IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| UNITED STATES OF AMERICA | CR Nos. 1:21-cr-00175-TJK-1 |
| | 1:21-cr-00175-TJK-2 |
| v. | 1:21-cr-00175-TJK-3 |
| | 1:21-cr-00175-TJK-5 |
| 1-ETHAN NORDEAN | 1:21-cr-00175-TJK-6 |
| 2-JOSEPH R. BIGGS | |
| 3-ZACHARY REHL | Washington, D.C. |
| 5-ENRIQUE TARRIO | Tuesday, August 29, 2023 |
| 6-DOMINIC J. PEZZOLA, | 9:30 a.m. |
| Defendants. | |

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

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Proceedings recorded by machine shorthand; transcript produced by computer-aided transcription.

**P R O C E E D I N G S**

THE DEPUTY CLERK: This is Criminal Matter 21-175, United States of America v. Defendant 1, Ethan Nordean; Defendant 2, Joseph R. Biggs; Defendant 3, Zachary Rehl; Defendant 5, Enrique Tarrio; and Defendant 6, Dominic J. Pezzola.

Present for the Government are Jason McCullough, Erik Kenerson, and Conor Mulroe; present for Defendant 1 is Nicholas Smith; present for Defendant 2 is Norman Pattis; present for Defendant 3 is also Norman Pattis; present for Defendant 5 are Nayib Hassan and Sabino Jauregui; and present for Defendant 6 are Steven Metcalf and Roger Roots. Also present are Defendant 1, Mr. Nordean; Defendant 2, Mr. Biggs; Defendant 3, Mr. Rehl; Defendant 5, Mr. Tarrio; and Defendant 6, Mr. Pezzola.

THE COURT: All right. Good morning to everyone. Apologies for the delay. I understand the marshals brought the defendants to the wrong courtroom which is why we were briefly delayed.

Here is how I would like to proceed, which is a little bit different than, I think, what I had relayed to the parties the other day, just a little bit different. We'll start with -- the Government had asked -- I think the Government has some victim impact statements they want to present. We will do that. Instead of, then, me, then --

me, then, proceeding to have me relay a ruling on the Rule 29 and Rule 33 motions, I think I'd rather catch you all when you're fresh, frankly, and I'll just hear from you on the three topics that I had laid out on the guidelines calculations that we're here to discuss. The Government, whichever -- whatever defendants would like to address those three topics. If a topic was not on that list, then either I don't need to hear from you on it or it may be something that individually pertains to one of the defendants in a particular way. I'll hear from defense counsel or the Government in the individual sentencings that will be happening later this week. But at least as to those three global topics, we'll go through them. Then, in whatever -- in the time we have remaining, once we're through that argument, while everyone is tired at that point, I'll put my ruling on the record regarding the Rule 29 and Rule 33 motions. So flipping the last two things, I think, is better for all of you to hear from you earlier in the day than later.

Any questions before we proceed from any counsel?

All right. Hearing none, why don't we start -- again, I said I would put the victims at the beginning of today so that they didn't have to wait around. So Mr. Mulroe, you may proceed.

MR. MULROE: Thank you, Your Honor. Conor Mulroe

for the United States.

We do have two victims who are here in person and would like to give a statement to the Court. One additional victim has submitted something in writing that the Government would like to just read into the record this morning. So all three were trial witnesses that I expect Your Honor will remember from the trial. We're going to begin with Officer Shae Cooney.

THE COURT: Officer, you may proceed.

OFFICER COONEY: Good morning. My name is Officer Shae Cooney. I've been on the department now going on six years. On January 6th, 2021, I was going into my third year on the department, wasn't quite sure what to say about everything that happened that day, but what I do want to say is that day --

THE COURT: I'm sorry. Can I have silence from everyone else on this side of the bar while the -- while Officer Cooney is testifying.

You may proceed.

OFFICER COONEY: January 6th definitely changed the way I saw the department. I took one of my fellow officer's overtime that day. I wasn't drafted to come in that early, but decided I would take his overtime and get an extra four hours which, for that day, would have been a 12-hour day, which turned into an almost 19-hour day.

Seeing firsthand of everything that happened when I went down to the lower west terrace was something I had never thought that I would ever have to do. I knew signing up for this department anything could happen, ranging from the smallest incident of showing someone directions to the nearest mall, the nearest Starbucks, to something that we saw on January 6th. That day was the first time I wasn't sure if I was going home that night.

(Brief pause.)

Sorry.

(Brief pause.)

THE COURT: Take your time.

(Brief pause.)

OFFICER COONEY: Probably one of the first times I've really talked about -- feeling my phone vibrate for hours, knowing that my family was trying to reach me and I couldn't do anything for hours was very heartbreaking. I had -- a previous relationship was on the department and he was on the roof of the Capitol watching the entire time, not able to do anything. He had his job and I had mine. And he was the last person I talked to before I had to go down to the lower west terrace. And thinking the entire time I really hope I get to see him at the end of this night.

I had to put my skills to the test that day. I never thought I'd be fighting my own fellow citizens that

day. It was heartbreaking to have a group of people who, on any other day, were very pro-police, pro-law enforcement, pro-United States, for hours, continuously attack us and beat us with thin blue line flags that I'd never thought I would ever see happen, asking us to just let them in and let them do what they had to do.

Everyone that came onto the Capitol grounds had a choice that day. They had a choice, and they decided to make the wrong choice. No matter how many times we told them that they were not coming past us, that nothing that they were doing that day was going to make a difference, it didn't matter to them. It didn't matter that they were -- that we were cops. It didn't matter that we were fellow U.S. citizens. They wanted any way possible to get inside that building. Continuously fighting side by side with my fellow officers, getting hit with flags, poles, anything you could think of, on top of being sprayed with something that -- as much as we've gone through training and we prepare for, having it actually happen to you against your fellow citizens was something that I didn't think would ever happen.

Since that day, I haven't really talked about anything that really happened. Tried to just move on, keep it in, because I have a job to do -- besides today -- kind of, let a little bit of emotion come out. I lost a friend

that day, someone who I had worked with for almost three years. I was standing right next to him when we started fighting, and later that night he was gone. And every day, we have to be reminded that he's not here anymore because the people in this courtroom decided that they weren't happy with how an election went and they thought the best idea was to break into the Capitol, fight police officers, and try to overturn an election. We understood people were upset and angry. We tried to talk to them as best as we could to understand that -- we understand we are angry and whatnot, but this is not going to fix anything. It didn't matter how much talking that we did that day. There was too many people that wanted to just keep on going and get through us as much as possible.

It breaks my heart that we're in this position today because people were unhappy, and instead of trying to do the right thing and have peaceful demonstrations, talk to your members of Congress, do things the right way, they decided to break the law, assault officers, and cause an officer to lose his life and to have other officers take their lives because of things that they saw.

I don't know how the rest of my career will go, but I really hope that nothing like this ever happens again. A lot of officers are fighting every day to get through the shifts, not knowing if another January 6th would happen

again. Every day that we go to work, we put on a uniform and do the job that we swore we would take. That day was the pinnacle of what we had to do. We had a job to protect the building and everybody inside it, and we did that. No matter what anyone says, that day, we ended up taking back the Capitol and protecting every staff and member inside.

I appreciate you talking and -- letting me talk and hearing me out. That's all I have to say. Thank you.

THE COURT: All right. Thank you, Officer Cooney.

MR. MULROE: Your Honor, also present today is Inspector Thomas Loyd from the Capitol Police.

INSPECTOR LOYD: Good morning, Your Honor.

THE COURT: Good morning, sir.

INSPECTOR LOYD: My name is Inspector Tom Loyd from the United States Capitol Police. Thank you for the opportunity to address the Court.

The January 6th riot started by the mob at 12:53 p.m. when they violently attacked my personnel at Peace Circle. During this initial breach, one of my officers was knocked unconscious and several others received serious injuries. Watching this unfold from the Senate majority leader's office and then from the inauguration stage was horrifying. Just a few dozen of my officers fought thousands of protesters on the west front. Despite the overwhelming odds, my personnel did not quit. After

they lost the line at Peace Circle, they established another police line at the base of the lower west terrace. This wasn't good enough for the mob. The mob attacked my personnel again, driving us back to the base of the inauguration stage. I joined my personnel at the base of the stage and witnessed the most violent fighting in my 33-year career. We were attacked with flagpoles, bear spray, hammers, and frozen water bottles, among other weapons.

The D.C. Metropolitan Police Department showed up in force within minutes on the west front, most without their protective equipment, saving the lives of my personnel. I am forever grateful for their quick response. After the Metropolitan Police Department took over the west front, my personnel fell back and began to focus on the interior of the Capitol building which was breached at approximately 2:10 p.m. At 2:10 p.m., I was ordered by my chain of command to leave the west front and respond to the east front because the mob had breached that perimeter. I never made it to the east front because the rioters breached the Capitol building at the Senate wing door. The mob was headed to the Senate floor. A quick-thinking officer led the mob away from the rear of the Senate lobby to a small police line at the Ohio Clock Corridor, saving several protester lives, the lives of the United States Senators,

and the Vice President of the United States. Once again, just a few Capitol Police officers formed a police line to stop the surge of hundreds of protesters inside the Capitol building.

From the Ohio Clock Hallway, I responded to check on the status of the House of Representatives. When I arrived, it was eerily quiet because the mob was still on the north side of the building. Eventually, the mob made their way to the House chamber. Once again, myself with just a handful of officers established a police line at the House main door. One of my sergeants made a valiant attempt to reason with the dozens of angry protesters who, once again, breached our police line. Thankfully, the House main door held despite the tremendous beating. The strength of the door saved the lives of several protesters who would have been shot if the door had been breached.

Unfortunately, the Speaker's lobby doors were made mostly of glass and were easily breached. While I was actively evacuating the members of the House of Representatives out of the west side of the Speaker's lobby, an attempt was made to breach the east side resulting in gunfire. Tragically, a protester lost her life during this breach. Due to the overwhelming numbers of the mob, my personnel were forced to shelter in place and then evacuate the United States Senate, the House of Representatives, as

well as the vice president. The evacuations were completed with only seconds to spare. Because communication was cut off from our command center, my personnel relied on their training and successfully sheltered in place and then relocated the Congress and the vice president when it was clear the mob would enter the House and Senate chambers. My team completed their actions on their own. I have never been prouder.

Recent video has emerged that alleged my officers were tour guides for the protesters in the Capitol building. From 12:53 p.m. until approximately 6:00 p.m., the mob was in control of the exterior of the Capitol building. From 2:10 p.m. until 4:30 p.m., the mob controlled the interior of the Capitol building. When a mob controls one-third of the United States Government, you will see disturbing videos of police officers being at the mercy of the rioters. The mob on January 6th was one team made up of tens of thousands of people. Individual defenses fall apart because defendants must assume the risks that they will be held responsible for all the crime committed by an entire mob. It doesn't matter what time individual defendants arrived at the crime scene or individual actions. They were one team for that particular event.

Some defendants have stated they assisted my personnel on January 6th. This is the same tactic used by

domestic violence suspects when they want to control their victims: Beat a victim to the point of unconsciousness and then attempt to render aid. The rioters should have gone home when it was obvious things were going off the rails.

The criticism of my personnel was unrelenting immediately after January 6th. It was alleged that the rioters penetrated the interior of the Capitol building because my personnel did not know how to lock down the building properly. These same critics were fully aware of the videos showing my officers valiantly fighting protesters as they broke through 200-year-old windows and 30-year-old doors.

The most egregious criticism of my officers came from a well-respected former government official just a few months ago. The former government official, whose tenure came to a close in December 2022, felt the need to slander my officers via the media. He insinuated my officers would have shot and killed additional January 6th protesters if a majority of them were a different race. A vile public statement. This is the same official who, on January 6th, sheltered in place with his military unit just a few blocks from the Capitol. For several hours, he watched law enforcement officers from as far as -- away as New Jersey passing by in an effort to save us. His unit arrived after the fight was over.

I wanted to thank all the police chiefs who immediately authorized their officers to respond to the Capitol. They lived up to the unwavering law enforcement motto, "first responder." The riot officially ended at 8:30 p.m. on January 6th when one of my officers collapsed and died while walking back to our office. His body survived a few more hours into January 7th because his fellow officers lined up to give him CPR until the paramedics arrived. A machine at the hospital kept his body alive until his family could say good-bye in person. There was nothing natural about the way the officer fought or died, because I witnessed both.

Another Capitol Police officer, as well as multiple Metropolitan officers, committed suicide as a result of the riot.

Despite the tremendous beating my personnel took on January 6th, all those who could walk showed up for work the next day. Once again, I could not have been prouder.

I am consistently asked if I ever grow weary of court prep and trials from January 6th, but my answer is no because every time I participate in court prep or an actual trial, I see a new video or hear a new radio run of the actions of my personnel on that terrible day. The courage of my officers is beyond words. After everything they have been through, they proudly represent the legislative branch

of government and support the mission of the department to protect the Congress.

Thank you, Your Honor.

THE COURT: Thank you, Inspector Loyd, and thank you and those who serve under you for your service on that day and every day.

Mr. Mulroe?

MR. MULROE: Your Honor, lastly, on the victims, I'm sure the Court will recall the testimony of Mark Ode, who was the Capitol Police officer victimized by the assault and robbery committed by Defendant Pezzola. He was not able to come in person today. He's moved on to employment with a different law enforcement agency out of the area, but he submitted a letter that we'd like to read into the record now.

THE COURT: Please.

MR. MULROE: Mr. Ode's statement is as follows:

"Thank you, respectful jury and Your Honor for giving me this opportunity to express freely on my experience on January 6th. I honorably served as a United States Capitol Police officer for a period of nearly six years and the event of January 6th is forever imprinted in my memory. I will always remember January 6th as the day that changed my life. I will remember stepping on the west front of the Capitol steps thinking that I will [sic] likely

to never see my family again and only wishing to tell them that I loved them just once more. I will always remember a heart-piercing stare of horror in the eyes of the young female MPD officer who was brutally clutched and pushed to the ground by violent assailants as I was trying to help her. I will never forget attempting to aid another officer and being violently dragged down by my riot shield as it ripped away from me by brutal force and simultaneously being pinned to the ground by multiple assailants, feeling all of their weight crushing my lungs and gasping for even the slightest pocket of air while being strangled by the chinstrap of my helmet.

