paraphrasing. You know,
23 they're -- the Secret Service is always interested in the
24 people they protect. The Secret Service statement says
25 they've never been arrested, there's no evidence that the

1 Proud Boys, in connection with rallies where the protectee
2 has been around or present, have ever been arrested for
3 committing any violence.

4 In addition to that, Mr. Rehl is the son and
5 grandson of Philadelphia police officers. I don't know if I
6 could have the Elmo. Mr. Rehl has always supported the
7 police. He has -- here's -- and these are -- is the Elmo
8 on? And this document is from the filing from the discovery
9 that the government has produced. And this is how -- it
10 says January 13th, 2020.

11 **MR. KENERSON:** Excuse me just a second, the
12 Court's indulgence. Our monitor is not working.

13 **MS. HERNANDEZ:** I'm sorry, I don't have copies for
14 you. I was planning to, but take my word for it.

15 As the Court knows, Mr. Rehl was the president of
16 the Proud Boys Philadelphia chapter. And here is a posting
17 from -- I'm not sure exactly, this is some of the discovery
18 that the government has produced. It's dated January 13th,
19 2020. And it is a fundraising request for a retired
20 Philadelphia police officer whose bar was vandalized by
21 Antifa, and where -- it says Antifa attacked a retired
22 police officer's bar for simply having Trump supporters
23 drink at his bar weeks ago. They broke seven windows
24 costing \$1,500 each, and spray painted on his wall anything
25 will help for repairs.

1 So I would submit that as Exhibit 1 for this
2 hearing.

3 **THE COURT:** Is there any objection from the
4 government to the Court receiving that exhibit?

5 **MR. KENERSON:** No.

6 **THE COURT:** It shall be admitted.

7 (Exhibit 1 admitted into evidence)

8 **MS. HERNANDEZ:** Here's another document from some
9 chat, I believe it's from Parler, but it's from some
10 discovery the government produced. Again, it's under the
11 caption of the Philadelphia Proud Boys. My understanding is
12 that it was dated June 14th, 2020, and that's from the
13 metadata on the document that was produced to me. Again,
14 I'm not sure whether that's an accurate date, but that's the
15 date -- I'm not sure that's an accurate date of when this
16 event happened, but that's -- that was what was on my
17 discovery matter.

18 What it shows is the blurred face, my
19 understanding, appears to be a police officer. And then
20 Mr. Rehl and I believe two other members of the Proud Boys
21 Philadelphia chapter. And there are pictures. It says,
22 "After a long week of riots and looting, we stopped in some
23 of the hardest hit districts in the city to give the city
24 police some well-deserved refreshments for our exhausted
25 officers working 15 plus hours a day." And you can see them

1 delivering food and refreshments I guess in the other
2 pictures.

3 So there is no basis for finding that Mr. Rehl did
4 in fact or intended to attack police officers. I know the
5 government has focused on a post that he put that said
6 something like police officers who should be tarred and
7 feathered who -- my understanding was it -- when I say my
8 understanding, that's from the government --

9 **THE COURT:** Ms. Hernandez, I'm losing your voice.

10 **MS. HERNANDEZ:** Sorry. That's rarely said of me.
11 I know the government says that he posted something about
12 they should be tarred and feathered. My understanding was
13 that was deleted within minutes, and it was after the fact,
14 not -- you know, it was not in the days before.

15 **THE COURT:** Ms. Hernandez, I think you're -- look,
16 I understand the point you're trying to make. Let me just
17 note this: We've got all sorts of defendants, January 6th
18 defendants, some who are former and current police
19 officers -- not in this case. But my point is there are all
20 sorts of folks who, for whatever reason, took actions that
21 day that might have been inconsistent with their prior
22 support for the police, including in fact because they were
23 police officers.

24 **MS. HERNANDEZ:** I think Mr. Pezzola is a former
25 Marine who has no history --

1 **THE COURT:** And military as well. My point being
2 is just that it seems to me in the limited time we have
3 available here that your strongest -- that the thing that is
4 most salient is when you're making arguments to me that
5 Mr. Rehl is factually distinguishable from the other
6 defendants in this case. And I know you began with that,
7 but my only point is the idea that he was supportive of the
8 police generally pre-January 6th, okay, I'm not saying it's
9 not relevant.

10 But I'm also saying -- just I don't know how far
11 it really gets you given kind of all the different cases
12 I've seen in which folks who might have had those kind of
13 sentiments before January 6th for whatever reason did not
14 act consistent with them that day.

15 **MS. HERNANDEZ:** Correct, Your Honor, and thank you
16 for pointing out what is important to you. I thought that
17 all this information folds into that issue, that he's --

18 **THE COURT:** I'm not saying it's irrelevant, but I
19 take your point. And I don't think the government is even
20 in a position to dispute what you're saying about his
21 feelings and associations before January 6th were. I'm not
22 saying they're irrelevant either.

23 **MS. HERNANDEZ:** It isn't just before, it's also
24 during and after, I would submit to the Court. And first
25 thank you to the Court for identifying what I should focus

1 on. Secondly, I agree, some of the conduct on January 6th
2 is -- it's like mind boggling. I remember reading in the
3 paper a firefighter -- a chief firefighter who took a fire
4 extinguisher and threw it at police officers. You know that
5 firefighter has worked with police his whole life.

6 Anyway, I digress. I do think because he is
7 distinguishable on multiple grounds, and he's
8 distinguishable on grounds that are material to the Court's
9 decision making. The Court has to find in order to detain
10 him, consistent with the Due Process Clause, that he
11 presents an articulable future threat. Not that -- and I
12 think Munchel made that very clear, it's not about the past,
13 it's what the future is. And the Court has to articulate.
14 With all due respect to the Court, I don't believe that the
15 Court in its earlier decision articulated it as the Munchel
16 decision would require.

17 **THE COURT:** The Court of Appeals did uphold me
18 twice.

19 **MS. HERNANDEZ:** Not me.

20 **THE COURT:** I understand, I understand. But in
21 particular, that's why I think your strongest points here
22 are telling me you've already -- you've got two Court of
23 Appeals decisions affirming my decision on the other
24 defendants in this case. So, again, I think that's your
25 strongest play here, is telling me why he is differently

1 situated.

2 **MS. HERNANDEZ:** Correct. And I will say the
3 following -- and obviously he's -- and I will quote from how
4 he is dissimilarly situated. I'll quote from the
5 government's omnibus motion in opposition to the motions to
6 dismiss: "While unlawfully on Capitol grounds, the
7 defendants engaged in mayhem." And then they go on:
8 "Nordean and Biggs participated in tearing down a black
9 metal fence. Biggs then announced in a video, 'We've just
10 taken the Capitol.' Pezzola robbed a riot shield from an
11 officer, and later posed with it while making a hand gesture
12 associated with the Proud Boys. Donohoe threw a water
13 bottle at a line of law enforcement officers."

14 It goes on and on -- this is at page five, ECF
15 454. It goes on and on for several paragraphs at pages five
16 and six. You know whose name is not listed? Mr. Rehl. And
17 he -- again, no forcible entry, he is not -- he's a
18 lieutenant, not a leader. I'll go back to that in a minute.
19 He did not participate in any of these things. And, you
20 know, after that original -- when the -- and I know Mr. Hull
21 is here. I don't like a circular firing squad, but I'm just
22 trying to make my point as to my client.

23 After that initial when he started out with them,
24 he goes off and meets the people from Philadelphia. The
25 original plan of the MOSD was to break off into small

1 groups, not to attack the Capitol, but to have more control
2 over the events of that day. And I hope -- I have the
3 video, the hour and 38 minute video. I've not submitted it
4 to the Court, and I'd ask the Court to view it. I've
5 submitted to the Court the transcript because I thought it
6 would be easier for the Court, but I'm happy to submit the
7 video. You can see Mr. Rehl, even in that video, that he's
8 a much more temperate person than everybody else. Bertino
9 is one of the hotheads, and Bertino appears to have been the
10 one who is -- on December 12th when they were in D.C. and
11 Bertino gets stabbed, Mr. Rehl was in D.C. that day. He was
12 not with the crowd that later got rowdy and got stabbed and
13 all of that.

14 So, again, at every point that the Court looks at,
15 he is different from everyone else. I simply don't believe
16 that there's evidence before the Court that meets the
17 Munchel standard, the Salerno standard.