"I will also never forget the burning sensation of chemicals in my throat and in my eyes as I felt my life fleeing my body and telling myself to get up while perceiving the most vivid vision of my own funeral, nor will I forget seeing tears on my fellow officer faces when we first heard about the passing of our brothers Officer Brian Sicknick and Officer Howard Liebengood or waking up in the middle of the night with an aching shoulder injury for a period of nearly two years while undergoing physical therapy as a result of the injury sustained while I was yanked to the ground by aforementioned violent rioters.

"Certain memories and experiences leave deep marks that never fully heal and serve as a real reminder of things

that were and things that could have been. These memories of January 6th and many more will always be with me and with all of those who responded to their oath of duty on that day.

"For me, the January 6th events were not an accident and it was not a random response of a small group of angry demonstrators who simply disagreed with the political climate of the period. It was a planned and organized attempt to overthrow our constitutional process by individuals who determined that their opinion of the few were superior to our Constitution and decided to use violence and terror to impose their will.

"I respectfully ask this jury to consider my experience and experience of others to serve a true justice for all of those who held the line on January 6th and their families who still continue to hold their watch and share their scars.

"Thank you, honorable jury.

"Sincerely, Mark L. Ode."

THE COURT: All right.

MR. MULROE: Your Honor, that concludes the victim statements.

THE COURT: All right. Thank you, Mr. Mulroe.

And to the extent any defendant wants to remark upon that or comment on it, we'll do it as you're -- in your

individual sentencings as we proceed this week.

All right. So let us proceed, then, to the three issues I outlined in my order of yesterday regarding the guidelines. Again, I'm going to hear from you all, obviously, regarding the entirety of the guidelines calculations for your clients, the 3553(a) factors, and all the rest at another time, but I thought it would make sense to try to hear all of you on these common issues and common issues that can, you know -- can greatly affect the guideline calculation for all defendants.

So why don't we start with the first issue in the order, the question of whether -- of the most analogous guideline to the conspiracy counts on Counts 1 and 4, the, sort of, non-obstruction conspiracies. I have -- the Government wants me to apply 2J1.2. At least -- I can't remember who may have joined the arguments, but at least Mr. Nordean, I believe, wants 2A2.4. I'm particularly interested in, as I read some of the cases that both parties cited -- it was, kind of, an interesting split -- maybe, split in the Circuits a little bit on how -- just the methodology that I'm supposed to employ. It seems as though -- the question is, what do I look to to see if a statute is -- or a guideline is sufficiently analogous or an offense is sufficiently analogous? And then if there's more than one statute -- if there's more than one guideline that

is sufficiently analogous, how to choose between two that is the most analogous. And there's at least some support out there -- I didn't see anything in this Circuit, but there's certainly some support for the notion that, at the first step, I only look at the elements of the offenses and that, at the second step, I look at the -- I can look at either -- and there's a little bit -- it sounds like a little bit of a split on this, too -- I can either look at the conduct in the indictment that's elicited in the -- or that's set forth in the indictment or I can look to the evidence in the case, what's been proven.

So I'd like to hear first from the Government on this point, why at least as to Counts 1 and 4 -- and I think, you know -- I think the Government is clearly on -- let's put it this way. The authority for applying the obstruction guideline for seditious conspiracy is pretty strong. It's less -- I -- there's less precedent on Count 4 and what to do with that one. So let me hear from the Government on, sort of, why you think it's 2J1.2 for both of those and what you think I should look at and what methodology I should follow to try to figure out which of them is appropriate, and then I'll hear from any defendant who wants to be heard on this.

Mr. McCullough, you drew the short straw. At least, that's what it looked like at

counsel table.

MR. MCCULLOUGH: That's quite all right. Thank you, Your Honor.

So as to your question in terms of the Circuit split and how to approach this issue, the answer is that you are to look at the elements of the offense that are presented as well as -- I think the appropriate thing is to look at the facts as alleged in the indictment. That is the way that the -- I think, the Ninth Circuit describes that. I know Your Honor clearly read the cases that, when you look at the Eighth Circuit, the Third Circuit, the Tenth Circuit also described, maybe, even a more reaching inquiry. But I think, here, you don't even need to get to that point. This -- the indictment alleged that they --

THE COURT: Well, I agree with you. The distinction between the indictment and the evidence is, kind of -- I agree, for -- I don't see a distinction there. I mean, for purposes of this --

MR. MCCULLOUGH: Excellent. So Your Honor, I think that, fundamentally, what you do is you look at the elements of the offense. And this -- and what these defendants are accused of doing is to use force to oppose the government. That fits with the administration -- the obstruction of justice here. It is an effort to obstruct the -- it is an effort to obstruct the operation of the

government as a government and when you --

THE COURT: Well, you're talking -- okay. As far as seditious conspiracy --

MR. MCCULLOUGH: As far as seditious conspiracy goes. So it is the effort to obstruct the government as a government. It addresses that issue. When we talk about the -- the approach here in terms of what the crime actually -- what the statute actually criminalizes, that's what it's focused on. It's focused on the disruption to the administration of justice, the obstruction of justice here. And that's why 2J1.2 applies.

Further, when you, then, look at the specific offense characteristics that are applicable in 2J1.2, you will see that they identify and graft very cleanly onto what is alleged here in terms of the crime of seditious conspiracy and the facts in the indictment, that -- the question is, there are specific offense characteristics that enhance the crime if it is -- if it includes physical violence or property damage, if it is planned, extensive planning. Those further tell you that it is the appropriate and the sufficiently analogous guideline to apply here. And, in fact, the guidelines themselves, as Your Honor knows, refer to this idea that you have -- that these guidelines are intended to address, kind of, a broad array of conduct. And so in 2J1.1, it describes, you know, kind

of, the idea that you would look across the relevant conduct of the offense. And so, Your Honor, I think it's -- in terms of seditious conspiracy, I think it's a clean application, certainly.

And just to address the defendants' points here, they suggest that once you go to 2M -- the 2M treason guidelines, that, you know, this, kind of, blows up the entire analysis because this is not tantamount to waging war. That's just simply not the case. As Your Honor has ruled, when evaluating the seditious conspiracy statute, you recognized that the statute was filling a gap between the serious crime of treason and the more -- the less serious misdemeanor crimes. It was intended to, kind of, fill this middle ground. It was not intended to just be another treason statute. And so when you look at the 2M guideline and it directs you to find the most analogous guideline, that's the appropriate step here.

And I think the other thing to remember, just, kind of, framing all of this out, which is where I intended to start but for your question, is that it doesn't -- this is not looking for a perfect match. That's not what we're after here. We are looking for sufficiently analogous and as the -- I think, as Judge Gorsuch in one of the opinions described, kind of, the ballpark test, if you will, kind of, you --

THE COURT: Well, no, but the ballpark test was the first step.

MR. MCCULLOUGH: Correct.

THE COURT: Okay.

MR. MCCULLOUGH: Correct.

THE COURT: In other words, is it adequately -- I'm going to -- I'm not going to use it --

MR. MCCULLOUGH: Is it sufficiently --

THE COURT: Sufficiently --

MR. MCCULLOUGH: -- analogous? That is correct. And that's why you don't -- you -- my good friend's, kind of, suggestion that it -- we get to 30- -- the 3553 factors, that you can't find a sufficiently analogous guideline is just not the case. It's a -- you're not looking for a perfect match.

So I -- unless you'd like to hear -- I know you said that the more complicated issue may be the -- Count 4.

THE COURT: Right. Well, it's just -- it's not -- and there isn't as much of a body of precedent; that it seems -- well, you tell me. I don't think -- I don't recall either party bringing to my attention a case in which a defendant charged or convicted of seditious conspiracy in which 2J1.2 wasn't applied, I think. I could be wrong.

MR. MCCULLOUGH: I --

THE COURT: But certainly the overwhelming

majority of them.

MR. MCCULLOUGH: That's correct. The first step of it -- of that inquiry is always going to the 2M and then, as Your Honor knows, that Mr. -- Judge Mehta applied 2J1.2 with respect to the Oath Keepers.

THE COURT: Right, and in many other situations.

MR. MCCULLOUGH: Correct.

THE COURT: You know, the -- Count 4, there just isn't as much precedent, and to the extent there is some precedent, you have that case from the Tenth Circuit. Now, it's a very -- obviously, the facts are very different. And at least what that case stands for is that there are other -- that, in a given situation, as for 372 -- as for Count 4, there are other guidelines that could be -- that could be sufficiently analogous -- that are sufficiently analogous and could be the most analogous in, maybe, a different case. I know you're going to argue to me this is not that case. Fine. But the point is there are -- there are more than one -- more than one guideline is in the ballpark there. And so I think that's -- to me, that one is the one where it's a little -- it's a closer call or, maybe, a closer -- it's not -- let me put it this way. It's not the -- the evidence is -- or the case law behind it is not what it is for seditious conspiracy.

MR. MCCULLOUGH: Certainly, Your Honor. And so I

think, again -- I mean, as Your Honor has framed it, there are -- this is a situation where you may have additional options, as you said. You may have the option of 2A2.4, which I know that the defendants promote as the applicable guideline there.

The -- I think the -- again, if you look at the elements of the offense, the elements of the offense are actually -- reach beyond just pure, kind of, assault, and so I think this is the key part here; right? So when you look at actually what is required in that statute, they have conspired to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging their duties thereof, or to induce by like means any officer of the United States to leave the place where his duties as an officer are required to be performed. That's the statute. It's not -- it -- so the statute -- the object, if you will, is deeper than simply addressing the individual officer, and we're talking about here law enforcement officers and members of Congress.

THE COURT: Right.

MR. MCCULLOUGH: And so we're talking about something that's larger than the individual act of an individual officer. We're talking about the ultimate object, which is to get those people to leave the place

where their duties are to be performed. And that's what the jury -- I mean, that's what the jury is charged with and that's what the jury found. And so when we're actually thinking about, well, which is more appropriate here, as between 2A2.4 which looks at, okay, well, you're just obstructing -- you're obstructing or assaulting an officer, as opposed to something that has a larger purpose, a larger meaning. And so that's where, once you go beyond the elements into the circumstances of the offense and the facts of the offense, I think that's where it becomes -- this is where this becomes the most analogous guideline. And the reason for that is that this is -- as Your Honor knows, we've presented this to the jury as one conspiracy that violated three statutes. And the ultimate purpose here was to obstruct the certification. The purpose of threatening, intimidating these officers, members of Congress, law enforcement, to leave the place where their duties are to be performed, the reason that that's happening is to obstruct the certification, is to obstruct the official proceeding, and that's consistent with the statute in the sense that that -- the statute is asking, kind of, what is the ultimate purpose here? It's not criminalizing just interfering with the officer; it's criminalizing that next step.

And so, Your Honor, that's why -- that there are -- there may be -- in this case, you may have other

analogous guidelines from which to choose that, kind of, fall into the sufficiently analogous question, which, again, I think, supports, frankly, the first argument in terms of, kind of, sufficiently analogous is pretty broad. But this is why the -- 2J1.2 is the most analogous guideline here.

So if Your Honor has any questions for me, I'm happy to answer them, but I think that --

THE COURT: No. No. On that, I hear you, and those are -- I think you made the arguments I thought you would make.

Let me hear from any defendant on this.

Mr. Smith, you may proceed if it's you, or anyone else as well.

MR. SMITH: Good morning, Judge. Nick Smith for Ethan Nordean.

On the one hand, this issue that the Court is focusing on, rightly, is -- seems, kind of, like it's in the weeds, because this determination as to which guideline applies to Count 1 might not control the Court's ultimate sentencing guideline range. However, I think it also points to something -- a deeper issue here that is extremely important, and it's one that, like many other issues in these cases, crops up again and again. With the obstruction of justice offense here, we had a lot of extensive pretrial briefing on the meaning of obstruction of justice and 1512

and whether it applies to a proceeding that doesn't involve the administration of justice. And at that pretrial motions stage when we were deciding the law, the Court held -- and many judges have held in this court -- that it's precisely because Congress does not administer justice that we should not count -- consider the fact that Congress was not reviewing evidence or making a quasi-judicial determination on January 6th.

Then, when we get to the sentencing guidelines stage, things start to look a little bit hinky. The guidelines under 2J1.2 that apply to the obstruction of justice offense focus on interference with the administration of justice. We're in a difficult spot now because, before trial, we had just held that Congress doesn't administer justice. When we get to the sentencing stage, Congress does administer justice, some courts have held.

We see the exact same problem with the seditious conspiracy offense. In pretrial briefing, the parties had agreed on the notion that this offense in section 2384 is basically a codification of a common law crime called constructive treason. Constructive treason used to exist where force was used to prevent the execution of law. And that's exactly the phrase that we see in section 2384. The courts called this a, kind of, constructive waging war on

the United States. A lot of colonial courts said that to interfere -- to use force to interfere with the execution of law is tantamount to waging war on the United States, for if a single law is violated, is prevented from being enforced through force, it's the same as taking down all of the republic's laws. That's what these courts found.

And there's some Supreme Court precedent for the idea that when Congress codifies an offense from the common law, the interpretation of those phrases at common law are, then -- are, basically, incorporated into the statute. So the argument -- just to keep things going, the argument the defendants were making pretrial is that that phrase, using force to prevent the execution of law or to oppose the government, should be interpreted in the context in which it was used before codification of the predecessor statute to section 2384. That would mean that this offense, seditious conspiracy, is committed when people agree to use force that's basically tantamount to waging war on the United States. We argued that wouldn't be something like the kind of, sort of, property destruction one sees at a riot or a protest, but rather something that looks akin to the attack on Fort Sumter which spawned this statute.

So Your Honor, now we're at the sentencing stage. And just like with obstruction of justice, we have something unusual going on. If we look at the Government's sentencing

memoranda, you can see that they concede, and, in fact, positively argue, that every time seditious conspiracy has been sentenced, the treason guideline applies. And the treason guideline says this guideline shall apply for any offense that's tantamount to waging war on the United States. Not just waging war, but tantamount. That happens to be -- line up very closely with the way that courts used to treat this common law constructive treason crime.

Now, I'm not arguing that my client should be sentenced under the treason offense. But what I am saying is there's something bad going on when we see, in the Government's sentencing memoranda, that it's agreeing that the offense here was not tantamount to waging war on the United States. And then the next question becomes, why? Why has -- is the Government saying that this is not the treason offense when, in every other application of this statute in history, it has been?

THE COURT: Mr. Smith, let me just cut you off right there. I really don't care, frankly, the why. I mean, I care about the legal arguments each side makes and I care about getting the legal question right. So talking about why the Government takes a position, why the defense takes a position, is, kind of, a waste of time.