18 **THE COURT:** So I'll make this point: Munchel --
19 obviously part of what Munchel said was, yes, it refocused
20 the district courts, to the extent they needed refocusing,
21 on thinking about the future, the future, the dangerousness,
22 which is part of the point you're making. Of course, the
23 other part of Munchel was the passage that I'm well familiar
24 with in which the Court said, well, the people who are
25 accused of planning what happened that day are in a totally

1 separate category.

2 So you're arguing to me there isn't evidence of
3 that, and fine. But my point is to the extent there is, you
4 know, Munchel kind of --

5 MS. HERNANDEZ: Correct.

6 THE COURT: It's less --

7 MS. HERNANDEZ: Correct, but that's why I point to
8 two things. You don't put -- the theory alleged in the
9 indictment and argued by the government is that this was a
10 hierarchical group; Tarrio, Biggs and Nordean were the kings
11 of the hill or however you want to describe it. Your Honor,
12 they have 160,000 messages from all the Proud Boys that
13 they've produced, Telegram messages. Tell me, where is the
14 message that was -- where is the clarion call to go out and
15 attack the Capitol? The only thing they've alleged --
16 again, I find it --

17 THE COURT: See, now, there -- I'm sorry, finish
18 your point.

19 MS. HERNANDEZ: I'd rather address the concerns of
20 the Court, that's the best.

21 THE COURT: So again, that argument you're making
22 to me, jeez, there's a million whatever they are, text
23 messages, 160,000 of them, okay. But I've got Mr. Donohoe
24 and Mr. Bertino having pled to -- well --

25 MS. HERNANDEZ: To an immaculate conception

1 conspiracy.

2 **THE COURT:** Look, you can say whatever you want
3 about it. They have pled to a conspiracy to do this,
4 different types of conspiracies. But still, I guess my
5 point is -- and putting aside those pleas, right, put aside
6 those. There's also a lot of other evidence that maybe
7 doesn't directly impact your client. But there's other
8 evidence that is more directly relevant to the other charged
9 defendants. So the idea that, well, just because there's no
10 text message that says let's go storm the Capitol, you know,
11 I think that --

12 **MS. HERNANDEZ:** Number one, Your Honor, I'm not
13 asking the Court to find him innocent or not guilty.

14 **THE COURT:** I understand, I get it.

15 **MS. HERNANDEZ:** Number two, yes, Donohoe pled
16 guilty. You know what, Donohoe took two bottles of water
17 and threw them at police. Donohoe is on video parading
18 through the -- one of the areas of the Capitol with Pezzola
19 while Pezzola has the stolen shield, and somebody's saying:
20 You stole the shield. And I don't know who's answering,
21 but: Yeah, we stole the shield. So yes, if I had been
22 representing Mr. Donohoe, I would have said, you know what,
23 Mr. Donohoe, you're going to be found guilty of some things,
24 whatever they are. So if they're offering you a deal, take
25 it.

1 **THE COURT:** I shouldn't have brought -- my point
2 is just this: To the extent I think your best arguments
3 here are why your client is differently situated from the
4 other defendants, the point is that there's no Telegram
5 message from anybody saying here is our planning to storm
6 the Capitol. I guess, again, whether you want to look at
7 defendants who have pled guilty or whether you want to look
8 at defendants for whom the Court of Appeals has upheld their
9 detention, either way my point is your best argument here
10 is: No, at least as to the allegations, my client is
11 differently situated.

12 **MS. HERNANDEZ:** He is differently situated.
13 Number one, Your Honor, to address the Court's -- the Court
14 of Appeals, in per curiam opinions, upheld the Court. But
15 remember, at least at the time that they were before the
16 Court, the argument as to them was they're the ones who
17 tore -- Nordean and Biggs are the ones who tore aside the
18 bicycle rack and let the crowd start --

19 **THE COURT:** There were a lot of other allegations
20 too.

21 **MS. HERNANDEZ:** And they were higher leaders. But
22 that was part of the argument. That will take me back to a
23 legal argument. So I want to say that. But yes, he is
24 different, because Donohoe actually took violent action that
25 day, and appeared to be supportive of the stealing of the

1 shield and whatever happened after that. After the fact on
2 January 6th, after the most violent events of the day, there
3 is audio/video of Mr. Donohoe and Mr. Rehl talking to each
4 other, and Rehl saying wow, you know, he was surprised at
5 what happened. And he didn't know that the person who had
6 broken the window was a Proud Boy. And Donohoe says: No,
7 no, that was one of ours. Again, Donohoe was much more
8 aware of what was going on. And Biggs -- I mean, Bertino in
9 his statement of offense, which is accurate, he is on those
10 chats on January 6th egging people on. Mr. Rehl is not on
11 those chats.

12 So in terms of distinguishing, I know the Court
13 hates this when I do this, but it's so important -- it's so
14 close to my heart because I'm a mother and I have two grown
15 children. Mrs. Rehl is in the courtroom, and she's prepared
16 to take the stand. And Mrs. -- and Mr. Rehl's mother is
17 also in the courtroom. Do you want to know what the biggest
18 difference is -- I mean, to me, I don't -- I think this --
19 this is relevant to whether Mr. Rehl will do anything to
20 jeopardize being out if you release him. That's his baby
21 who is now 15 months old. And I know, I know it doesn't
22 land well with the Court. But I find it so -- I guess I'm a
23 mother, I remember my husband when my children were little.

24 I mean, and it isn't -- you know, the family
25 circumstances, a downward variance in the guidelines, are

1 not about the defendants, they're about what it does to the
2 child. And I'll tell the Court -- and she can testify if
3 the Court wants to hear it from her mouth. She's told me
4 how difficult it is for her when she visits Mr. Rehl and the
5 baby's with her, that the baby doesn't understand why he
6 can't hold her in his arms. This is since their child was
7 born he's been detained. We're doing psychological damage
8 to this child not to have her father around, and that's a
9 known fact that there's evidence.

10 So to me, you want -- and I think this is
11 relevant, because in deciding the nature and
12 circumstances -- the history and characteristics of the
13 defendant, family circumstances and the support a defendant
14 has is part of that analysis. And the four letters from the
15 men who wrote to you were all veterans who have known
16 Mr. Rehl for many years. This man is a stable person. He
17 didn't commit -- I mean, and Munchel is very clear what you
18 do with language, that they refer to it as rhetorical
19 bravado. I argued to the Court it's First Amendment
20 protected.

21 You know, Your Honor, the framers were not
22 concerned with protesters, wild and crazy. The Supreme
23 Court, you can burn a flag and not be prosecuted. You know
24 what the framers were concerned with? The Fourth, Fifth and
25 Sixth Amendments to the U.S. Constitution to protect us from

1 a government run amuck. The First Amendment protects -- I
2 know it protects peacefully petitioning our government. But
3 what -- I'm not a kraken lawyer I want to say. I believe
4 very strongly in the First Amendment, very strongly.
5 Justice Holmes and a lot of other great judges in our
6 history have made clear that conspiracy law and a lot of --
7 how dangerous those laws are. Like, I am convinced as I
8 stand here that next year or two years from now or five
9 years from now, these seditious conspiracy statutes are
10 going to be used against people from the other tribe. And I
11 think it is a dangerous road for the United States -- as bad
12 as what happened on January 6th is, I know the Court and all
13 the judges in this district are very concerned about that.

14 I personally think -- I guess maybe because I'm a
15 criminal defense attorney and I've spent my life -- I've
16 spent my life protecting innocent and guilty people from the
17 government. I am very concerned that these laws are being
18 misused. Mr. Rehl did not commit any violence. Mr. Rehl
19 did not express any desire to overthrow the government of
20 the United States. Mr. Rehl is a Marine veteran. Mr. Rehl
21 is married and has a child and another daughter from a
22 previous marriage which he's always kept in touch with. His
23 mother is here. I understand it's a big -- to me, it's a
24 big deal that he's a son and grandson of a police officer.
25 I'm being more personal than I should be. My father was a

1 police officer for many, many years. I understand what that
2 does to -- you know, what that mentality is. And I know
3 that the Court has pointed to a retired New York City police
4 officer was recently charged. But Mr. Rehl did not exhibit
5 that kind of behavior that day, he didn't. So I don't think
6 it's fair to say -- to say yeah, but how about that police
7 officer. Well, that's not Mr. Rehl. It has never been
8 Mr. Rehl.

9 **THE COURT:** Ms. Hernandez, a couple things, just
10 to be clear. I never wanted to indicate that the things
11 you're arguing to me are not relevant. They are relevant.
12 All I'm saying is I think what is much more relevant is what
13 your client is accused of doing or not doing that day. And
14 you've made your points, I hear you. But I think it only
15 gets you so far, it seems to me, to say -- for the reasons I
16 mentioned, that he had these connections to the police.

17 And the same thing goes -- just to make clear, you
18 said before, well, you know, it doesn't sit well with me to
19 raise the issue of his child. It's not -- to be clear, the
20 only thing I've expressed in the past is that -- I mean, we
21 are here arguing for his detention, right. In various -- at
22 various times when we've been together for other reasons,
23 you have injected that into the proceeding. I have
24 tolerated it. But the point is it wasn't relevant to what
25 we were discussing on those other occasions, number one.

1 Number two, again, my point is -- again, I'm not
2 saying it's not relevant. I am saying that, again, I think
3 the far more salient thing here, the far more impactful
4 piece of it seems to me what your argument is, is the extent
5 to which he's differently situated.

6 **MS. HERNANDEZ:** And that --

7 **THE COURT:** You've made your points, I'm just
8 saying like I don't think it gets you that far to say as
9 heartbreaking as this is -- okay, I'm not -- you know,
10 that's not -- I mean, we all have feelings about things, and
11 I think it is heartbreaking what you're laying out here.
12 But I've got to apply the statute as I -- and you know,
13 as --

14 **MS. HERNANDEZ:** I think this is -- I understand, I
15 may be a little heavy handed on it. When I tell -- I
16 appreciate the Court telling me what's important to you,
17 because really, I'm not here to make a speech, I'm here to
18 persuade the Court. I'm happy that the Court says this will
19 be more important to me. I also -- you shouldn't play
20 poker, Your Honor, for high stakes. Because you
21 sometimes -- like I know -- and it's fine, as I've told the
22 Court, if I think it's an important point that I need to
23 push, I will push it because the Court has been very kind;
24 that even though I can tell maybe this is more important to
25 you or not, you don't cut me off. So it's fine. I'd rather

1 know what the Court is thinking than not know, that's the
2 best kind of argument, right.

3 What is it that the Court needs from me to bring
4 out so that Your Honor will release him today? I would be
5 happy to answer any questions. I've already pointed to the
6 difference to the discrimination that Judge Mehta has done
7 in his cases. He hasn't said okay, you're all in jail, he
8 has not. I've quoted a large -- a lengthy passage from
9 Judge Bates. He released the guy who was -- I think he
10 worked at the White House.

11 **THE COURT:** I know the case you're talking about.

12 **MS. HERNANDEZ:** He goes through this whole thing,
13 he released that guy. Let me say something else, none of
14 the Oath Keepers who have been released, none, have caused
15 any problems.

16 **THE COURT:** Ms. Hernandez, just to be clear, I
17 understand the need to make individualized decisions. I've
18 had numerous occasions -- and prosecutors here can attest
19 to, for -- well, other -- non January 6th defendants, but
20 also January 6th defendants, that I have released over their
21 objection. Sometimes there haven't been problems, other
22 times there have been. And those individuals had to be
23 re-incarcerated pending trial on a couple of occasions.

24 My point is only to make the point to you that I
25 am in the business of making individualized determinations,

1 and that's why I focus your attention on telling me why he
2 is factually differently positioned.

3 **MS. HERNANDEZ:** And I'm here to tell you that his
4 wife and mother came down so that you can hear them
5 personally. Because I think the Court has to consider, in
6 deciding whether to release, the history and characteristics
7 of the defendant, and I think they can fill you in. And
8 again, their support for him I believe will go a long way to
9 assuring that whatever release conditions the Court imposes
10 would be upheld. If you -- you know, that's what the case
11 law and the facts show, not just in this case, in all these
12 cases. The more support a person has the more likely they
13 are to abide. And his wife is at home with their baby.
14 She's home taking care of the child, so she has -- again, I
15 don't know whether the Court wants to -- I would like the
16 Court to hear from her. But she has expressed to me she can
17 be home 24/7 if the Court imposed home incarceration -- not
18 home detention, home incarceration. These days you don't
19 need to leave the house. You call Uber or Amazon or
20 whomever, they deliver groceries and everything else. He
21 has a family support network in Philadelphia. So I --
22 they're here for that purpose.

23 The two men who are -- if the Court wants to hear
24 from them, you know, again, high caliber men, no prior
25 convictions, men who served their country who are here to

1 tell you Mr. Rehl is a decent person who will abide by the
2 Court's decision. Again, his past conduct shows it. I know
3 what the government has said. The other thing, Your Honor,
4 is with respect to almost every fact that the Court was led
5 to rely on -- you know, the fact that he brought
6 programmable radios.

7 **THE COURT:** Right, you make --

8 **MS. HERNANDEZ:** I said I proffered that I have
9 receipts from -- this is from November 29th. These were
10 purchased in advance of the December -- I said I would -- I
11 proffer that I have those receipts. I have those receipts
12 here. These were purchased in November in advance of
13 December. These were not -- this wasn't something we're
14 going to go fight and we need this. And plus I quote a
15 passage from the discovery the government has produced where
16 Mr. Rehl is talking about the benefit of having these phones
17 or whatever they're called, these radios, in case somebody
18 gets hurt. And he describes at a prior rally somebody was
19 having a heart attack or something, and they were able to
20 get him medical care.

21 As I say, I have multiple receipts that I can
22 submit to the Court so we don't have to waste time. But
23 they all come from the tactical vest which was purchased in
24 November of 2020. Again, this is I would say Defense
25 Exhibit maybe 4 for the hearing. The date is there. Again,

1 here is another item, December 4th, 2020, urban ops cargo
2 pants and another radio.

3 So almost --

4 **THE COURT:** Ms. Hernandez, let me just interrupt
5 and give you a sense here. I've heard you now for about an
6 hour, and I have another hearing at 10:00 o'clock, a
7 pretrial conference at 11:00 o'clock and another matter in
8 the early afternoon. And I have to hear from the
9 government. Here's my point to you: I think, in fairness,
10 I can hear you however you would like for another 15 minutes
11 or so. If you want to put on a witness, now's the time to
12 do so. I'm perfectly -- just like I heard from the
13 government via proffer, I'm perfectly happy -- and I've
14 gotten all -- and I know your objections to that, fair
15 enough, you've made them on paper.

16 **MS. HERNANDEZ:** They weren't even proffers.

17 **THE COURT:** I'm going to consider what you've
18 written. But in order for me to give them the opportunity
19 to be heard today, I'm going to have to say that like after
20 another 15 minutes, I'm going to have to hear from them.
21 Now, again, how you want to spend that 10 or 15 minutes is
22 up to you. If you want to put a witness on, that's fine
23 with me. I'm not going to tell you that you couldn't. But
24 I'm just telling you I'm happy to hear your representations.
25 First of all, their very presence here speaks for itself.

1 You've made that point. But however you want to use that
2 time to your best advantage, I will let you do that. And
3 then I need to hear from the government. I mean, this is a
4 very -- as you say, a very individualized and fact-intensive
5 decision. I'm not going to make it today, but I want to
6 give you the opportunity to be heard for another 10 or 15
7 minutes before I hear from the government.

8 **MS. HERNANDEZ:** I have a 10:00 a.m. before Judge
9 Boasberg too. Three things, Your Honor. Again, that goes
10 to some of the statements the Court has made and some of the
11 factors that the Court has to take into account. The
12 government has argued that he has shown no remorse, blah,
13 blah, blah. The letters from these gentlemen that were sent
14 to you expressed that, in their opinion and in their
15 conversations with him, he has said he wants nothing more
16 with this. And he has done nothing -- he was -- and Judge
17 Bates took this into account in releasing the one guy, that
18 he was -- this happened on January 6th. He was not arrested
19 until March. There's no evidence that he was out there
20 doing anything that would allow the Court to make a finding
21 that he presents an articulable threat to society.

22 The other thing is the primary basis, my
23 understanding -- and I think the Court brought it up again,
24 that led the Court to detain him was this notion that he was
25 a leader in this group that planned an attack on the

1 Capitol. As the Court mentioned, Munchel says yes, look at
2 these things. But those who led the -- or planned or led
3 can be --

4 **THE COURT:** Differently situated.