MR. SMITH: Well, so -- I take your point, Your Honor.

THE COURT: Because I'm, you know -- once again, I'm here to resolve -- actually, today, of all days -- only legal issues that pertain to the guidelines. The guidelines calculations. So if, for one day, we could take off -- we could take the day off from pointing the finger at one side or the other and impugning each other's motives, that would aid my job today.

MR. SMITH: Thank you, Your Honor.

I was not impugning the Government's motives. I'm just making an argument that says this guideline, 2J1.2, cannot be analogous to treason because there is a treason statute. It doesn't just apply to technical treason in Section 2381. It applies to all crimes tantamount to treason. We have an analogous guideline. And, Your Honor, if it were true -- setting aside the legal arguments about the statute --

THE COURT: But it -- okay.

MR. SMITH: -- if it were true that seditious conspiracy were analogous to obstruction of justice, then we're saying something very, very broad here that --

THE COURT: Well --

MR. SMITH: -- says every obstruction of justice offense in the new crime we've created, any attempt to influence Congress corruptly --

THE COURT: Mr. Smith, let me just say this. If

you read all the cases that wrestle with the concept of choosing, first of all, any guidelines that are sufficiently analogous, and then moving to the question of which is most analogous, you're going to see that -- what did now Justice Gorsuch call it? Something like the ballpark test? So -- at least for the first step. My point is it -- I understand the argument you're making, but my response to you is that this is all -- by the very nature of the fact that we're trying to find the closest fit, and you can look at a lot of different things in doing that, that it's going to be an inexact science.

MR. SMITH: Oh, Your Honor, I think I'm understanding the point I should be making now. I apologize. So when we're looking at -- I think everyone agrees, including the Court, that we turn to -- after 2X5.1, we turn to the treason guideline. That's what the Probation Office said; that's what the Government has said; and I think the Court is implicitly agreeing that at the first stage at least, we go to 2M1.1.

THE COURT: Well, all I'm -- what I'm saying is that many courts have, at the minimum, found that to be one that is sufficiently analogous to consider. So I don't think -- I don't know whether you're disputing that or not, but --

MR. SMITH: So I'm -- what I'm just pointing to,

Your Honor, is there's a reason we turn to 2M1.1 at the beginning; right? If there was no argument that the treason offense -- the treason guideline was the appropriate one, we wouldn't have turned to 2M1.1 after looking at 2X5.1, because 2X5.1 says if there's no guideline for the specific statute, we turn to the most analogous one.

THE COURT: Right.

MR. SMITH: I don't know if the phrase is most analogous or to an analogous --

THE COURT: Well --

MR. SMITH: -- an analogous.

THE COURT: -- it's used two different ways in that guideline, but go ahead.

MR. SMITH: So we've made a legal determination -- everyone, I think -- that 2M1.1 is analogous.

THE COURT: Mm-hmm.

MR. SMITH: And there's a reason we determined that it was analogous, because this statute that's being used is basically a codification of constructive treason.

THE COURT: Well, but one could come to that conclusion -- one could come to the conclusion that it's analogous without going that far, is my point.

MR. SMITH: So we've made a determination that it's analogous. And then 2M1.1 says if the crime is tantamount to waging war against the United States, apply

this base offense level, 2M1.1(a). And then it says if it's not -- if it's not analogous to -- if it's not tantamount to waging war against the United States, then look to the most analogous guideline. So what I'm -- the legal argument I'm making is we don't reach the argument the Government is trying to make here because the seditious conspiracy statute is, by its nature, a crime that's supposed to be tantamount to waging war on the United States. So when I was saying -- when I was pointing out that the Government is making a distinction between this case and every other, I guess, reported case involving seditious conspiracy, that's not to impugn their motives. It's to suggest that that was their guideline. They've said it doesn't apply. Ergo, at this stage, at least we're in section 3553 range.

And I think the final argument here, Your Honor, is that it just proves too much. If we have courts holding that seditious conspiracy is analogous to obstruction of justice, you know, we don't -- that doesn't satisfy the elements test, as Your Honor might have noted, but it also suggests that everyone who's convicted of obstruction, at least the January 6th cases, has committed a crime analogous to seditious conspiracy. That's the -- it's a two-way street. If seditious conspiracy's analogous to obstruction of justice, obstruction of justice is analogous to seditious conspiracy, and yet -- just the final point is the average

sentence for the 1512(c) offense in the January 6th cases is approximately 38 months of incarceration which would not seem to be proportionate to a crime like seditious conspiracy.

THE COURT: All right.

MR. SMITH: And then, Your Honor, the final point on Section 372 is --

THE COURT: Yes.

MR. SMITH: -- that I -- it sounds like Mr. McCullough was suggesting that although this -- if we were to take this "conspiracy to interfere with police officers" offense and break it down into its underlying offense, I think there he might have suggested, "Well, it might be appropriate in that case to apply 2A2.2 -- or 2A2.4," rather, "But because it involves conspiracy, then we've got something larger here. We have a larger purpose at work." But, Your Honor, that's not how the guidelines work. There's a guideline that says when you have a conspiracy offense that does not have a specific guideline, you look to the other underlying offense, and the underlying offense here is interference with individual police officers. So the guidelines would seem to suggest there directly -- I'd --

THE COURT: How do you respond to the points Mr. McCullough made that it's broader -- the statute is

broader in the sense that, number one, it seems to be -- it includes members of Congress, not just merely law enforcement; and, two, it seems to be getting at something more than just assault by referencing the duties of the person and by this concept of moving the person away from the place where their duties are to be performed and, I guess, number three, that -- isn't that the underlying thing that was going on here that they're charged with, not really assault, but trying to move them -- trying to interfere with their duties which were -- which, at least as to the members of Congress, were to continue the count of the electoral process?

MR. SMITH: I think I'm on the same page with Your Honor on this issue, that it seems like this is a -- every fact that Your Honor just described is -- the offense of interfering with police is a 231 offense or a 111(a) offense which have been sentenced under 2A2.4 if there's not aggravated assault. So I guess adding a layer of conspiracy to the claim doesn't seem to change that.

THE COURT: Well, but don't you agree that I have to look at -- ultimately, even if I have several guidelines that are sufficiently analogous to consider, that I do look at at least -- whether it's -- what's charged in the indictment or what was proven at trial -- for this purpose I don't think it really matters, the difference between those

two things -- doesn't it come off more as something more than just an assault?

MR. SMITH: Your Honor, I think we would probably say it comes off as something less because there was no, you know, assault. The jury acquitted Mr. Nordean -- either acquitted or hung on every relevant, sort of, assault count. So I think that would not be appropriate in light of the jury's verdict.

THE COURT: Okay. Any other defendant want to be heard on this slice of the guidelines question?

MR. ROOTS: Yeah, very quickly, Your Honor. This is Roger Roots on behalf of Mr. Pezzola.

Of course, the jury acquitted Pezzola of Count 1, so that does not apply to Pezzola, but I do want to discuss just the issue of the proper guideline for Count 4.

THE COURT: Mm-hmm.

MR. ROOTS: As Your Honor mentioned, there isn't much case law on this issue. There is that case from the Tenth Circuit authored by Neil Gorsuch. And we're going to argue that that -- that Gorsuch got it wrong in that case; that, in fact, the appropriate guideline for Count 4 is the other one that was under consideration in that case, and that is 2A2.4, for several reasons. Number one, Count 4 is this statute called 18 U.S. Code Section 371. And that is a post-Civil War statute in the -- it was written by Congress

in the wake of the Civil War: If two or more persons in any state, territory, possession, or district conspire to prevent, by force, intimidation or a threat, any person from accepting or holding any office, trust, or place of confidence, et cetera, you know, they shall be punished by up to six years in prison, et cetera.

Okay. So this statute is most analogous to the idea of resisting or opposing officers. It is not most analysis -- analogous to this idea of obstructing justice. This statute is a resisting officer-type statute. It is not an obstructing proceeding-type statute. And this is very important, because obstruction of justice is this concept of doing something -- using violence to -- like the 1512 count, for example -- disrupting the findings of a legislative session or a court session, whereas clearly that is not the focus of the statute, 372. That statute is focused on resisting officers on -- in the field, much as the guideline range 2A2.4.

THE COURT: Well, it does include members of Congress, though.

MR. ROOTS: It does include members of Congress, but it is not -- it -- the -- I guess you could call it the gist of the statute is not about the findings of a proceeding. It's more -- to me, it seems more temporal, more -- the statute reads more about resisting and opposing

a congressman in the field. And I would also point out just the severity -- I think that's another thing that should be taken into consideration by the Court, not just the elements, but the -- not just the conduct, but the severity that Congress enacted with Count 4, this idea of 18 U.S. Code 372, up to six years in prison. Congress did not indicate that this was a crime punishable by up to 20 years in prison, like obstruction of justice would be. And so I would just suggest that 2A2.4 is the most analogous, clearly, of all the guidelines with regard to Count 4.

Thank you.

THE COURT: Okay. All right. Any other defendant want to be heard on that slice?

All right. If not, let's move to -- so let's next go to -- I think it was the -- let's see what order I put these in. Actually, it was the third issue I raised in the order, the issue of aggravated assault and -- this is Count 5 now -- the issue of whether to apply aggravated assault. I guess my questions -- start with the Government again. My questions to the Government are, what are the limits on what -- I mean, you, kind of -- in your memo, you throw out a bunch of different conduct -- I think even including Donohoe's conduct -- but you throw out a bunch of different possibilities for what you think I can consider as meeting the standard for aggravated assault here. I

think -- or really just assault, period, to start with. How can I -- I mean, I guess my question is, can I consider all of those different things you lay out, number one? Can I attribute -- can I really attribute the conduct of one defendant to another for purposes of this guideline? That is my question.

MR. MCCULLOUGH: Thank you, Your Honor.

So with respect to the question as to the conduct, so let's -- I want to start there, but there's more to this. You can look at all of --

THE COURT: Go ahead.

MR. MCCULLOUGH: I just wanted to make sure.

THE COURT: No, no, no, please.

MR. MCCULLOUGH: You can look at all of the relevant conduct. It encompasses the defendants' acts and those the defendant, you know, aided and abetted, counseled, commanded, induced, procured, or willfully caused. And so the defendants --

THE COURT: And jointly undertaking criminal activity; that's your -- that's the Government's position.

MR. MCCULLOUGH: Correct.

THE COURT: Okay.

MR. MCCULLOUGH: Correct. And, Your Honor, it's -- that conduct is not necessarily, kind of, coterminous with the scope of the conspiracy.

THE COURT: Right.

MR. MCCULLOUGH: Under the guidelines, as you know, it -- the relevant conduct includes all harm that resulted. And so you can look at a broad scope of the conduct here. And, Your Honor, I think that they -- the defense counsel will point to the -- you know, quibble as to the assault that Pezzola carried out.

THE COURT: Yes, they do, as they should.

MR. MCCULLOUGH: As they should. As they should. But there was not an acquittal on Donohoe's assault. And the jury clearly knew how to acquit, but it did not. And so we remember that -- Your Honor, we remember that the standard there is beyond a reasonable doubt. The standard here is propensity of the evidence. And it is more than satisfied. When we look at the way that the jury convicted in terms of the conspiracies here and what these defendants intended to do and what they carried out doing, property damage, pushing forward with a goal of obstructing the certification, Count 1, that they agreed to use force to stop the certification. So Your Honor, there is not -- Your Honor should not be -- kind of, in any way feel, kind of, constrained by this, that because of the jury's decision with respect to Pezzola's assault in which he testified as to, kind of, his mental state as he did it extensively, and what others who acted in furtherance of the conspiracy did.

And while Mr. Rehl's assault on an officer was not charged, Your Honor can nonetheless view that and take that into account in terms of the kind of conduct that was being carried out. So let's -- but --

THE COURT: And I can count that against all of them --

MR. MCCULLOUGH: That's correct, Your Honor.

THE COURT: -- is your position?

MR. MCCULLOUGH: Yes. Yes, you can. But, Your Honor, to -- let's set all that to the side, because the -- I think there's the more, kind of, straight line answer in terms of the aggravated assault guideline here in terms of the 231. So we're talking about Count 5, the 231 charge. And in this case, Your Honor, the -- one of the -- one element of aggravated assault is a question as to whether it was done with the intent to commit another felony. And so I wanted to answer your question --

THE COURT: But isn't -- aren't -- don't I need to get to -- so I think I see where you are going, but I had thought those two things had to act together. In other words, you do need an assault, right, in order for this to kick in? In other words, for me to -- the aggravated assault guideline -- I -- a felonious assault that involved, A, dangerous weapon -- we're not talking about that; B, a serious bodily injury -- we're not talking about that; C,

strangling, suffocating or attempting to do that -- we're not talking about that; or attempt to commit another felony.

The question is -- so -- but I apply that when the conduct is an aggravated assault. But -- and so I guess why do you think it is, sort of, a -- I don't want to put words in your mouth, but it's, sort of, an end around the question we were just discussing to say, "Well, Judge, you can just find -- you can conclude that they had an intent to commit another felony," because there has to be an assault first for it to get to aggravated assault.

MR. MCCULLOUGH: Well, Your Honor, I think we are talking about using the -- we are talking about the crime of 231, which is interfering with an officer during a civil disorder. That's what -- that's the count of conviction. And so we're using the 2A2.4 guideline because it is the appropriate guideline to basically apply here, but it doesn't necessarily mean that you need a physical assault in order to --

THE COURT: Okay. So --

MR. MCCULLOUGH: It is the interference that we are talking about.

THE COURT: So the Government's position is because anyone who was -- any defendants who were convicted on Count 5, that, sort of, satisfies the assault? And that the question now becomes, is it aggravated? And so I don't

even really need -- I don't need to be mucking around in the -- my -- I mean, I'm just -- I'm not trying to -- but --

MR. MCCULLOUGH: Not my words, Your Honor.

THE COURT: No, they're not your words, but I'll say them. Your argument to me was, I didn't need to be mucking around with that antecedent question I asked because the count of conviction, sort of, makes it an -- effectively, an assault?

MR. MCCULLOUGH: That is correct, Your Honor. That is correct. It is -- what they have been convicted of is interfering with law enforcement during a civil disorder. And that puts you into this guideline. And the question is, then, is there -- is there --

THE COURT: Is it aggravated? I mean --

MR. MCCULLOUGH: Is it aggravating? And, you know, kind of, the aggravated assault, Your Honor, kind of, the Black -- I mean, Black's Law Dictionary would, you know, kind of, describe aggravated assault as, you know, any criminal assault that's accompanied by circumstances that make it more severe, such as intent to commit another crime. That is, kind of -- that's the definition of aggravated assault. And so when we're talking about the way that this crime was committed, it was committed in an effort to further the obstruction of justice, a count on which they were all convicted, Count 3.

THE COURT: All right. I understand that argument. I did not -- you know, this is why sometimes oral argument is helpful. I did not understand that argument before, but I do understand your argument now. I'm not sure -- I mean, but I understand the argument.

MR. MCCULLOUGH: And if -- I guess if Your Honor has -- I'm happy to expand on any of the, kind of, relevant conduct that Your Honor can consider, but I think, as Your Honor is prepared to rule on the Rule 29, Rule 33, you've no doubt, kind of, covered the landscape of facts. But, Your Honor, the -- with respect to the relevant conduct here that one can consider, as I said, the assault by Zachary Rehl, one can consider. Your Honor can consider the assault by Milkshake as he pushed up the concrete stairs and pushed behind the -- as Mr. Biggs and his cohort followed behind, and Mr. Pezzola followed behind. And, Your Honor, you can even consider -- I mean, I -- and I would submit to you that you can even consider the assault by Mr. Pezzola. Now, I, 100 percent, you know, appreciate that the jury did acquit on that count, but that there is a delta between, you know, preponderance of the evidence for purposes of the -- for purposes of applying the guidelines and beyond a reasonable doubt for purposes of proving a conviction.

THE COURT: Let me just say -- I'm just looking now at the language in Count 5, committing or attempting to

commit an act to obstruct, impede, or interfere with law enforcement officers, lawful -- carrying out their official duties incident to a civil disorder.

Isn't there a delta -- speaking of deltas, isn't there a delta between conduct that the jury could have found to satisfy that -- for example, the conduct of Mr. Biggs and Mr. Nordean at the fence, okay -- that conduct could satisfy that statute, but it wouldn't necessarily be an assault; isn't that fair?

MR. MCCULLOUGH: I think that's -- that is an accurate statement, that that -- that could have been one thing that the jury was considering. We don't have that answer. We did not have a specialized jury -- verdict form, rather, on the --

THE COURT: Right. I --

MR. MCCULLOUGH: So I appreciate Your Honor's question. I think I would submit to you that the jury did see the full array of evidence, including assaults by these -- some of these individual defendants and others that were under their command as they marched to the Capitol.

THE COURT: Right. This is all to say it's my decision, not the jury's, but my point is only it's not -- it's -- I don't think it's in -- I'm not saying you're saying this, but it -- whatever the jury found -- my only point is the jury need not have found an assault. The point

is I -- in order for me to apply this guideline, though, I have to conclude from evidence that there was an assault.

MR. MCCULLOUGH: Well, I think one thing is -- and Your Honor will, no doubt, kind of, take your time with this -- but as -- comparing the 111 statute and the 231 statute, impede and interfere are in both statutes. And so I think --

THE COURT: Fair.

MR. MCCULLOUGH: And so in terms of it being an assault, I think that, you know, even if you, kind of, take a different bar and you say, well, there's no physical contact, of course, we know that there can be non-physical contact assaults. And so the issue, you know, fundamentally boils down to, were they engaged in this 231 activity for purposes of carrying out another felony? And that -- the answer has been provided -- on that question, Your Honor, that answer's been provided by the jury, that they have -- they were carrying this out for purposes of obstructing the certification, Count 3. So I think that that is a -- that's, kind of, a clean line there. But I appreciate Your Honor's questions in terms of, kind of, wading into the facts.

THE COURT: All right. Any defendant want to be heard on this?

Yes, sir, Mr. Smith.

MR. SMITH: Very briefly, Judge.

It's a given that the Court can consider acquitted conduct for purposes of applying this enhancement. So we'll just move past that. It doesn't matter whether the jury acquitted Mr. Nordean on the assault or hung. The problem here with the Government's argument is that it hasn't offered facts showing by a preponderance of the evidence that the aggravated assault guideline applies to Count 5. The first reason is -- let's take Donohoe's assault. We didn't hear from Mr. --

THE COURT: Well, let's -- can we just --

MR. SMITH: Yeah.

THE COURT: I -- why don't we -- will you address the point Mr. McCullough made, which is to say I don't need to -- let's put it this way. The jury -- what -- the -- putting aside the different examples they raised, for example, what about the conduct at the fence? I know -- look, I know -- I have to, you know -- I know you have -- you dispute the conduct at the fence. But isn't that enough for me to conclude that there was at least the kind of assault that -- an interference assault, if you will?

MR. SMITH: Your Honor, we would say that the -- under the aggravated assault dead- -- guideline in 2A2.2, there's a precise definition of "aggravated assault" which is a felonious assault that involves a dangerous weapon or

the intent to cause bodily injury, serious bodily injury, strangling, suffocating, or attempting to strangle or suffocate, or an intent to commit another felony. So for the fence-shaking episode, we don't have a felonious assault. Mr. McCullough was referring to assault and how it can be established without physical contact. A felonious assault under Section 111(a) is felonious -- is physical contact or it's not a --

THE COURT: Is -- say again.

MR. SMITH: Is -- involves physical contact or it's not a felonious assault unless you have the intent to commit another felony.

THE COURT: Right.

MR. SMITH: So we don't have a felonious assault at the fence-shaking episode. Assault itself under the generic federal definition involves an intent to cause bodily harm or an intent to cause a threat that would reasonably put one in apprehension of bodily harm. I don't think Mr. McCullough pointed to facts at the fence-shaking episode showing an intent to cause bodily harm or the threat to cause bodily harm. So we don't have an assault there. We don't have a felonious assault because we don't have physical contact with a victim. And I don't think Mr. McCullough pointed to any facts showing what intent -- showing Mr. Nordean's intent to commit another felony at

that point in time.

On Mr. Donohoe's bottle-throwing --

THE COURT: I mean, isn't that the entire -- I mean, I, you know -- he would say that's the entire case. I know you don't think they made their burden, but in an attempt to, you know -- in, you know -- the federal obstruction statute is what he would argue just to make it as clean as possible; right? And I know -- well, you have -- we've talked about the -- that statute a lot, but -- okay. I mean, that would be his argument.

MR. SMITH: Well, the fence-shaking episode wasn't even charged as an assault. It was not charged --

THE COURT: Right.

MR. SMITH: -- under 111(a).

THE COURT: Correct.

MR. SMITH: And the -- I think you were going through this with Mr. McCullough, Your Honor, but you pointed out that, you know, interference is not the same thing as assault and, you know, Section 231 and 111(a) share some actus reus like interfere and obstruct, but that's not the definition of "aggravated assault."

THE COURT: It's clearly not the definition of "aggravated assault." I understand.

MR. SMITH: And so, Your Honor, I think on -- but on -- I'd just like to address Mr. Donohoe's

bottle-throwing, because I think that's --

THE COURT: Okay.

MR. SMITH: -- mostly where the Government hung its hat in the briefing. Again, Your Honor, there, even if we assume that's an assault, we didn't hear from Mr. Donohoe at trial. So what -- we don't have any evidence in the record to show by a preponderance that Mr. Nordean was engaged in joint activity with Mr. Donohoe when he threw the water bottle. So in order to make -- in order for this to be relevant conduct to Mr. Nordean, there has to be some -- you have to satisfy the joint activity, you know -- joint criminal activity definition in the guidelines, and we didn't hear any facts from the Government on how -- what facts show that that water bottle throwing was attributable to Mr. Nordean as relevant activity.

Then, Your Honor, I don't think the water bottle struck an officer. So we don't have physical contact for a felonious assault.

THE COURT: But you agree -- if I believe the evidence -- if I conclude they had intent to commit another felony at that time, that doesn't matter?

MR. SMITH: Well, I'm saying that the -- for it to be relevant conduct to Mr. Nordean, that act still has to -- we have to go through the Pinkerton analysis, essentially, which is how relevant conduct is defined using the Pinkerton

test, and we would have to see by a preponderance of the evidence that Mr. Donohoe's bottle-throwing was in furtherance and reasonably foreseeable to the conspiracy.

THE COURT: Yes, I agree --

MR. SMITH: And I'm -- the argument we're making to Your Honor now is we don't have facts showing that Mr. Nordean's conspiracy, as found by the Government, was being furthered and was -- and was reasonably foreseeable -- it was reasonably foreseeable that a water -- throwing a water bottle would be contemplated within the corners of the conspiracy.

THE COURT: All right.

MR. SMITH: And although the Court can consider acquitted conduct, we don't think that acquitted or hung -- you know, conduct for which the jury acquitted Mr. Nordean or hung would be appropriate in this context.

So thank you, Your Honor.

THE COURT: All right. Mr. Roots --

Or Mr. Pattis?

MR. PATTIS: Good morning, Judge. Good to see you again.

If -- as I look at the cases in the annotations in the guidelines and try to discern the line between cases finding no aggravation and cases finding aggravation, it seems to me that one could argue that in this case, you

should not find aggravation. And I can recite all the cases, but you have the same guidelines manual I do. But referring to them anecdotally, cases finding aggravation talk about using a gun to shoot. "Defendant shot an occupied vehicle; stabbed a corrections guard with a syringe; knocked out a police officer; swerved a car into a pursuing agent's car," these were found to have the predicate assault and they were aggravated, and that -- and aggravating -- and, as I understand it, an aggravating factor enhances the culpability. Cases in which no aggravation was found was -- mere use of a deadly weapon alone is not sufficient.

THE COURT: But, Mr. Pattis, it's not a -- I -- look, I take your point about these analogies, but it's not a -- I don't have a free-flowing, open-ended task of just saying, "I think this is aggravated," or, "I think it's not." I have to apply the definition in the guidelines; right? I mean --

MR. PATTIS: You do, but you still have to reach the conclusion that it's, in fact, aggravating.

THE COURT: Under the definition here.

MR. PATTIS: Correct.

THE COURT: Right. I -- obviously. Yeah.

MR. PATTIS: And so -- and the question that you'd asked the Government that I didn't hear the Government

respond to was the attribution problem, and I don't think that you can simply say aiding and abetting and, therefore, everything. I mean, I don't see a case that says you can.

THE COURT: Well, they were --

MR. PATTIS: And so --

THE COURT: Whether I agree or not, they responded that under the guidelines, this was jointly -- that, you know, I can conclude it's jointly undertaking criminal activity. Whether I do that or not, I -- but that's the response to that.

MR. PATTIS: And it's -- yes, you could, and language is written in general terms such that any particular can be crammed under a general if -- to serve a purpose, but I think the purpose here is to provide some uniformity in sentencing and some sense in -- that the law makes sense from case to case to case. And so to say that they were there to engage in this sort of conduct and, therefore, whatever -- and I think Mr. Smith's point about Donahue [sic] is particularly well taken -- therefore, that was reasonably foreseeable at the time and because one, you know -- because they were there for a felony, everything counts, I think that's just pressing too hard, and that's my general response to the Government's sentencing memos in general: They're pressing too hard. A crime was committed here, and it was a crime that was deeply embarrassing

perhaps to the United States in the eyes of the world, but it wasn't the crime of the century.

THE COURT: All right. Mr. Jauregui?

MR. JAUREGUI: Good morning, Your Honor. Sabino Jauregui on behalf of Enrique Tarrio.

Judge, I just have just a very basic, specific -- fact-specific argument, and it's going to be the same one I'm going to be making on the terrorism. As Your Honor knows, my client was not there on January 6th. It was not reasonably foreseeable for him to see this water being thrown by Donohoe. It was not reasonably foreseeable for him to know what was going to happen with that fence. He never personally touched the fence. So just based on the specific facts, as Your Honor heard during our very lengthy trial, there was no way my client could have reasonably foreseen these specific actions, any assault, any destruction of property.

Thank you, Your Honor. As to the fence.

MR. ROOTS: Thank you, Your Honor. Roger Roots for Mr. Pezzola.

This statute -- this is 18 U.S. Code 231 -- is a very specific statute. It's unique. It is really a riot-type statute. And it -- I think it's obvious from the reading of the statute that Congress intended it to apply to a fairly low -- a low-level state of thinking, or mens rea,

doesn't require a whole lot. It is designed at people who engage in riots and oppose, resist officers during those riots. Now, the word "assault" I don't read as being in that statute. So I cannot imagine that they can shoehorn an aggravated assault-level sentence out of that. Now, this is a statute punishable by up to five years' imprisonment. And they're trying to catapult a sentence so high from -- by attaching this aggravated assault idea. Again, this is not a statute that requires a lot of -- and I would argue that it's a low intent and it's -- it is -- ironically, it's a specific setting-type statute. It can only apply to civil disorders, riots, civil disturbances. So at -- the irony of this particular statute, it's designed and it's almost self-contained. It does not lend itself to specific intent to commit another felony. So Congress obviously intended this statute to apply to a setting where someone resists law enforcement during a riot, and it can't be turned into a specific intent statute with the idea that someone -- that someone, then -- with the intent to commit another felony. It just -- it becomes just convoluted and confusing if that were the application. This cannot be punished as aggravated assault.

THE COURT: Well, but there's nothing that says, here's a statute; it criminalizes certain conduct. Now we have a guideline for that statute. And the Sentencing

Commission says, well, if you do it with this other -- whether it -- with this, sort of -- in a particular way that we think you should be -- we, the Sentencing Commission, think the guidelines should be higher -- there's no reason they can't do that; right? I mean, obviously, they can't -- we -- I can never sentence anyone above the statutory maximum. But what's -- what is the reason -- I don't see any reason why, in the -- conceptually, the Sentencing Commission can't say, Okay. I, you know -- persons convicted of Offense A, because -- and the -- they've -- the Government's met its burden as to the elements. If there's something else above and beyond that that happened, whatever it might be, some aggravating factor -- I mean, that is the guidelines, right, to say -- you still can't go above the statutory maximum, but you -- something else happened that we want to make -- we want to make clear that the guidelines should be higher rather than lower, and that's all really they're doing here.