5 **MS. HERNANDEZ:** Right. And that was based on his
6 leadership in the MOSD. But I submit to the Court that what
7 the Court now knows, and a fair reading of that -- and I
8 know that's not the only MOSD hearing, but that was like the
9 most expansive meeting, it's on video. It really says this
10 is what they wanted. There's no -- nothing in there that
11 says our plan is to attack the Capitol. And Mr. Rehl is
12 quoted as saying, you know, we don't want to repeat -- we
13 don't want an APM -- I forget what he calls it, we don't
14 want another APM thing. He's talking about what happened in
15 D.C., you know -- which let me say this: It appears to me,
16 without disclosing -- just from looking at the evidence,
17 these gentlemen like to drink a lot. And you can read it in
18 the MOSD. You know, they're all talking: Can we go through
19 a rally without everybody getting sick drunk and making
20 fools of themselves. So that's part -- a lot of
21 conversations and things that may have been said, you know,
22 have to be taken with that. But Mr. Rehl at all times is
23 just even tempered. And not just that, his conduct on that
24 day supports that analysis.

25 As a matter of law, I don't believe the Court can

1 detain him, because the Court's analysis has been grounded
2 on 1512. Seditious conspiracy, the government has not made
3 an argument that you can detain him. Under D.C. Circuit
4 case law, you have to look at the charges categorically to
5 see if they fit the categories under the statute. The only
6 charges here that fit the categorical permission to detain
7 are the destruction of property. And the Chief Judge of
8 this district has expressed sort of -- I believe it was in
9 the Nordean case, she didn't quite think that the
10 government's view of how aiding and abetting or Pinkerton
11 liability could really bring that charge into the detention
12 decision.

13 But in particular, as we know, Mr. Rehl did not
14 know that Pezzola was the person -- didn't know he had
15 stolen the shield, didn't know he was the person. So even
16 if you could, there really is a far distance between those
17 events and Mr. Rehl's conduct. And that's shown by the fact
18 that the government has never stood here and argued to you
19 look at that, look at that. They're all focusing on this
20 allegation that their intent was to attack the Capitol and
21 prevent the certification.

22 And the last thing I'm going to say on that, Your
23 Honor, is that Mr. Rehl -- of all the ones I believe -- I
24 don't know that -- I'm much more familiar with the evidence
25 against Mr. Rehl. He clearly says: Biden is the president,

1 get used to it, let's plan for it. He's not saying, as some
2 people today, like the former president of the United States
3 continues -- and a lot of members of Congress and people who
4 are running for office, the person who's running for office
5 from Pennsylvania who is a purple heart recipient. There
6 are people out there arguing that the election was stolen
7 and that it was invalid or whatever it is. Mr. Rehl, you
8 don't see that. He accepted it. So it's inconsistent with
9 this notion that he was there to prevent the counting of the
10 Electoral College when he quickly thereafter says, hey --
11 and he sort of mocks -- there are other text messages, he
12 mocks people who are still saying we've got to stop this or
13 whatever.

14 So the last thing I'll do before I put his wife
15 and mother on for a short period of time is --

16 **THE COURT:** You have 10 minutes.

17 **MS. HERNANDEZ:** Is there a question that -- how do
18 I persuade the Court? What is the question that the Court
19 needs to -- what is the answer that the Court needs to hear?
20 What is the point that is troubling the Court about
21 releasing Mr. Rehl?

22 **THE COURT:** Ms. Hernandez, I've said all along
23 that I think your strongest argument here is arguing that he
24 is factually differently situated from the other defendants.
25 You've made a bunch of arguments along those lines, but I

1 think -- as I said, I think that's your strongest place to
2 emphasize.

3 **MS. HERNANDEZ:** And I believe, Your Honor, that's
4 indisputable that he's factually different on a personal
5 level, on his conduct that day, on his role in the
6 hierarchy, on every aspect of everything. I think he's the
7 most stable of the people here that have appeared before
8 Your Honor. He's the least violent of anybody, verbally and
9 physically. And I have every confidence that his mother
10 and -- and the men who wrote those letters, I thought they
11 were, again, very succinct and to the point. But if the
12 Court will allow me, I'd call Mrs. Rehl, Zachary's wife, to
13 the stand.

14 **THE COURT:** All right, you may. Are you going to
15 question and provide testimony or do you want her to simply
16 address me?

17 **MS. HERNANDEZ:** I simply want her to address the
18 Court.

19 **THE COURT:** That's fine.

20 **MS. HERNANDEZ:** Whatever the Court wants.

21 **THE COURT:** She can address me then from the
22 podium.

23 **AMANDA REHL:** Good morning, Your Honor. I'm
24 Amanda, I'm Zach's wife. Zachary and me have been together
25 for over 11 years. He's a great person obviously. I've

1 been with him for so long because he's a good person. He's
2 a great father. I've watched him, since our relationship,
3 raise his other daughter. She's always been a priority.
4 When her mom like stepped out years ago, he stepped in to
5 raise her without question. She lived with us. She's been
6 with us for years.

7 This situation has been hard on her. It's been
8 hard on our newborn daughter. She's never met her father
9 other than sitting across from him at a prison. This has
10 been detrimental on him also not being able to be a father,
11 not being able to be a husband, being away from his mom, his
12 stepdad and my parents. He's a family man, a good person.
13 If he were to be released, like he wouldn't be committing
14 crimes. He would take -- he would just be a father, he
15 would want to be home to reconnect with his eldest daughter,
16 meet his youngest daughter. And I would be there
17 constantly. Not to watch him, but just to be a part of his
18 life. Because I know he would not partake in jeopardizing
19 being home with his family.

20 **THE COURT:** All right. Thank you for being here,
21 Mrs. Rehl. And you have my sympathy for how much stress I'm
22 sure this is putting on your family. You may return to your
23 seat.

24 **MS. HERNANDEZ:** Your Honor, his mother is here,
25 but she'd prefer not to speak, just shy. I will tell you,

1 my understanding is she's had some medical issues recently.
2 I don't want to say any more than that. Mr. Rehl also may
3 want to say a few words to the Court. It's kind of scary to
4 have a defendant talk to the Court, but I think he may want
5 to say a few words to the Court.

6 **THE COURT:** All right. Mr. Rehl, would you like
7 to address me, sir?

8 **THE DEFENDANT:** I would love to, Your Honor.

9 **THE COURT:** Please go ahead, the floor is yours.

10 **THE DEFENDANT:** All right, thank you. I actually
11 prepared a little statement here. I just want to start off
12 by saying I understand the seriousness of the charges
13 against me, and completely understand your reluctance on
14 whether to release me. For the last year and a half, I've
15 had a lot of time to reflect on what's really important to
16 me, and why you can rest assured why I will not be a threat.
17 The events on January 6th were absolutely terrible, and I
18 wish it never happened. It was an embarrassment to our
19 country, and I feel terrible for anyone who suffered because
20 of it. If I had the opportunity to turn back the hands of
21 time, I would stay with my wife every time. I'm not a
22 violent person. I don't support any violence that happened
23 that day, and I certainly won't advocate for any violence in
24 the future.

25 With that said, no protest, no group, no cause is

1 worth losing time with your family over or any special
2 moments that could arise -- excuse me.

3 **THE COURT:** It's okay, take your time, Mr. Rehl.

4 **THE DEFENDANT:** Thank you. As you know, in front
5 of you sits two of those family members that mean the world
6 to me, my wife and my mother. The other two are my youngest
7 and oldest daughters who couldn't be there today. But I've
8 missed birthdays, barbecues, family get togethers, so it
9 really hit home to me because I really love my family more
10 than words can describe. The most devastating thing for me
11 was not being there to hold my wife's hand while she gave
12 birth to our daughter, or being there to hug my mom when she
13 was diagnosed with cancer. The idea that something could
14 come up again and I wouldn't be there terrifies me to my
15 core, keeps me up at night. It's one of the many reasons
16 why I can say with the utmost certainty that if given the
17 opportunity for bail, I will comply with every condition
18 this Court may ask, and I won't jeopardize that opportunity
19 for anything.

20 I thank you, Your Honor, for the opportunity to
21 speak today. I hope you could hear the seriousness in my
22 voice, and know I mean everything I say and will not let you
23 down. Thank you.

24 **THE COURT:** All right. Thank you, Mr. Rehl.

25 **MS. HERNANDEZ:** I'll sit down and shut up on that.

1 **THE COURT:** That's a trial lawyer for you there.
2 Let me hear from the government.