MR. ROOTS: Well, it's -- I think the sentencing guidelines are -- obviously, it's, sort of, an umbrella that the Sentencing Commission tries to place over this vast array of criminal laws, and they don't always fit very well. I do believe the right -- the most analogous guideline is 2A2.4, which is resisting law enforcement, which also is probably the most analogous to, you know, 111(a) type

assaults. I -- it's probably the same guideline. But this is a statute that is a riot-type statute. It's not a -- imagine the idea -- just the -- just the whole idea -- the concept of participating in a riot with the specific intent to commit another felony, rape or, in this case, you know, let's just say -- it becomes ridiculous. In this case, it's, you know, obstructing an official proceeding or seditious conspiracy or something. It becomes ridiculous that you would commit a riot with the specific intent to commit some other felony. I think we all recognize that a riot -- a civil disorder or civil disturbance is some kind of a -- well, it's an -- it's an -- it's an episode of, you know, vitriolic, perhaps, violent conduct that really doesn't lend itself to specific intent to commit another felony.

And so this can -- and I would just argue also that the Government doesn't need more incentive, as they already have, to create indictments with multiple counts. This is a -- the Government is increasingly, over the years, starting to create these indictments and knowing that if they stack enough indictments, enough counts on an indictment, and that, then, they can, at sentencing time, if anybody gets convicted, they can argue, well, hey, this aggravated idea applies because, well, there was an intent to commit another felony. What was that other felony?

Well, let's look. Oh, it's one of these others that we've put on the indictment. It just incentivizes Government to create more and more convoluted, multiple-count indictments, and it just does not apply to Count 5.

THE COURT: All right. Very well.

Mr. Smith?

MR. SMITH: Your Honor, just one preservation point. We would object to applying the aggravated assault guideline to the extent the felonious assault and the Section 2A2.2 definition is felonious because the defendant had the intent to commit another felony and where the aggravated assault guideline applies under Definition 1, subsection (d), because the defendant has the intent to commit another felony. If we have a felonious assault because of the intent to commit another felony and we have an aggravated assault for the exact same reason, that would render subpart (d) of the definition superfluous. So the defense would argue that the intent to commit another felony that's -- that would hypothetically render the 231 offense a felonious assault cannot be the same as the intent to commit another felony in aggravated assault subsection part (d).

THE COURT: What's -- well, at least antecedently, it seems to me, Mr. McCullough, among the arguments he made, I think, was that something can be felonious -- in other words, they were convicted of -- right -- they were

convicted, you know -- if you're convicted of Count 5, that doesn't -- that didn't require any particular injury or anything. Why can't -- if -- in other words, if I accept the argument -- I'm not saying I do -- that a conviction under Count 5 -- or evidence I find sufficient to sustain a conviction under Count 5, to be technical -- if that, by virtue of -- if that gets you -- gets the Government past felonious assault, then it -- then your argument doesn't hold up; is that right? But you would challenge that, I guess.

MR. MCCULLOUGH: Yes, Your Honor. If I'm understanding Your Honor -- I mean, you're basically suggesting that there's effectively double-counting; right? So you're pushing -- you're --

THE COURT: That's what Mr. Smith is -- or it's -- yes, or bootstrapping perhaps.

MR. MCCULLOUGH: Bootstrapping --

THE COURT: Yeah.

MR. MCCULLOUGH: -- a better way to put it. Your Honor, I think it is a fair question. I think that it is nonetheless the case that the civil disorder and the crime in civil disorder does constitute an interference with a law enforcement officer during a civil disorder which, you know, kind of, suggests the broader array of conduct that is taking place, to include relevant conduct that includes the

assaults that are happening during the riot. But I think more importantly, Your Honor, the relevant conduct here for these defendants -- and I just -- I want to, kind of, hit this back because -- I mean, the suggestion is that we've, kind of, run from relevant conduct in some way; meaning, the purpose of felonious assault. The relevant conduct here includes felonious assaults. It includes common law assaults. That -- those common law assaults include Mr. Rehl's spraying of officers, Daniel Lyons Scott's assault of officers as they pushed up the stairs, Dominic Pezzola's assault on Officer Ode, Charles Donohoe's assaulting officers with the water bottles, and those are all carried out with the intent to commit another felony. That is Count 3. And so I don't want to, in any way, suggest that we are, you know, kind of, not leaning fully into that.

THE COURT: No.

MR. MCCULLOUGH: The -- I think the jury's verdicts demonstrate an understanding that this was a concerted effort. The suggestion that some of these acts were not foreseeable, given as -- I think -- I would just point Your Honor to the path that the defendants took in the course of the morning on the west plaza as they --

THE COURT: You don't have to recount.

MR. MCCULLOUGH: I -- and I will not, but I would

point you to the path. And the path that they removed themselves and went back forward, I think, kind of, demonstrates that the assault's fully reasonably foreseeable within the scope of the conspiracy and, again, pointing to the jury's conclusion with respect to Count 8 which, when they know how to acquit on Count 9; they did not on Count 8, demonstrates that, in fact, that is well within the scope of the conspiracy.

THE COURT: Okay.

MR. MCCULLOUGH: Thank you, Your Honor.

THE COURT: We need to take a break for our court reporter. We'll come back and talk about the terrorism enhancement. Let's take a five-minute break -- 10-minute break.

THE DEPUTY CLERK: All rise.

(Brief recess taken.)

THE DEPUTY CLERK: We are back on the record in Criminal Matter 21-175, United States of America v. Ethan Nordean, et al.

THE COURT: All right. The last topic that I wanted to hear from you all on is the adjustment for crimes of terrorism. And so let me just -- I think -- I'm certainly going to hear from any defendant who wants to argue for any reason why I shouldn't apply it. I think my questions will -- starting with the Government, my questions

more -- to the Government at least -- are going to be more along the lines of -- I just want to confirm you're asking me to apply it to Counts 6 and 7 and you're not asking me to apply it on any of the other counts, I think, and -- number one, I just want to make sure that is the Government's position.

Then there's the question of the departure. And, again, from your written submission, I wasn't sure whether that was something you were asking for as a backstop in case I didn't apply the -- in case I didn't apply the adjustment or what, number two.

So those are, really, the arguments I have for the Government, sort of the interplay, exactly what -- just to confirm that, as far as the adjustment goes, you're only requesting it for Counts 6 and 7 in the way that you lay out, and I just don't have to consider whether, directly through the guideline, the adjustment would apply to the other offenses, and then what the relationship between that request and your upward -- and your departure request is. And then I'll hear from the defendants on all the reasons why I -- in their view, I shouldn't apply it at all.

MR. MCCULLOUGH: Thank you, Your Honor.

I think your understanding is correct so -- in terms of the Government's position, but I'll just walk through it to make sure that we're talking about the same

thing here.

The Government is asking for the application of the 3A1.4 adjustment to apply to Counts 6 and 7. So the destruction of federal property.

THE COURT: And only those counts.

MR. MCCULLOUGH: And only those counts. That is correct. And Your -- as Your Honor knows that those -- the destruction of federal property, 1361, is one of the enumerated crimes under 2332b(g)(5)(B) and we argue that it meets the requisite intent under b(g)(5)(A). You did not ask to hear from us on that, and so I will not address that. I will save that to the extent you'd like to hear from us after or I can address it now. It's your -- but I want to focus on what you asked. And so that's -- to address that, that's the fundamental issue here. And so it is an -- it -- the -- Count 6 and 7, it is an enumerated statute under b(g)(5)(B); it meets the requisite intent, as we've said; and we would ask for the application of that adjustment. In addition to that -- and so it's not a backstop, Your Honor.

In addition to that, what we do in terms of the order of operations, right, is we analyze the individual counts and we come up with a guideline for the individual counts. And so we would ask for the upward departure under Note 4 of 3A1.4, but to be clear, the upward departure of Note 4 -- not the adjustment, but the upward departure -- to

apply to the counts of conviction, Counts 1 through 4. And there, the guidelines --

THE COURT: Counts -- did you say Counts 1 through 4?

MR. MCCULLOUGH: Correct.

THE COURT: Okay.

MR. MCCULLOUGH: There, the guidelines, again, say that the upward departure would be warranted when the crime is calculated to influence or affect the conduct of government by intimidation or coercion or to retaliate against government conduct.

The -- Your Honor, I think, just -- to just start, I mean, the crime of seditious conspiracy, I think, is the -- kind of, a core one here. It applies to the count of seditious conspiracy. The jury's findings with respect to the -- Count 1 demonstrate the intent and demonstrate the fact that these defendants intended to influence government, coerce government into changing its posture that day with respect -- and it's acting against the government as a government. That is the count of conviction with respect to Count 1.

With respect -- and so --

(Brief pause.)

I don't know if Your Honor has other --

THE COURT: Well --

MR. MCCULLOUGH: -- questions or --

THE COURT: So -- and it's your argument that -- what is the practical effect of that on the guidelines calculation?

MR. MCCULLOUGH: So the practical effect of that on the guidelines calculation is that when you -- so for seditious conspiracy, when we calculate under 2J1.2 and we apply -- so for Count 1 -- so just, kind of, building it up, right -- so the math, if you will, you apply 2J1.2. Start with a base offense level of 14. You add the specific offense characteristics, the plus eight and plus three for substantial interference as well as the physical or property damage, and then plus two for the planning.

THE COURT: Okay.

MR. MCCULLOUGH: And then, of course, Your Honor, these are specific to the defendants, but we have Chapter 3 role enhance- -- which I won't even get into --

THE COURT: Sure. Right. But just --

MR. MCCULLOUGH: So let's just fast-forward through that.

THE COURT: Right. Just imagine I would have applied that just for --

MR. MCCULLOUGH: Imagine --

THE COURT: -- purposes of this.

MR. MCCULLOUGH: So then we get to offense level

calculations for Mr. Tarrio and Mr. Biggs of Offense Level 33. You'll get to an offense level for Mr. Rehl of Offense Level 32. And you'll get to an offense level for Mr. Nordean of Offense Level 31. Now, you -- and for Mr. Pezzola, I believe it's Offense Level 30.

You then apply -- so the distinction between 3A1.4 adjustment and the Note 4 adjustment, of course, is that the 3A1.4 -- sorry, I think I said Note 4 adjustment. I meant Note 4 upward departure. My apologies. The distinction between the two is that under 3A1.4, the adjustment, you -- it has a process by which you increase the offense level to a minimum of 32 and then you also apply the criminal history category of VI. And so the calculations that we've set forth in our sentencing memo refer to that calculation, and that is how we get to the guidelines ranges that are set forth on, effectively, Page 2 of our omnibus.

THE COURT: Right. I am looking at them right now.

MR. MCCULLOUGH: Okay. Now, Your Honor can get to -- as we point out in Footnote 2 in our response memoranda -- and you don't have to look at it; I'll explain it, but we point this out. It's also in writing in Footnote 2. You can also take the offense level calculation for, let's say, Mr. Biggs or Mr. Nordean at 31 or 33, and by applying Note 4, you can increase the offense level, not --

holding the criminal history constant, so keep them at Criminal History Category I -- but you can increase the offense level such that the same range applies. And so, for instance, with respect to Mr. Biggs, I believe that's an offense level increase of nine points, which puts him in that same range. And so, Your Honor --

THE COURT: So it wouldn't have any -- I mean, ultimately, it doesn't have any practical application other than with regard to the way the individual offense guidelines are calculated.

MR. MCCULLOUGH: That's --

THE COURT: After grouping it, it doesn't affect it at all.

MR. MCCULLOUGH: So --

THE COURT: Well, it could, but you're not -- to be clear, you're not asking me to make it matter.

MR. MCCULLOUGH: That's correct, Your Honor. I -- and I think that the process -- I mean, from an order of operations perspective, I think the process would be that you would apply -- you would apply both and then you, kind of, do your grouping at the end.

THE COURT: Right.

MR. MCCULLOUGH: Right? So you've got -- you, kind of, hold the counts constant and then you do your grouping. And so, Your Honor, I think, as you said, you

come to the same practical destination whether you apply 3A1.4 adjustment to Count 6 or you apply the Note 4 upward departure to Count 1.

THE COURT: Well, it depends on how much I depart, obviously, but yeah, right.

MR. MCCULLOUGH: And that's -- and I think that is our position, is that one can and one should. It's appropriate here.

So I don't know if Your Honor has any other questions on that, or if you'd like to dive into any of the specifics, but that's -- that is the Government's position which, I think, you asked me to address.

THE COURT: No, that's -- why don't I wait to hear -- I think it may be more productive to -- as far as just -- putting aside the odd math of all this and how it works under the guidelines, to hear from you all after I hear from the defendants on just the, kind of, core question of why I should or should not apply, frankly, either one of these.

MR. MCCULLOUGH: Thank you, Your Honor.

THE COURT: All right. So any defendant who wants to address this. Again, I wanted to just understand what the Government's request was in terms of the mechanics, but I'll hear from you on why I should not apply it.

MR. SMITH: Thank you, Your Honor.

So we heard two arguments from Mr. McCullough. One was on the adjustment under 3A1.4 and the second was the upward departure. On the first argument, the adjustment, the Government is arguing that it should apply to Count 6 which involved Mr. Nordean's fence destruction, according to the jury. And, there, I think, it's essential that we look at the definition of federal crime of terrorism in Section 2332b(g)(5). And this is another example of a case where we're looking at a partial sentence, and the question is, do we interpret this sentence in isolation or do we interpret it in the context of the surrounding statutory scheme and setup?

And here, if we look at 2332b(5) [sic] in isolation, it says a federal crime of terrorism is one that's calculated to influence or affect the conduct of government through the use of coercion or intimidation, and then there's a list --

THE COURT: Right.

MR. SMITH: --- of federal crimes. But before we get to the list, if we were to just interpret that phrase in isolation, then you're encompassing -- well, first, you're encompassing half of the statute of Section 1512 which involves threats to government witnesses and informants. Every attempt to threaten a witness or an informant in the context of an official proceeding could be considered using

coercion or threats to extract some conduct from the government through threats or coercion. Every single one.

THE COURT: Okay.

MR. SMITH: Every single one. And, of course, that's never how the terrorism enhancement has been applied, because courts look down at the context of the statutes that are being used in the context of the terrorism enhancement, and what you see are threatened use of nuclear weapons, biological weapons, destruction at airports, the kinds of events -- spectacular events of violence that are -- that mark acts of terrorism, particularly international acts of terrorism. And here, what the Government is asking the Court to do is so radical. They're taking an instance of petit property destruction and they're saying that this can be a federal crime of terrorism. If that's true, then any act of protest in the country, if we can fit it within the corners of either relevant conduct or the federal crimes of terrorism statute, becomes a crime of terrorism. The implications of the Government's argument are vast. And what it says in response to that is, "Well, January 6th was a unique event in our history." That is true. But the way in which they're defining this enhancement could apply elsewhere.

THE COURT: But let me just respond to that. Even if I agreed with you about those risks, isn't that something

that people who are concerned about it need to take up with either, A, Congress; or B, the Sentencing Commission? In other words, I -- in this case, Congress; right? Congress has defined -- I mean, a combination of Congress and the Sentencing Commission. They've defined the offense this way and they've defined the enhancement this way. And I just don't know that I have the authority to just, sort of, say, well, that's not really the spirit of any of this. Even if I agreed with you. Or -- let's even take it one step further. I don't think I have the authority to say, jeez, in other cases, this could be abused. Right? So I'm just not going to do it here.

MR. SMITH: Well, Your Honor, even if we just look at the facts here, they don't satisfy the standard for Count 6 and -- so we've made an argument that the standard is clear and convincing evidence.

THE COURT: Right.

MR. SMITH: Even if the Court doesn't find that clear and convincing evidence applies, there's no way we get from the fence-shaking episode -- where there really isn't sufficient evidence to make out a felony -- we get from that to that act was calculated to affect the conduct of government through coercion or force. Which act? Which -- what conduct is Mr. Nordean said to extract from the Government in that? We've never heard that from the

Government. What it does is it points to Count 1 and says, in its nature, intrinsically, seditious conspiracy, it meets -- satisfies the federal crime of terrorism definition, even though it's not listed as a federal crime of terrorism, but that can't be sufficient. That's not listed as a federal crime of terrorism. Congress decided not to include it. So it can't satisfy clear and convincing evidence, much less preponderance, to merely point to a crime that's not listed and then bootstrap it to Count 6.

THE COURT: Oh, no.

MR. SMITH: There have to be some --

THE COURT: I think you're --

MR. SMITH: -- facts.

THE COURT: I think you're -- now, you're doing apples and oranges. They don't -- they need the -- I think their argument is that, "Judge, you can -- as to the requisite mental state, we think -- regardless of what the jury did, we think you can find" -- and I don't have the language here, but you know the mental state that's needed -- "we think you can find that and, just for good measure, the jury did find seditious conspiracy. So if you think that count was satis- -- if you think there was sufficient evidence for that count, then, jeez, of course that mental state is satisfied." And then, number two, you need an enumerated offense; right?

MR. SMITH: Well, I think even the Government would agree that there has to be some factual nexus between the count --

THE COURT: Right.

MR. SMITH: -- whose elements they're hanging on and the count to which they're trying to apply the adjustment, and that's what I'm zeroing in on here, Judge. I'm saying that they still need to show the Court facts to prove by a preponderance that the fence incident was calculated to affect the government -- calculated to affect government conduct through coercion or intimidation.

THE COURT: Right.

MR. SMITH: So it can't be sufficient to just point to another count's elements. There has to be a factual link.

THE COURT: Sure. I get that. But I -- I mean, I just -- candidly, I don't see the -- I don't think that's a tough bar for the Government, with all the evidence I heard.

MR. SMITH: Well, so, Your Honor, the argument we would be making is there's any number of reasons why someone might pull down a fence that don't have to do with extracting something from the government.

THE COURT: In theory, that's correct, but that wasn't this trial.

MR. SMITH: Well, I -- so they haven't pointed to

facts at trial that show his intent at that moment was to calculate -- was calculated to influence the conduct of the government.

THE COURT: All right. I understand your argument.

MR. SMITH: So -- right. So there's another factor here, Your Honor, which is that the defendant was intoxicated, was drinking at the time. It's -- as Your Honor knows, it is always a defense on specific intent crimes where someone is intoxicated at the time. So particularly in the context of clear and convincing evidence on the mens rea issue, we don't see how anyone could get to clear and convincing evidence on the specific intent. The courts have said this is a specific intent element that must be satisfied calculated to influence the conduct of government. There's no dispute -- I think even the Government would acknowledge he was intoxicated at the time of this incident. There's no dispute of -- on the facts on that issue at trial.

THE COURT: There was no evidence -- there was evidence that he had a beer can in his hand. That's what I recall.

MR. SMITH: And there's evidence that it was empty when it hit the ground.

THE COURT: Say again.

MR. SMITH: There was evidence that it was empty when it hit the ground.

THE COURT: Okay.

MR. SMITH: So unless he was, you know, holding it for someone else, he was, you know -- so I think we do have -- there is evidence in the record he was drinking.

There's also other evidence, Your Honor --

THE COURT: All right. Mr. Smith --

MR. SMITH: -- on the march he was --

THE COURT: -- what's your argument on the departure?

MR. SMITH: On the departure provision, Your Honor, number one, the argument's waived because the -- Mr. McCullough seems to be making some argument about how Section 3 -- the Government argues that Section 3A1.4, quote, applies when it's used as an adjustment, but it's not 3A1.4 that is applying when it's used as a departure. It's still 3A1.4 either way.

THE COURT: Okay.

MR. SMITH: In the Government's response to the PSR, Your Honor, they said, quote, "We are not" -- I don't have the exact quote, so I won't say "quote" -- but they said, "We are not asking the Court to apply 3A1.4 to any -- to Counts 1 through 4." Applying it, Your Honor, means also using the departure on those -- the departure under 3A1.4,

Note 4, to those counts. So it's waived. But then even if Your Honor -- does Your Honor understand that argument that --

THE COURT: I do. It's -- I do understand it.

MR. SMITH: Well, they say, "We're not asking the Court to apply it." So --

THE COURT: All right.

MR. SMITH: So I'm just -- I think if the defense were to say something like that, the Government might take the position that, hey, the defense has waived this argument.

THE COURT: I would look at them funny, too, but --

MR. SMITH: Okay.

THE COURT: -- proceed.

MR. SMITH: So Your Honor, another reason it doesn't apply is the Supreme Court has recently said in this Kisor case -- K-I-S-O-R -- that the courts do not defer -- should not defer to application notes when they're clearly -- when they're unambiguously inconsistent with the guideline itself. And here, there's an unambiguous inconsistency.

The guideline in 3A1.4 says, clearly, two elements have to be satisfied for a -- the adjustment to apply. It has to be a federal crime of terrorism, the offense that

we're considering, and that's to satisfy the federal crime of terrorism statute in Section 2332b(g)(5). So to the extent Note 4 says, "Well, actually, one of those prongs is not necessary; you don't need a federal crime of terrorism," that is unambiguously inconsistent with the guideline itself.

THE COURT: For a departure.

MR. SMITH: For a departure. I thought -- we're just discussing the departure argument right now.

THE COURT: Right.

MR. SMITH: And our first departure argument was waiver. The Court didn't like that one. So the second argument we're making on departure -- that is, the argument that 3A1.4 should apply to Counts 1 through 4 -- the argument we're making there is the Court should not depart on those counts under 3A1.4 because Note 4, which gets you to crimes outside the federal crime of terrorism, is unambiguously inconsistent with the guideline itself to the extent it sheds the federal crime of terrorism --

THE COURT: All right.

MR. SMITH: -- requirement. And, Your Honor, I think a couple of your colleagues on the bench have actually so held in some prominent January 6th cases. I think Judge Berman Jackson considered the question in a case involving one of the most violent defendants in all of these cases,

someone who was going around -- I think the defendant's name was Rodriguez, but he was basically going around punching and assaulting everyone in sight for hours. And so if there was a case where Note 4 might be applied because the conduct was just -- there was no federal crime of terrorism, but the conduct was calculated to affect the conduct of government through coercion or force, it would be this case, and the judge -- I think what the judge was saying was, "Wait a second. This note is inconsistent with the guideline."

THE COURT: Did she -- was this after the case you're citing came down?

MR. SMITH: Yes. I think -- the Supreme Court case?

THE COURT: Yeah.

MR. SMITH: Yeah, I think that case is from 2019.

THE COURT: Okay. And --

MR. SMITH: It's cited in our papers, but -- and, Your Honor, a couple of other judges -- except for Judge Mehta, who, I think, might be alone on this issue -- a couple of other judges have also held -- Judges McFadden and Friedrich, I think, have held that, "No, we can't apply Note 4 and 3A1.4 as a departure in this context."

THE COURT: Can't -- if I -- you couldn't -- you think they both held that you cannot -- that a court could not apply both of them to different counts of conviction in

a particular case?

MR. SMITH: I don't think they were making a general statement about Note 4 so much as they were saying, "Well, at least in this -- at least in the January 6th context with these defendants we have in front of us, we're not applying Note 4."

THE COURT: Okay. But that's not -- I mean, that could be for any one of many reasons, but --

MR. SMITH: Well, but, Your Honor, if we just -- if we're -- if we detach this adjustment or departure from the list federal crimes of terrorism, what are we left -- we're left with a very general statement about any act that influences the conduct of government through the use of coercion or force and then we're in space.

THE COURT: Okay. I just --

MR. SMITH: And so --

THE COURT: I'm just asking you what the rationale -- you're saying Judge Berman Jackson's rationale was -- under the Supreme Court case you're mentioning, that it was -- it's inconsistent.

MR. SMITH: I think that was her logic, Judge. But Judge Friedrich's logic, I know for sure -- and I'm willing to quote her on this -- was that it would create -- to apply Note 4 in the Reffitt case in front of her --

THE COURT: Right.

MR. SMITH: -- would create unwarranted sentence disparities.

THE COURT: Well --

MR. SMITH: And that's a different part of the analysis, but --

THE COURT: Obviously.

MR. SMITH: But nevertheless, her point, I think, is very well taken, which is that if we have -- if you could describe any January 6th defendant's conduct as satisfying that -- the first half of the federal crime of terrorism standard, then what you'd have -- you could characterize misdemeanors --

THE COURT: Listen --

MR. SMITH: -- as --

THE COURT: -- the background to all of this, quite frankly, is that -- I don't disagree with what you're saying, and that's -- and so, I think for good reason, the Government doesn't come in and ask for this very often. The question is -- but -- anyway, yes, that's the background to all of this. What to make of that is another thing. But I agree with you that it's not -- for a variety of reasons, it's -- there are certainly cases where the Government could come in and ask for things that seem completely draconian. I'm not sure this is that case, but I don't disagree with the point you're making.

MR. SMITH: And the final point, Your Honor, Judge, is while the Court and the Government might be able to distinguish a misdemeanor case from this case on certain facts, the problem -- the heart of the problem is that the standard the Court is applying leaves us without any limiting principle.

THE COURT: I'm not --

MR. SMITH: Yeah.

THE COURT: I hear you.

MR. SMITH: Thank you, Judge.

THE COURT: I understand the argument.

MR. SMITH: Thanks.

THE COURT: All right. Any other -- arguments from any other defendant on this?

MR. JAUREGUI: (Indicating.)

THE COURT: Your client wasn't present.

(Laughter.)

MR. JAUREGUI: Judge, my client wasn't present. He wasn't there. And, as Your Honor knows, in previous rallies, he had difficulty controlling the Proud Boys. He did not control the Proud Boys on January 6th. He was not there. It was not reasonably foreseeable that this fence was going to be touched, destroyed, or affected in any way. And I think the Government, to a certain point, concedes that because when they did their supplemental response to

the motion for the conflict between Rehl and Biggs, they wrote that one of the issues would be that Mr. Pattis might successfully argue that Mr. Rehl never touched the fence and thus the terrorism enhancement did not apply to him. So if it's reasonably foreseeable that terrorism enhancement could not apply to Mr. Rehl, then definitely it cannot apply to Mr. Tarrio who wasn't even there on January 6th.

So -- and, as Your Honor knows, throughout all the evidence throughout trial, my client, over and over again, said -- over and over again, said that the Proud Boys would never be the ones to cross police lines; would never be the ones to engage with police. There was not a single statement during the trial where my client -- advocating attacking the police or being violent towards the police or anything of the sort or destroying government property in any way, shape, or form.

So again, he wasn't there; not reasonably foreseeable; that fence was not destroyed upon his command; he had no knowledge of it; and that's it, Judge.

THE COURT: All right.

MR. JAUREGUI: Thank you.

THE COURT: All right.

MR. METCALF: Mr. McCullough actually said it -- what I intended to say, but he just said it opposite. Just because you can doesn't mean you should, and it doesn't mean

that you should take these facts and find the requisite intent for Counts 6 and 7 to rise to this level of a terrorist enhancement. So how does the Government get there? Your Honor already discussed that. It is, kind of, through Count 1. And it was stated that Count 1 goes to the intent. And in -- on the third page of their most recent filing to all defendants' sentencing memorandum, this statement is actually stated, and Your Honor, kind of, hit it on the head, as well. In addition to them showing intent, oh, yeah, the jury found -- just one second; I want to find the exact language. The jury unanimously concluded beyond a reasonable doubt that the defendants conspired or agreed with at least one other person with the goal of opposing by force the authority of the government. Now, missing in that one sentence, Your Honor, Page 3, is Mr. Pezzola's name. And that goes to the essence of what I'm saying.

The intent component being found in the two conspiracies that he was not convicted in. Now, if you utilize or just focus on that intent component and we go to Note 4 of Section 3A1.4 -- I had to read this a couple of times, and I believe that this upward departure provision should not apply to Mr. Pezzola for a completely different reason. It's broken up into two separate parts: (A) is for counts that are not enumerated; (B) is for the counts that

are enumerated. So Counts 6 and 7 actually would go to Subdivision (B) of this note, but instead what is being referenced is the first part. And if the first part, you take that intent and you take that seditious conspiracy and the two conspiracies that Mr. Pezzola was not convicted of, it's our position that the first part, (A), of Note 4 should not apply to Mr. Pezzola for specifically that reason, that requisite intent reason, and that could be a fact-specific inquiry that Your Honor knows the evidence and can go through. Mr. Pezzola walked away from the crowd for over an hour. Mr. Pezzola then ended up branching off with other people from New York, not these other co-defendants. Count 6 specifically does -- was not shown to have been committed by Mr. Pezzola, but it would actually only rely on co-conspirator liability. And I ask Your Honor to take that into consideration when taking such a -- when considering such a drastic approach and what this terrorist enhancement actually means. Terrorism has a real, true meaning, and I don't want to get into the spirit because Your Honor already said, shouldn't we be going to Congress about that? But the spirit and essence of these crimes in no way should even come close to comparing -- to being applied here. Mr. Pezzola did not physically touch a fence, was not actually alleged to have physically touched a fence --

THE COURT: Can I just -- can I just jump in on

the fence part.