3 **MR. KENERSON:** Thank you, Your Honor, and good
4 morning. This is Erik Kenerson on behalf of the United
5 States. So the Court was correct back in June of 2021 to
6 detain Mr. Rehl. And it refused again to reopen the hearing
7 in December of 2021. I think since then, the evidence of
8 Mr. Rehl's decision to join the conspiracy was strong then,
9 it's gotten stronger. Since then -- and the charges more
10 serious since that last hearing. And the Court has, of
11 course, heard not only the proffer of facts from the
12 government in Mr. Rehl's two detention hearings, but in I
13 think eight other hearings conducted -- detention hearings
14 conducted between the other five defendants on the
15 indictment in this case. So the Court is very well familiar
16 with the facts.

17 What those facts show is that this defendant chose
18 to join the group -- chose to join the group on January 6th
19 knowing that it had the unlawful objection -- objective of
20 stopping the certification of the Electoral College vote.
21 That's what the government's evidence shows in this case.
22 The defendant knowingly chose to associate with those men.
23 The defendant knowingly participated in what those men did
24 on January 6th. The defendant was a leader within the
25 structure of the ministry of self-defense. He was not at

1 the tip top of the pyramid, we agree with Ms. Hernandez on
2 that, but he was certainly a leader within the structure.
3 He was on the operations council. He acted as a leader on
4 the ground on January 6th. He helped lead the group of
5 hundreds -- dozens, if not hundreds, of Proud Boys away from
6 the Washington Monument at 10:00 a.m., away from where the
7 President was speaking; away from where the individuals
8 known as Normies, in the parlance of this case, were
9 listening to the President speak; away from the location
10 where, if there were, as has been kind of expressed
11 throughout this case by Rehl's prior counsel, a worry about
12 Antifa, where those attacks by Antifa would happen, led them
13 away from there and led them straight to the Capitol.

14 There was discussion in the text messages, chains
15 of which Rehl was a participant about targeting the Capitol.
16 There was -- so he was well aware of the criminal objective
17 of what was going on on January 6th. And what he -- his own
18 state of mind, what the Court has in terms of evidence of
19 what Mr. Rehl was trying to accomplish on January 6th is
20 also very strong. The Court had found back in June of 2021
21 that the defendant's posts suggest that the violence should
22 continue after January 6th. Again, this is reading the
23 Court's findings from page 57 of the June 30th, 2021
24 transcript. Again, on January 6th, he, the defendant,
25 wrote: "I find this hard to believe now. I'm proud as fuck

1 of what we accomplished yesterday, but we need to start
2 planning. We are planning for a Biden presidency." The
3 reference to a Biden presidency is in regards to being
4 "proud as fuck" of what happened on January 6th.

5 And he referred to law enforcement officers who
6 defended the Capitol as they deserve to be tarred and
7 feathered, and he called them turncoats. And that was what
8 the Court highlighted just on June 30th. The government has
9 since proffered additional statements. These the government
10 proffered during the defendant's first motion to reopen the
11 hearing. And these are the -- some of the statements that
12 the defendant claims the Court can't consider, but of course
13 Wisconsin v. Mitchell says the Court can consider the
14 defendant's words for his motive or his intent.

15 At 1:15 p.m. on January 6th, he texted a group:
16 "Everyone raided the Capitol." This is, for context, 30
17 minutes prior to when the group of rioters, including a
18 number of Proud Boys, pushed up the stairs onto the
19 scaffolding. It's nearly an hour before Mr. Pezzola broke
20 the window with the shield. And he's on -- at that point on
21 the Capitol grounds within the restricted area, and chose to
22 use the word "raided" and the word "we" -- sorry, not "we,"
23 that's not this one, "Everyone raided the Capitol."

24 At 1:34 he texted: "We are at a standstill,"
25 again, here suggesting that he was part of a group adverse

1 to the police trying to push forward. "Cops" -- this is
2 back to his words, "Cops are dropping concussion bombs and
3 pepper spraying. People are pepper spraying and fighting
4 back riot cops." That standstill was of course broken, as
5 the government has argued to this Court, when a number of
6 members of the Proud Boys gathered at the base of the stairs
7 under the scaffolding, overran the U.S. Capitol Police
8 defenses and surged up the stairs. At 2:29 p.m., defendant
9 sent a message to a group that said: "Civil war started."

10 On January 7th, he texted: "Trump basically
11 conceded, we lost our country. We shoulda held the
12 Capitol." January 7th: "Once Pence turned his back, he was
13 fucked, but was hoping we all sent a message yesterday. I
14 guess that was the message to ben" -- B-E-N, and I believe
15 that's, "bend the knee. It's depressing." Again,
16 January 7th: "Looking back, it sucked. We" -- again, that
17 word we, "We shoulda held the Capitol. After Trump
18 conceding today, it all seemed like a waste." He continued:
19 "The reason why it feels like a waste is because instead of
20 all of these politicians getting scared and realizing they
21 need to answer for this fraud, they're all turning on Trump
22 and cucking, they're doubling down on their actions.
23 Everyone shoulda showed up armed and took the country back
24 the right way." Mr. Rehl did not think that he or the group
25 he joined went far enough on January 6th. Those were his

1 words on January 7th.

2 Now, the Court has already I think -- with regard
3 to Mr. Rehl -- and I think the Court brought up that the
4 Telegram chats don't explicitly have directions to attack
5 the Capitol. The Court's heard this argument I think in all
6 the detention hearings so far in this case, including on
7 January 30 -- excuse me, June 30, 2021 when the Court said:
8 "Although much of the evidence is uncontroverted insofar as
9 it's Telegram chats, photos and videos, it's also true that
10 much of the government's evidence is circumstantial about
11 the details of the alleged conspiracy." But what the Court
12 found -- and we think that this is correct, is that: "The
13 best evidence of the conspiracy is what the conspirators
14 did, acted in concert to do" -- this is, again, from the
15 June 30th transcript, "and what happened from their
16 coordinated actions. And here, that includes interference
17 with the certification of the Electoral College vote.
18 Although Mr. Rehl may have been somewhat surprised by
19 exactly how that came about or the group's degree of
20 success, I don't think that undermines the evidence of prior
21 planning and coordination."

22 And most -- in the most recent detention hearing,
23 the Court held in this case writ large, with respect to
24 Mr. Tarrio: "Similarly, Tarrio argues that essentially the
25 government does not have a smoking gun, perhaps in the form

1 of direct evidence of an order from Tarrio to other Proud
2 Boys to storm the Capitol. True. But, again, that's hardly
3 necessary for the evidence to be very strong in the
4 aggregate for detention purposes."

5 Mr. Rehl has brought up a number of issues
6 surrounding I guess his prior counsel in the case. One
7 thing we would note about those arguments is that there has
8 been no allegation by Ms. Hernandez that either prior
9 counsel were ineffective in their representation of Mr. Rehl
10 at the detention hearings. The case she cited from the
11 Chief Judge, Thorne, where the Chief Judge allowed someone
12 to reopen a hearing, it was a suppression hearing I think.
13 And that case did involve allegations of ineffective
14 assistance, or at least what would have been tantamount to
15 ineffective assistance. And the Chief Judge found in that
16 case that those situation were unique.

17 We don't have those types of allegations from
18 Ms. Hernandez here. Certainly any lawyer who looks at a
19 case might see things differently. It's unquestionable that
20 both Mr. Johnson and Mr. Moseley put forth substantive
21 arguments to the Court, made the best arguments they could
22 based on the evidence available to them at the time.

23 **THE COURT:** Mr. Kenerson, what do you make of the
24 argument that given the volume of discovery -- even if it's
25 not ineffective assistance, that at least insofar as there

1 was evidence that was produced but that reasonably wasn't
2 available in the sense that, again, given the volume,
3 counsel just might not have been aware of, for example, the
4 video that Ms. Hernandez mentioned? I know you have
5 separate arguments, I'm sure, as to why the video is not
6 material and doesn't change the analysis. Okay, I get that.

7 But what do you make of the argument that at least
8 I should consider that to be evidence that was not
9 reasonably available to the defendant; that even if it was
10 in their possession -- his possession, that really just
11 given the timing and given the practicalities of the volume
12 of discovery in this case, that that's something I can
13 consider?

14 **MR. KENERSON:** Certainly. And we do certainly
15 have our evidence on the substantive, and we will be happy
16 to answer any questions the Court may have. But with regard
17 to kind of the argument as to whether or not Mr. Rehl or
18 Mr. Rehl's counsel at the time had effective access to the
19 video, what we would note is that the government relied upon
20 that same video in the June 30th hearing. So Mr. Rehl's
21 counsel was aware that the government was relying on this
22 video.