MR. METCALF: Yes.

THE COURT: The Government is arguing it applies to Count 7 as well. So --

MR. METCALF: And I'm going to get there.

THE COURT: Okay.

MR. METCALF: So Your Honor, the nature, circumstances of Count 7 -- I know I'm going to say -- or we've argued this ad nauseam -- even argued it to the jury -- that should have been a misdemeanor offense. $700. So the threshold between felony and misdemeanor there is $1,000. One pane of glass was shown, and testified to, to be in the $700 range. Two puts you at $1,400. We believe that another individual, not a co-conspirator in this case, was responsible for the first pane of glass and Mr. Pezzola was responsible for just one. Now, that becomes relevant because to, kind of, branch off what Attorney Smith said, we're talking about a misdemeanor here or our argument that this should be a misdemeanor. I'll wait for your decision this afternoon or -- on the 2933, but I know Your Honor's not going to agree with me, but that is our position. This is a lower-level offense when taken -- when the facts are fully considered. And whether you agree or disagree, that's the kind of offense level that we're talking about here.

THE COURT: Although under the -- am I right -- I

don't have the statute in front of me, but it actually wouldn't -- I mean, you might argue it's unfair, and I might agree, but it actually doesn't matter for purposes -- whether it's a misdemeanor or not I don't think actually matters under the guideline, does it? Well, I guess the guidelines wouldn't apply to a misdemeanor. So maybe, that's right.

MR. METCALF: I mean, everything's stacked. Mr. Pezzola's guidelines are at a 30. You're going to hear arguments about that on Friday. As far as that misdemeanor versus a felony, I don't think it would have changed anything in the calculation. It wouldn't have changed anything in the PSR. But it does go to the nature of what we're speaking about here: terrorist enhancement. That's what I'm trying to get. The essence of that statute, although written in that form, also should have meaning, and it should have meaning vastly greater than the offense that was committed here.

Mr. Pezzola took responsibility for that, as well. I mean, there are so many different components that Your Honor could look at as far as the facts and the evidence that were presented during this trial that would allow for you to say that this should not apply to this offense. And specifically Count 7 is an offense where Mr. Pezzola took full responsibility for. He said, "I was the one who did

this. I understand co-conspirator liability is going to apply for 6 and 7."

But ultimately, at the end of the day, and in considering, are you going to put them at a Category VI for this behavior? That's what this comes down to. So even if the guidelines go up just a little bit, you're at a Criminal History Category VI. This is Mr. Pezzola's first arrest. To make that jump is, to me -- is -- it should not even be coming close to being applied here, and that's what we respectfully submit, Your Honor.

Take a look, again, at the subsection (B) of Footnote -- of Note 4 and how that specific section applies to enumerated crimes, and the standard there completely changes, as well. The terrorist motive was to intimidate or coerce a civilian population. Either way you apply this statute, it shouldn't apply to Mr. Pezzola.

THE COURT: All right.

MR. METCALF: Thank you.

THE COURT: Thank you, Mr. Metcalf.

Let me hear -- if no other defendant -- I let the Government -- I indicated I would give them the last word because I thought most of the arguments, at least in the first instance on this one, were going to be coming from the defendants.

MR. MCCULLOUGH: Thank you, Your Honor.

So I think just starting with, kind of, where we left off, the idea that -- I think, kind of, echoed by a number of the defendants that this is just, kind of, a misapplication of terrorism. It's not mass casualties and the like. Your Honor, this -- as Your Honor knows, the focus of this was on obstructing the peaceful transition of power in this country. That is what was before the jury. That is what they aimed at. And that is a significant crime. And they did it -- they prepared to do it. They recruited individuals that they believed could help them do it, Mr. Pezzola being one of them, virtually -- and I say this intentionally -- literally the poster child for their effort. "Lords of War, #J6." These are the men that they prepared to stop the peaceful transfer of power with. It does not require mass casualties.

Look at what the Seventh Circuit said in Christianson -- it's a case we cited in our brief, 586 F.3d 532 -- "the purpose of the defendant's actions was to further" -- in that case, ELF, Environmental Liberation Front -- "political agenda, the end to industrial society. The method they chose to communicate this desire was not peaceful protest with speeches, songs, and a petition outside the facility but instead a violent attack against the facility. Because the defendants do not look the part of our current conception of a terrorist does not separate

them from that company."

The terrorist -- the application of 3A1.- -- the -- 3A1.4 has been applied to individuals who have met at a bar and gone to the IRS to deface the records.

THE COURT: Mr. McCullough, you don't have to spend any more --

MR. MCCULLOUGH: Okay.

THE COURT: -- on this argument. I mean, look, I have to calculate the guidelines as they are. What, you know -- but -- and I don't think it's my -- I don't think I have the ability to, sort of, look at the spirit of things and decide, No, the guidelines are going to be applied some other way. Of course, you know, the guidelines are advisory, so, you know -- this is what you all are going to be arguing to me after we calculate them. But I do think -- I need to calculate them, and I -- I mean, I don't find the argument that, jeez, this isn't the spirit of this guideline, or even, gee, this guideline could be applied in some way in some other case that's totally inappropriate -- that may well be, but I don't think that's the task in front of me.

MR. MCCULLOUGH: Fair enough, Your Honor. And so I -- if you'd like me to address the intent when they got to the fence, I will. Otherwise, I'll move on. I think that falls into the category of things that you --

THE COURT: Well, I'd like to hear -- I mean, this issue -- the issue that Mr. -- in particular, the issue that Mr. Smith brought up regarding the various -- actually, I assume the Government's probably more familiar with -- or as familiar with this as any defense lawyer -- is what Judge Berman Jackson -- the issue of the application of the upward departure, whether -- what rationale is different -- different members of the bench in this court have given in not applying that for one reason or another and whether any of them have adopted this issue of, well, this is, sort of, inconsistent with -- the departure is, sort of, inconsistent from the broader adjustment, and so that -- I'm not going to apply it.

MR. MCCULLOUGH: So Your Honor, it is my understanding that with respect to -- and these are some of the cases that were mentioned here -- Reffitt and -- Rodriguez, which was before Judge Berman Jackson; Reffitt, of course, before Judge Friedrich -- my understanding is that those decisions were made with respect to unwarranted sentencing disparities.

THE COURT: Right.

MR. MCCULLOUGH: The -- I do know and -- that Ms. -- sorry, that Mr. Smith pointed out this question that Judge Friedrich had raised as to whether Note 4 goes beyond 3A1.4. It was raised. I -- Your Honor, I think that -- the

question there is whether the -- the -- whether the guidelines -- the commentary goes beyond, kind of -- in any way expands the scope or purpose of 3A1.4. And here, the application of Note 4 is -- does not go -- it does not extend beyond what is promulgated in the original law, in the 1996 law, that allowed -- that directed the Sentencing Commission to basically institute 3A1.4 and expand it to these crimes of terrorism. It offers increases in the offense level up to 12 points, which is within that boundary. And it does not request any change to the criminal history category. And as -- the Ninth Circuit had looked at this in a case called Tankersley, 537 F.3d 1100 -- it's the Ninth Circuit, 2008 -- and determined that, looking at Congress's intent in passing the -- the act that allowed for this provision to be added to the Sentencing Commission -- the sentencing guidelines, rather, and determined that it did fit within the construct, and it was in furtherance of the intent of the statute, that it would be applied either to someone who was trying to institute -- or affect a private population or coerce government with a non-enumerated statute. And it was applied there in that case -- or I should say upheld there in that case.

So I don't know if Your Honor had any other questions there, but I think, kind of, fundamentally, the Note 4 departure is -- it's, of course, discretionary, but

the guideline -- in terms of the -- Your Honor's ultimate application there, but the Note 4 departure as set forth in the commentary there is a valid -- is valid and -- guidance from the commission.

THE COURT: All right.

MR. SMITH: Your Honor, there's --

THE COURT: Yes, Mr. Smith.

MR. SMITH: There's one point, I think, that Mr. McCullough just raised that's worth drilling down on for the Court. I believe that in explaining why Note 4 does not conflict with the language promulgated in Guidelines 3A1.4, Mr. McCullough said that that's because Note 4 calls for an upward departure in the offense level as though the 3A1.4 adjustment applies, but not the criminal history category --

THE COURT: Okay.

MR. SMITH: -- if I heard that correctly. Now, one of the questions the Court was asking earlier of Mr. McCullough was, "Well, what's the practical difference between the Court applying 3A1.4 as an adjustment to Count 6 and 3A1.4 as an upward departure on Counts 1 through 4?" Now, if we heard Mr. McCullough correctly, there is a practical difference because the Government appears to be taking the position that under Note 4, the criminal history category is not elevated from I to VI, unlike the adjustment. So there would be a difference in the

guidelines range if the Court were to apply --

THE COURT: Sure. I don't -- I think this is -- you're misunderstanding, I think, that -- what -- the point was if I did apply the guideline as opposed to the departure -- if I did apply the guideline, the adjustment, the question of whether, then, I also applied the departure would become irrelevant; that -- not either/or, but if it was one versus both, that that wouldn't make a difference in the guideline calculation in the way the Government's asking me to do it.

MR. SMITH: Correct, if it was one versus both, as Your Honor just --

THE COURT: Right.

MR. SMITH: -- framed it, then there wouldn't be a practical difference.

THE COURT: Right.

MR. SMITH: It would only be a difference if the Court was choosing between applying 3A1.4 --

THE COURT: Or the --

MR. SMITH: -- as a departure generally --

THE COURT: No, no, no. Right.

MR. SMITH: -- or 3A1.4, right, as an adjustment to just Count 6.

THE COURT: I understand. I think we're all on the same page. Okay.

MR. SMITH: But, Your Honor, it -- because there could be factual arguments that are specific to Count 6, this could become an issue later on. So just putting that out there. So if the Court, for example -- hypothetically speaking, if the Court were to say, "I'm applying 3A1.4 to Count 6 as an adjustment. I'm also applying -- but just to -- the avoidance of doubt, I'm also applying 3A1.4 under Note 4 as a departure on Counts 1 through 4," then suppose some future court were to decide there's insufficient evidence on Count 6. Then there would be a difference.

THE COURT: Sure. No, no, obviously.

MR. SMITH: So --

THE COURT: Right. Right.

MR. SMITH: So just --

THE COURT: Understood. It's not -- I -- I'm going to come out with what I think the right thing is. I'm not trying to hide behind the fact that it would make no difference that I could just apply it. I understand your point.

All right. It's 12:18. Let's break for lunch until 1:45. 1:45, we'll be back here and I'll rule on the outstanding motions.

THE DEPUTY CLERK: All rise. This Honorable Court stands in recess until the return of Court at 1:45.

(Brief recess taken.)

THE DEPUTY CLERK: We're back on the record in Criminal Matter 21-175, United States of America v. Ethan Nordean, et al.

THE COURT: All right. So we'll turn now to my oral ruling on the post-trial motions. It is a lengthy ruling, but it was a lengthy trial.

Before me are defendants' post-trial motions in this matter. All the defendants moved for judgment of acquittal under Federal Rule of Criminal Procedure 29(a), and I reserved judgment under Rule 29(b). So following that ruling, defendants Nordean, Biggs, Rehl, and Pezzola have now moved for judgment of acquittal under Federal Rule of Criminal Procedure (c). Those are ECF Nos. 822, 824, and 825. Defendant Tarrio moved to join Nordean's motion which, I think, remains pending, so I'll just grant that right now. ECF No. 823. Biggs, Rehl, and Pezzola also moved for a new trial under Rule 33.

To recap, the third superseding indictment charged each of the five defendants here with nine counts: Count 1, seditious conspiracy, in violation of 18 United States Code 2384; Count 2, conspiracy to obstruct an official proceeding, in violation of 18 United States Code Section 1512(k); Count 3, obstruction of an official proceeding, in violation of 18 United States Code Section 1512(c)(2); Count 4, conspiracy to use force, intimidation, or threats

to present -- prevent officers of the United States from discharging their duties, in violation of 18 United States Code Section 372; Count 5, obstruction of law enforcement during a civil disorder, in violation of 18 United States Code Section 231(a)(3); Counts 6 and 7, destruction of United States property, in violation of 18 United States Code 1361; and Counts 8 and 9, assaulting, resisting, or impeding federal officers, in violation of 18 United States Code Section 111(a). The indictment further charged Mr. Pezzola with Count 10, robbery of the personal property of the United States, in violation of 18 United States Code Section 2112.

The jury convicted Nordean, Biggs, Rehl, and Tarrio of both seditious conspiracy and conspiracy to obstruct an official proceeding. It acquitted Mr. Pezzola of Count 1 and hung on Count 2 as to him, prompting me to declare a mistrial as to him on that count. The jury further convicted all five defendants on Counts 3 through 6, obstructing an official proceeding, conspiring to use force to present -- prevent federal officers from discharging their duties; obstructing a law enforcement officer during a civil disorder; and destruction of government property, specifically a black fence valued above $1,000. However, on Count 7, the jury convicted only Mr. Pezzola of destroying a Capitol window and hung as to the remaining defendants. It

hung entirely on Count 8, the Section 111(a) charge predicated on Charles Donohoe throwing a water bottle at a line of police. And it convicted only Mr. Pezzola on Count 9, assaulting an officer in the course of his taking a riot shield, acquitting the others. And finally, the jury convicted Mr. Pezzola of robbery on Count 10.

So here's how I'll plan to proceed. Starting with the Rule 29 motions, I'll discuss the relevant standard and then explain why I do think the Government's evidence was sufficient to sustain the jury's verdicts. And after that, I will take up and deny the defendants' motions for a new trial, as well.

Rule -- Federal Rule of Criminal Procedure 29 allows a defendant to move for a judgment of acquittal on any offense for which the evidence is insufficient to sustain a conviction. After a jury has rendered a verdict, a defendant carries a very heavy burden to show it should be set aside. Courts, quote, "must affirm the verdict if, considering the evidence in the light most favorable to the Government, it determines that any rational trier of fact would have reached the same verdict." That's United States v. Hale-Cusanelli, 628 F. Supp. 3d 320 at 324, a D.D.C. case from 2022 quoting United States v. Wahl, 290 F.3d 370 at 375, a D.C. Circuit case from 2002. Courts must draw, quote, "no distinction between direct and

circumstantial evidence," closed quote, and give full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact. That is United States v. Williams, 836 F.3d 1 at 6, a D.C. Circuit case from 2016.