23 The government's disclosure letter that -- under
24 which that video went, the cover letter, described that
25 there was a Miami Proud Boy, so on and so forth, and

1 describes the MOSD. It listed the members who spoke, at
2 least the members who had been charged at that point who
3 spoke on the video. So all counsel would have had to have
4 done to find that particular video was say oh, the
5 government is looking for this, let me reread the letters to
6 see if anything has come up. And sure enough, we make a
7 description of that video in the letter. It wasn't a matter
8 of looking necessarily for a needle in a haystack for that
9 particular video given where everything was on June 30th,
10 2021.

11 Ms. Hernandez also brought up, I think, the
12 Bertino plea. One thing we would note both about
13 Mr. Bertino's plea and Mr. Donohoe's plea -- which I
14 understand she takes issue with in terms of the government's
15 quantum of proof, is that the Court accepted both of those
16 pleas. The Court accepted Mr. Donohoe's plea to conspiracy,
17 the Court accepted Mr. Bertino's plea to conspiracy. And in
18 the charging documents on both of those cases, it charged
19 that both of those defendants conspired with a number of
20 people, including Zachary Rehl. And she, of course -- I
21 think if defense had their way here, the Court would not
22 consider Mr. Bertino's plea at all substantively, but would
23 only consider the fact that he's been released in talking
24 about Mr. -- where Mr. Rehl stands.

25 I think, as the Court pointed out -- and we just

1 want to make sure we stress this, is that the Court made the
2 finding that Mr. Bertino's decision to cooperate with the
3 United States puts him in a different position than where
4 Mr. Rehl is sitting right now. And Mr. Bertino --

5 **THE COURT:** Not just to cooperate, but to take
6 responsibility.

7 **MR. KENERSON:** Correct, and Mr. Bertino in fact
8 did so prior to being charged. He walked in with an
9 information filed by the government and pled guilty prior to
10 the government even charging him. So going back to -- we
11 led with this a little bit, Mr. Rehl knew the criminal
12 objective, he joined the conspiracy. Ms. Hernandez wants to
13 say, okay, he wasn't a leader, but he was, as the Court
14 found, a lieutenant. I think Ms. Hernandez relied, at least
15 in her papers, on this other defendant who was interviewed
16 and said that he wasn't calling the shots. She left out
17 that that same defendant said Nordean was calling the shots,
18 which is essentially the government's theory of the case.
19 And it's completely consistent with the idea that Rehl was a
20 lieutenant and a leader, even if not the top leader.

21 He joined this group. He was in these
22 conversations that led to discussion of more animosity
23 towards the police leading up to January 6th. He was on
24 chats where people talked about storming the Capitol. He
25 was in the group where the description of the group was:

1 "Fit in or fuck off." He joined that group willingly. He
2 makes a big argument about, oh, he wasn't at the Airbnb on
3 January 5th, so therefore he could not have known the plan.
4 All he was told was to meet at the Washington Monument.

5 Again, the question for the Court to consider is
6 not whether the defendant knew every single step in any plan
7 that may have been laid out, or whether he received some
8 sort of text message from someone saying: Mr. Rehl, we need
9 you to be here or we need you to be there at this time, and
10 here's the objective. He -- what the Court needs to decide
11 is that he agreed with others to join this conspiracy to do
12 the unlawful objectives of the conspiracy, whether that be
13 the 1512(k), the seditious conspiracy, or 372. And that is
14 what the evidence shows. That's what the evidence shows for
15 all the reasons that we laid out earlier.

16 I want to talk just a minute about the question
17 about whether he forcibly entered the Capitol versus not
18 forcibly entered the Capitol, and the comparison that
19 Ms. Hernandez makes to Mr. Donohoe. One thing I would note
20 is that at the time the Court decided Mr. Donohoe's
21 detention hearing, he had not been charged with, nor did the
22 Court have in front of it, any evidence regarding whether he
23 threw a bottle. And she says that in connection with the
24 other defendants in the case, the others are charged to have
25 forcibly entered, he is not. Mr. Donohoe did not enter the

1 Capitol at all. So in terms of whether he's similarly or
2 not situated to other defendants, Mr. Donohoe did not enter
3 the Capitol at all on that day. And, of course, Mr. Tarrio
4 as well was not present in D.C. on January 6th at all.

5 So whether someone took individual actions on the
6 ground on January 6th certainly is relevant, but is not the
7 be all, end all of the Court's analysis. The be all, end
8 all is what did he agree to do, what did he join, what was
9 his role and what is his danger going forward.

10 **THE COURT:** Nor was -- now that I think about, nor
11 was Mr. Bertino.

12 **MR. KENERSON:** Correct, Mr. Bertino was not there
13 as well. One thing I want to hit -- just address briefly is
14 the notion of the defendant's kind of support for the
15 police. I think the Court's correct, we have no reason to
16 doubt that in June 2020, and as a general matter, Mr. Rehl
17 supports the police. I think what is clear, though, from
18 the evidence is that by January 6th, 2021, given of course
19 all of the defendant's rhetoric from November 2021 that we
20 heard -- that the Court heard about in June of 2021, and
21 statements leading up to January 6th that -- and especially
22 his reference to kind of turncoats, and to his actions on
23 the ground where he films himself and other members of the
24 Proud Boys and other members of the mob running over police
25 barricades that had just been trampled.

1 He later texts people: "This is how it all
2 started," and talks about that in a glowing manner: "USA,
3 so much patriotism." By January 6th, whatever views he has
4 of the police writ large, he does not believe that police
5 that he doesn't view to be quote, unquote on his side get
6 the same type of deference. That's why he's referring to
7 U.S. Capitol Police as turncoats. That's why he thinks it's
8 patriotic that everyone rush through the First Street
9 barricades where members of the police had just been
10 trampled by a mob.

11 One thing I'd note, too, Ms. Hernandez spoke about
12 Mr. Biggs and his statement that: "We've just taken the
13 Capitol," walking up the Capitol steps. That, of course, is
14 not a statement that Mr. Rehl made. However, it is a
15 statement that his co-conspirator made. And the Court, I
16 think, can take it as evidence of the conspiracy that the
17 defendant joined, that right after that First Street breach
18 happens, Mr. Biggs, one of his co-conspirators and one of
19 the leaders above him in the pyramid, says: "We've just
20 taken the Capitol. We've gone through every barricade thus
21 far." And Rehl was with them. I think the fact that he's
22 storming with them up there is evidence in and of itself
23 that he joined the unlawful plan that day.

24 One thing I'll note -- and I don't --
25 Ms. Hernandez, I know, and the Court had a back and forth

1 about Mr. Rehl and having a son -- or daughter, excuse me,
2 at home who is very young obviously, and how that is a very
3 stressful situation for him and for his family. The
4 government certainly does not doubt any of that. But the
5 argument that Ms. Hernandez put forth was that this child
6 was -- is essentially what's going to keep him on the
7 straight and narrow. This is an argument that also was
8 previously raised by Mr. Johnson back in June of 2021. The
9 Court considered it -- and, again, this is page 54 from the
10 transcripts. Certainly the Court found family ties that
11 weigh in the defendant's favor, but the Court found: "Even
12 the wife, who would have been pregnant with a child, did not
13 stop him from taking the actions that he did related to
14 January 6th." Mrs. Rehl was, in fact, pregnant on January
15 6th. Mr. Rehl knew that, and it didn't stop him from taking
16 the actions that he took.

17 One note on the radios, and the timing of the
18 purchase of the radios and the tactical pants and the vest
19 that Ms. Hernandez brought up, is I don't think it should
20 give the Court any comfort that he purchased those in
21 November of 2020 as opposed to January 2021. That was, of
22 course, after the election and as the defendant's rhetoric
23 was escalating, as his co-conspirators -- soon to be
24 co-conspirators' rhetoric was escalating. I'm not sure the
25 fact he bought those in November of 2020 as opposed to

1 January 2021 moves the needle much.

2 The Court did engage, I think back in June of
3 2020, in an analysis of the defendant's future
4 dangerousness. I know Ms. Hernandez thinks it was not
5 enough, but the Court found, essentially for the reasons
6 that the government is putting forth here today -- his
7 joining in the conspiracy, his statements after the
8 conspiracy evincing essentially that this isn't over, that
9 shows that nothing has changed in the Court's analysis on
10 that front, that future dangerousness is still there. And
11 in fact, the government's case against Mr. Rehl has only
12 gotten stronger since January 6th. I understand that some
13 of the defendants' friends have put forth some letters. I
14 understand the defendant's wife has addressed the Court.

15 **THE COURT:** And Mr. Rehl has.

16 **MR. KENERSON:** And Mr. Rehl has addressed the
17 Court, certainly. And all of this is looking now a year and
18 a half later with trying to get him out of jail. So I
19 don't -- all of them -- and I don't blame them for doing
20 this, are going to put forth the best qualities that they
21 can of Mr. Rehl. That's the role they play in this. Their
22 role is to put forth the best qualities they can of
23 Mr. Rehl. And he has certainly been incarcerated since
24 March of 2020 I think, so it's quite some time, quite some
25 time after -- 2021, thank you. That's quite some time after

1 the offense. So he certainly had some time to think. But I
2 also don't think the Court should put too much stock in what
3 he will or will not do.

4 And I do want to bring to the Court's attention
5 just a couple of things. One, I think -- I would note
6 before I do this that what I'm about to proffer for the
7 Court is from a text message from the defendant to his wife.
8 I think that we have put what the defendant has done in
9 proffering the wife as a witness, and himself talking about
10 what he will and will not do at home, makes his texts to his
11 wife relevant, and that's why I'm saying this before I
12 start.

13 **MS. HERNANDEZ:** Can I see it before you do it, see
14 if there's marital privilege?

15 **MR. KENERSON:** That's why I raised it. Yes, you
16 can see it. But I do believe that stuff that is on point to
17 what the defense has raised has essentially been waived
18 marital privilege wise.

19 **MS. HERNANDEZ:** So I think it's not relevant to
20 anything. It's November 8th, 2020 before anything happens.

21 **THE COURT:** Ms. Hernandez, you're going to argue
22 to me and tell me it's not relevant, but you don't have any
23 other objection?

24 **MS. HERNANDEZ:** Well, again, I think there's a
25 marital privilege. I don't think it's a big deal, Your

1 Honor, but I think there's a marital privilege. Obviously
2 the government has downloaded everything from his phone
3 regardless of privilege.

4 **THE COURT:** Do you object to me hearing it and
5 receiving it here today, subject to those objections?

6 **MS. HERNANDEZ:** Subject to those objections. I'm
7 not waiving those objections for the future, Your Honor. I
8 want you to hear it, because I want the Court to release him
9 and be confident when you release him. But I think there
10 may be marital privilege, so I don't want to waive it for
11 the future.

12 **THE COURT:** All right. But you don't object to me
13 hearing it here today, all right.

14 **MR. KENERSON:** Just to be clear, before I go
15 further, there are a few more things that I will -- that
16 come from these text messages that I think I would present
17 to the Court in summary form as proffer.

18 **MS. HERNANDEZ:** So here I would object. He could
19 have brought these up so we wouldn't be having this back and
20 forth right now. Perhaps this could be done in a post
21 hearing memo or something, Your Honor, where we can discuss
22 it. I don't know exactly what he's bringing up. Obviously
23 these are from November of 2020, so they've had them for a
24 while.

25 **THE COURT:** Ms. Hernandez, we'll discuss this in a

1 moment. You obviously were going to submit something
2 relating to the prior counsel, that you were going to submit
3 under seal but also provide the government. So we can talk
4 about it.

5 Mr. Kenerson, why don't we -- some of the other
6 matters, why don't we table them for now. You can submit
7 them to me, and Ms. Hernandez will have the opportunity to
8 see them and respond after today.

9 **MR. KENERSON:** Certainly, that's fine. So
10 reserving those issues, if the Court does not have any
11 further questions, I don't have anything else.

12 **THE COURT:** Well, I think Ms. Hernandez said --

13 **MR. KENERSON:** Oh, just the one?

14 **THE COURT:** The one that you didn't have an
15 objection to me hearing that here today. Correct,
16 Ms. Hernandez?

17 **MS. HERNANDEZ:** Yes.

18 **MR. KENERSON:** This is from November 8th, 2020.
19 The defendant is texting his wife Mrs. Rehl: "I don't know
20 what to say. I'm fighting to make sure our baby has a
21 future under freedom instead of communism. You can or
22 cannot walk to WaWa right now, give me some time to
23 respond." But the first portion is the relevant portion.

24 **THE COURT:** Very well. Why don't --
25 Ms. Hernandez, why don't you submit what you were planning

1 on doing on Tuesday. I'll have the government -- why don't
2 we do this -- and why doesn't the government submit, if
3 appropriate under seal, what you want to put before me,
4 Mr. Kenerson. And either side can respond by Friday to
5 whatever the other side submits, and I'll take it all under
6 advisement.

7 **MS. HERNANDEZ:** And I hope to discuss whatever it
8 is in the texts with the government beforehand if I have any
9 objections.

10 **MR. KENERSON:** Certainly we'll talk.

11 **THE COURT:** Okay.

12 **MS. HERNANDEZ:** Your Honor, could I have just 10
13 minutes to respond?

14 **THE COURT:** You can have five.

15 **MS. HERNANDEZ:** First of all, Your Honor, this is
16 the video -- this is the post that Mr. Rehl said about:
17 "I'm proud as hell of what we did yesterday," or whatever.
18 It's a post of Americans on the Mall with American flags.
19 There's no attack on the Capitol, there's no police
20 brutality, nothing -- or police -- attacks on police or
21 anything. Number two, the government says --

22 **THE COURT:** Hold on, Ms. Hernandez, this is an
23 important point. You're saying -- first of all, the Elmo
24 isn't connected. Why don't you just tell me -- or you can
25 just represent to me, what is the context? It's post

1 January 6th, he's saying: "I'm proud of what we
2 accomplished yesterday."

3 **MS. HERNANDEZ:** I don't know if this -- this is --
4 my understanding is this is the photo -- can you -- do I
5 have to turn it on?

6 **THE COURT:** All right, here we go.

7 **MS. HERNANDEZ:** It's a photo -- this isn't a photo
8 of people fighting with police or attacking the Capitol.
9 Look at the -- the view is looking towards the Washington
10 Monument, and thousands of people at a political rally.

11 **THE COURT:** Right, understood. But just tell me
12 the connection between this photograph and the statement.
13 He texted it at the same time?

14 **MS. HERNANDEZ:** Yes, that's my understanding, that
15 this was -- when he says "We're proud as hell of what we
16 accomplished yesterday," this was the photograph he
17 attached.

18 **THE COURT:** Okay.

19 **MS. HERNANDEZ:** And let me say, Your Honor,
20 Mr. Finley, who is the president of the Proud Boys from West
21 Virginia, said something about at the moment -- his plea
22 agreement describes what he saw, he saw the attacks. At the
23 moment, he said he's proud as heck, and said to Rehl:
24 "Great job," or something like that, and he was allowed to
25 plea -- he's been out all the time, and he was allowed to

1 plea to a misdemeanor.

2 **THE COURT:** Sure. He is not charged with a
3 seditious conspiracy.

4 **MS. HERNANDEZ:** He was boots on the ground. He
5 was with them the whole time. His statement of facts is
6 equal to or worse than Mr. Rehl's. He directs the members
7 of his group, of his chapter, to delete after the fact --
8 you know, obstructive conduct after the fact, he directs
9 them to delete their messages. So anyway, look, to respond
10 to the -- you know, the government says I haven't alleged
11 ineffectiveness with respect to the other defendants. And I
12 have not, I'm not making a claim of ineffective. I could,
13 but I'm not making it.

14 The first time I appeared before Your Honor in
15 December when I came into the case, I said to the Court --
16 and I quoted from the transcript: "Mr. Rehl at this date
17 has not seen any discovery in the case." The two lawyers he
18 had before him had not shared any discovery with Mr. Rehl.
19 So whether that amounts to an ineffective counsel claim,
20 we'll file something in the next couple days. I don't think
21 I have to make an ineffective -- I don't want to make it. I
22 don't think -- I don't want to be in that position. But I
23 will make it -- I'll make whatever arguments I deem
24 necessary in order to get the Court to consider.

25 You know, the government says -- number one, Your

1 Honor, I am not asking the Court to find Mr. Rehl not
2 guilty. A jury will decide that. The only issue for the
3 Court is whether the Court -- whether the government has
4 proved by clear and convincing evidence that Mr. Rehl
5 presents an articulable future threat. So I don't want to
6 spend too much time refuting the government's arguments as
7 to what they can prove or what they've proved or what the
8 evidence shows, because I don't think that directly -- given
9 that Mr. Rehl himself did not commit any violence, did not
10 attack anyone, did not destroy property, did not throw
11 bottles at anybody, and that there is scant evidence that he
12 directed any of this happening -- or no evidence I would
13 argue, I don't think -- he's not charged with murder, and so
14 that somehow whether he's innocent or not isn't placed into
15 this.

16 And a lot of -- again, I've made these arguments
17 before. A lot of what the government seeks to rely on are
18 First Amendment protected activities. Yes, he bought those
19 items before coming to a political rally in December --
20 which no one has claimed was anything other than First
21 Amendment protected activity. And I relayed the Court back
22 to the Secret Service's analysis of the Proud Boys. And the
23 Secret Service documents reflect that they did have evidence
24 in their possession that there were anti-Trump groups that
25 had the intent to disrupt what was going to go on on January

1 6th. And the Secret Service documents reflect that a number
2 of those members of those groups they identify had been
3 arrested at prior events. Contrast that with the Proud
4 Boys.

5 The government says -- said, and I agree -- first
6 of all, for the reasons I already told the Court, Donohoe,
7 whether the Court knew it at the time or not, stands
8 differently. He threw bottles at the cop, and he walked
9 around with the shield and all of that. Bertino, by his own
10 admission, and by the text messages that I have reviewed, is
11 egging people on in a completely different way from
12 Mr. Rehl. But the government did say that the most
13 important -- I'm trying to find the exact words they used.
14 The most important is what he did that day. And, again, I
15 won't -- I'd tell the Court what he did that day is
16 consistent or refutes the government's burden of showing by
17 clear and convincing evidence. It's their burden by clear
18 and convincing evidence, and I think the Court has heard
19 more than enough in light of Mr. Rehl himself, and in light
20 of all the other comparable cases in this district, I think,
21 and how the other judges have dealt with this.

22 The government, I think, misstated the evidence.
23 This is a complex case. I'm not accusing them of doing
24 anything wrong, I just think they overstated what the
25 evidence shows. ECF 454, pages five and six, the government

1 lays out what the defendants did as their introductory
2 paragraph. They do not say -- and I do not believe the
3 evidence will show, that Mr. Rehl was with Biggs and Nordean
4 when they went forward and attacked the Capitol or whatever
5 it is the government's saying. And it's clear from these
6 paragraphs that they do not include Mr. Rehl in any of the
7 factual assertions of what they did. And you don't see
8 them -- I mean, they have shown a video where Nordean and
9 Biggs go off and do a video of whatever with a bunch of
10 people around them. Mr. Rehl is not there at that point.
11 Mr. Rehl -- I don't know at which exact point he
12 disassociates himself from those two, but he ends up with
13 the Philadelphia Proud Boys.

14 I have not -- we've discussed -- I've discussed
15 this with the government, the exact moment that happens. I
16 haven't found that video yet, but very early on he no longer
17 is with the others. The government claims that there's
18 clear evidence. Again, I don't think -- I'm not asking the
19 Judge to find -- this is not a trial. But the government
20 continues to say Mr. Rehl knew the criminal objective of
21 this conspiracy. I haven't seen the evidence. I'm not
22 saying that a jury will acquit him, because a jury is a
23 jury, and how they perceive the evidence. But if we're
24 going to lay out facts, and if we're going to lay out the
25 evidence, I haven't seen it. I haven't seen -- and, yes,

1 people were saying a lot of things. As I say, Your Honor,
2 these men were often drinking. Admittedly, by their own
3 admission, they're drinking and saying a lot of BS. Bertino
4 being one of the primary ones. By the way, Bertino is the
5 one, in my understanding, who brings Pezzola into the
6 organization.

7 Mr. Rehl was present in December in D.C. when
8 Mr. Pezzola was here, but has never had a conversation with
9 him. Pezzola is alleged to have been in some of those
10 chats, but there's never a back and forth involving
11 Mr. Rehl. And Mr. Pezzola -- who, again, Mr. Pezzola, I
12 don't want to pile on him, but he's another -- there's a lot
13 of people who acted in ways that day that are
14 incomprehensible given who they are and who they had been
15 all their lives. And I think that's part of the -- what
16 happens at a rally and politics, people lose control and
17 everything else.

18 **THE COURT:** All right, Ms. Hernandez.

19 **MS. HERNANDEZ:** Your Honor, I just think that the
20 Court -- that the government has failed to meet its burden.
21 I think the Court has more than enough evidence to support a
22 release on whatever conditions the Court deems necessary.
23 Although I haven't made much of an argument, I think we're
24 going to -- on this point, there are issues -- I don't know
25 what's going to happen once the Court tries to -- where is

1 he going to be housed at some point? I mean, that's a whole
2 issue. I mean, my conversations with the deputy marshal
3 still seem like that whole thing is up in the air.

4 **THE COURT:** Okay. There's one other thing before
5 we go that I want to just clarify, and mostly I think with
6 you. So just as a technical matter, I think whatever I do
7 here has to be an indicative ruling. Do you agree?
8 Because --

9 **MS. HERNANDEZ:** Oh, stay the --

10 **THE COURT:** Yeah, because his detention is sitting
11 before the circuit now. Technically I don't have
12 jurisdiction to release him today, even if I wanted to. But
13 the point is I would -- I mean, if I were to do that, one
14 way or the other, what I'm doing here is an indicative
15 ruling. You'll go back to the circuit. If I release him,
16 you'll say we withdraw our appeal; if I hold him, you'll say
17 no, we need to plow ahead.

18 **MS. HERNANDEZ:** That's my understanding. And my
19 understanding is that the way the rule is written -- and I
20 should have looked at the rule more carefully before I came
21 today, essentially the circuit will back off and let the
22 district court, if the Court wants to, take it.

23 **THE COURT:** They would send it back down. I mean,
24 you would ask them to do that, they would send it back down
25 and then I would technically release him.

1 **MS. HERNANDEZ:** Correct, correct, correct. I
2 think if the Court even wanted to tell the circuit that you
3 were -- even before you wrote the opinion that you were -- I
4 think there's provision for the Court to say: I plan to
5 write an opinion or I plan to make a ruling or something
6 like that. I'll look at the rule and see, but I think there
7 is a provision so that you don't have to wait until you
8 write the opinion to let the Court know.

9 **THE COURT:** To start the mechanism, all right.

10 **MS. HERNANDEZ:** And again, thank you, Your Honor.
11 I think I fight hard for my clients. I mean no disrespect
12 to the Court. I know I make a lot of jokes sometimes and I
13 don't know how they land. It's my nature. I thank the
14 Court for its time and its consideration.

15 **THE COURT:** That's quite all right, Ms. Hernandez.
16 I certainly don't mind you fighting hard for your client. I
17 think as we get closer to trial, we're all going to have to
18 be more disciplined about addressing only what's in front of
19 us, and me hearing arguments, making decisions and moving
20 forward one way or the other. But I understand your
21 position.

22 **MS. HERNANDEZ:** Thank you, Your Honor.

23 **THE COURT:** You're very welcome. So what we'll do
24 then is if the government wants to submit something, talk to
25 Ms. Hernandez, see if there are objections. Submit whatever

1 you would like, let's just say -- let's do this: Let's say
2 Wednesday, to give you a little bit of extra time.
3 Ms. Hernandez, I'll give you until Wednesday to file
4 whatever you would like. Obviously you are welcome to file
5 something sooner if you would like. And if either side
6 wants to respond to the other's submission, we can do that
7 by the following Monday. So Wednesday, and then Monday I'll
8 have everything and we'll go forward that way.

9 Anything further from you, Ms. Hernandez?

10 **MS. HERNANDEZ:** No, Your Honor. Thank you.

11 **THE COURT:** Anything further from the government?

12 **MR. KENERSON:** No, Your Honor. Thank you.

13 **THE COURT:** All right. Very well, I'll take this
14 under advisement, and the parties are dismissed for today.

15 (Proceedings adjourned at 9:56 a.m.)
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C E R T I F I C A T E

I, Jeff M. Hook, Official Court Reporter,
certify that the foregoing is a true and correct transcript
of the record of proceedings in the above-entitled matter.

December 28, 2022

DATE



Jeff M. Hook

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