As Rule 29 requires, I will focus on the evidence as it existed at the close of the Government's case when the defendants first moved for relief, but because the defendants so moved again after the close of all the evidence and after the verdict, I'll address the evidence in their case in chief as appropriate, but considered at either juncture, the motions must be denied.

So we'll begin with Count 1, seditious conspiracy. To prove an offense under 18 United States Code Section 2384, as charged in this case, the Government had to prove the defendants conspired to do at least one of two things: one, oppose by force the authority of the United States; or, by force, prevent, hinder, or delay the execution of any law of the United States. As I instructed the jury, to satisfy its burden, the Government had to prove both that the charged conspiracy existed and that each defendant intentionally participated in the conspiracy with knowledge of its unlawful goals and with the specific intent to further its unlawful objectives. So I'll begin by outlining the evidence on which a rational jury could have determined

that a conspiracy existed to, by force, oppose the authority of the United States and to prevent, hinder, or delay the execution of a law. In so doing, I'll construe all the evidence, as I must, in the light most favorable to the Government and afford it the benefit of all reasonable inferences. I also note now that I'm not going to say much about Defendant Pezzola's conduct at this point because the jury acquitted him of seditious conspiracy. I will discuss his conduct and involvement with the other defendants more once I reach the third conspiracy conviction under 18 United States Code Section 372.

To prove the existence of a conspiracy, the Government had to prove that at least two people, in some way or manner, explicitly or implicitly came to an understanding to accomplish the charged unlawful objectives. They didn't have to prove that the members of the conspiracy agreed to all the details or to the specific means by which they would accomplish their ends. They only had to prove that the conspirators shared an explicit or implicit mutual understanding to try to achieve a common and unlawful objective.

In broad strokes, a reasonable juror could have concluded, based on the following, that the follow- -- based on the following, that the following evidence comprised -- essentially comprised the defendants' conspiratorial

agreement.

During a debate between former President Trump and then candidate Joe Biden, a moderator called upon President Trump to disavow, quote, "white supremacist," closed quote, organizations that supported him. When former President Trump asked who he meant, Biden chimed in, answering, the Proud Boys. In response, former President Trump said "Proud Boys, stand back and stand by."

A rational jury could have concluded from that evidence that this comment galvanized the Proud Boys organization and aided their recruitment. Indeed, several of the defendants here showed great enthusiasm that former President Trump had mentioned them. At that time, Tarrio, Nordean, Biggs, and Rehl were all leaders or prominent members of the organization. Tarrio, who was at that time the organization's national chairman, posted on his Parler account, quote, "standing by, sir."

Then later that year, former President Trump lost several key swing states and, with them, the election. The defendants' social media commentary reflected increased frustration over failed efforts to challenge the outcome in the courts or otherwise. Twice, Mr. Tarrio traveled to Washington, D.C., to lead other Proud Boys at so-called Stop the Steal rallies. Nordean, Biggs, and Rehl all joined Tarrio for the second rally in December. At both events,

violence erupted, which these defendants then celebrated in broadcasts online. In some instances, videos of the Proud Boys' use of street violence in furtherance of their political goals was used a recruitment tool for the organization.

However, at the December rally, a Proud Boys member, Jeremy Bertino, was stabbed in a violent outbreak -- from -- by someone who the Proud Boys believed was Antifa. After the rally, Tarrio said in a Telegram chat of Proud Boys chapter presidents, including Nordean and Rehl, that the problem at the December rally was, quote, "dudes not listening to a simple chain of command," bemoaning that he had posted rules that had not been followed. That's Government's Exhibits 513-34 and 513-39.

In the early morning of December 19th, 2020, just a few weeks before January 6th, former President Trump posted on Twitter, quote, "big protest in D.C. on January 6th. Be there. Will be wild." Exhibit-1102. Two hours later, while discussing the Proud Boys' organizational reputation, Tarrio messaged Biggs that, quote, "the drinking stuff helps us mask and recruit," closed quote. Biggs replied, quote, "but we recruit losers who want to drink. Let's get radical and get real men." Exhibit-525-5. Later that day, Tarrio, Nordean, and Biggs had a 15-minute video chat. And later that evening, in the early morning hours of

December 20th, Tarrio created an encrypted Telegram chat group called the Ministry of Self-Defense, or the MOSD. That's Exhibit-501-1. The group included Tarrio, Biggs, Nordean, and Rehl, as well as Charles Donohoe, Jeremy Bertino, and John Stewart.

Based on the evidence at trial, which I'll soon walk through in detail, a reasonable jury could have concluded that the MOSD, created immediately after Trump's call for supporters to rally in D.C. on January 6th, and Tarrio and Biggs's discussion, manifested the defendants' and other leaders' conspiratorial agreement and objective: To recruit, organize, and, if necessary, deploy the Proud Boys' so-called rally boys on January 6th to stop the unlawful [sic] transition of power; that is, to weaponize those members that had displayed a willingness to use violence as to achieve the organization's political goals instead of just drinking and socializing.

So the question now is what other evidence, viewed in the light most favorable to the Government, supports the jury's verdict that the agreement I just described actually existed. Of course, it's not possible, sitting here today, to identify every single piece of evidence in the Government's months-long case in chief that supports denying the Rule 29 motions. But I will discuss here some of the key evidence, apart from what I just mentioned, upon which a

reasonable jury could have concluded that the seditious conspiracy charged -- that was charged, in fact, existed. I'll break that evidence down into three buckets which should proceed more or less chronologically. First, the evidence that suggests the defendants and their other co-conspirators, including at least Bertino and Stewart, individually intended to use violent means to achieve their political ends in this period after the election, including to stop the transfer of presidential power. Second, I'll outline the evidence on which a jury could have concluded that the defendants assembled the MOSD as a tool to accomplish that shared objective. And, third, I'll describe the defendants' conduct and statements on January 6th itself that support the existence of that agreement.

So in the Telegram chat -- in the Telegram group for Proud Boys chapter presidents in which members celebrated former President Trump's comment, Mr. Tarrio responded, quote, "guys, stand by." Exhibit-514-3. About an hour later, in a response to one member's question about what exactly former President Trump's comment meant, Stewart, a soon-to-be MOSD leader, responded, quote, "I read it as stand by. Don't engage immediately, but be ready to go," closed quote. That's 514 -- Exhibit-514-7. Separately, on Parler, Biggs announced that, quote, "Trump basically said, go fuck them up," closed quote, likely

referring to Antifa. Exhibit-603-66.

Afterward, the evidence reflected that a divide emerged within the Proud Boys leadership, with Tarrio and Nordean seemingly on one side and at least some organizational leaders on the other. Members of the Proud Boy elders chat Skull and Bones took issue with Biggs's public comments after the presidential debate. They asked Tarrio, who was close with Biggs, to tell him to take his posts down, disagreeing with Biggs's interpretation of what former President Trump said and expressing concern that if Biggs didn't, quote, "shut up," closed quote, Proud Boys would get hurt. Exhibit 500-3. Tarrio, however, told them to, quote, "let this play out," closed quote, and refused to, quote, "disavow a guy that has helped the Proud Boys every step of the way," closed quote. That's Exhibit 500-5.

Around the same time, the elders discussed how to handle messages that had been posted publicly from a Proud Boys uncensored chat along with some of Biggs's posts. Nordean suggested, quote, "Why don't we just fash the fuck out so we don't have to worry about these problems anymore," closed quote. He elaborated "politics ain't working for nobody; optics game doesn't work," closed quote, and, quote, "it's time to fuckin' rage, not pay [sic] tea time with rhinos." Exhibit 500-15.

Criticism of Biggs did not debate -- abate, but

neither did Tarrio's support. In the official presidents chat, Tarrio defended Biggs by explaining that he helped -- he helps Tarrio, quote, "organize," closed quote. When someone asked if it would be a big deal for Tarrio to, quote, "tap the Biggs breaks," closed quote, for a while, Tarrio responded that he, quote, "depended on Biggs and Rufio," a nickname for Nordean, quote, "to make decisions," closed quote, at events. That's Exhibit-514-37.

A reasonable jury might have taken all of this as -- all of this early evidence unifying Tarrio, Biggs, and Nordean, and setting them apart from the other Proud Boys leadership, and suggesting an intent and motive to form the MOSD.

Defendants' suggestions that violence could be needed or would be needed to address the election results continued apace.

Beginning with Tarrio, he posted to his Parler account on November 5th that the Proud Boys would not, quote, "stand by and watch" our country "America be," quote, "taken over by these socialist pigs," closed quote. Exhibit-600-2. The next day, he posted that, quote, "the media constantly accuses them of wanting to start a civil war," warning them to, quote, "be careful what they ask for" because they "don't want to start one, but they will sure as fuck finish one." Exhibit-600-5.

After media -- major media outlets announced that Joe Biden had won the election, quote, "he remarked that the Proud Boys would be rolling out because the stand-by order has been rescinded." Exhibit-600-6. And as January 6th approached, Tarrio's rhetoric continued. On New Year's Day, he posted, quote, "let's ring in this year with one word in mind. Revolt"; as well as "New Year's revolution." Exhibit-600-52 and 54.

The morning after the election, Biggs posted a video on his Parler saying there would be a, quote, "civil war," closed quote, because defendants [sic] were, quote, "poking the bear," closed quote, trying to steal the election. Exhibit-603-1. He later added that the left didn't, quote, "realize they were radicalizing people," closed quote, and it would be, quote, "time for fucking war if they steal this shit," closed quote. That's Exhibit-603-2 and -4. A few days later, he remarked that the state of the country now is -- the state of the country now is all the evidence you need to understand why we need the Second Amendment. Exhibit-603-9.

Rehl posted that he hoped, quote, "firing squads," closed quote, would be reserved for those who were trying, to, quote, "steal the election," closed quote. Exhibit-602-59.

At the same time, and along similar lines, the

defendants' statements suggesting a hostility toward and a willingness to forcibly oppose law enforcement in relation to the election results. In response to a headline in December suggesting that police officers in Michigan had prevented GOP electors from entering the state capitol, Biggs posted, quote, "we the people will treat your thin blue line like we do Antifa. We will knock you to your unconstitutional asses. Get in our way and get walked over. You will become the enemy of the state. You will be tried for treason. You will have no chance. FAFO. We aren't here to play games. This is war." Exhibit-603-33.

Nordean made similar comments. In mid-December 2020, he echoed the views of someone in the elders chat who said, quote, "there wasn't much reason to ally before other than punching commies, but now there's a real reason. We are months away from gulags. It's now or never. We fight or we get locked up." Nordean responded, "perfectly said, my brother." Exhibit-500-40.

Then in a podcast on December 28th, 2020, Nordean remarked that, quote, "the only thing left," closed quote, was to use force against the government. He clarified that he didn't want to use force against the government because, quote, "the repercussions are unknown," but he would, quote, "prepare an army," closed quote, to "literally replace," closed quote, the officials in charge. Exhibit-608-C.

Then, again, a few days later, during another podcast with Jeremy Bertino, Nordean explained that, quote, "when police officers or government officials are breaking the law," quote, "you have to use force," closed quote. Exhibit-609-B. In his view, doing so was the point of, quote, "the organized militia part of our Constitution," closed quote. Again, that was Exhibit-609-B.

Collectively, a reasonable jury may have viewed this evidence that defendants believed violence was necessary to stop the presidential transition. More specifically, a jury might conclude -- a rational jury -- that these statements reflect their thinking also that law enforcement had aligned against them and that they would need to battle law enforcement to accomplish their goals.

The defendants' words became actions at two so-called Stop the Steal rallies in D.C. on November 14th, 2020, and December 12th, 2020, both of which were coordinated to protest the election results.

Of the defendants, only Tarrio and Pezzola attended the November rally, although Pezzola -- and Pezzola was not yet a Proud Boy. Tarrio posted a photo of himself on social media with a caption saying that, a, quote, "can of whoop-ass" was on its way to D.C. Exhibit-600-15. And violence indeed broke out the night of the rally between the Proud Boys and Antifa, or at least those that they believed

were Antifa.

After the rally, the defendants celebrated what had happened that day, including violent clashes, as a success for the organization. Rehl shared videos of a Proud Boy smashing a woman in the head with a helmet, knocking her unconscious. He commented that the video showed the Proud Boys not laying down and standing up for America. Exhibit-602-9. Rehl posted another video interlacing clips of the Proud Boys' street violence in Washington, D.C. with videos about the election, commenting, quote, "be careful what you wish for when you ask to release the Kraken," closed quote. Exhibit-602-12.

Biggs and Nordean also commented on the violence at these rallies. Biggs remarked that he had spoken with Tarrio and that, quote, "the Proud Boys had one hell of a day," closed quote, and, quote, "in self-defense, they whipped commie ass and were victorious." Exhibit-603-13. Within minutes, Nordean also posted that the Proud Boys killed it in D.C. and that, quote, "more needs to be done to," quote, "come together and run these scumbags out of our cities and anyone supporting them." Exhibit-601-3.

Still, while the defendants publicly celebrated the November rally, Biggs privately expressed to Tarrio that it wasn't enough. Two days afterward, Biggs messaged Tarrio, I'm ready to war. When Tarrio responded, we warred

on Saturday, Biggs responded, that's a sparring. War hasn't happened yet. I'll let you know when a war starts. Tarrio said, quote, "I'll be at your house when it does. I can't throw a rock, but I can shoot," to which Biggs responded "I got thousands of rounds and guns." Exhibit-525-1.

Another rally took place on December 20th, 20- -- December 12th, 2020, which each of the defendants attended. Transcript 4480 to 84. Former President Trump had announced the rally, and Mr. Biggs shared a flyer encouraging Proud Boys to attend and answer the, quote, "call to action." Exhibit-603-19. He later posted online that he was ready to rumble. Exhibit-603-27. On December 7th [sic], the night before the rally, Tarrio gave a speech to a group of Proud Boys that had traveled down for the event. He encouraged the men to resist the stolen election and announced, quote, "if you want a war, well, you've got one." That's trial transcript 4487 through 88. And on the evening of December 12th, Tarrio led a march through the city, flanked by Biggs, Nordean, Rehl, and Pezzola. A group of Proud Boys stole a banner, and Tarrio joined them in setting it on fire. Exhibit-273; transcript 9970.

Later that evening, violence broke out between several Proud Boys and a pedestrian they believed to be Antifa. While the video footage at trial might admit multiple interpretations, at least in one light it shows

multiple Proud Boys ganging up on that pedestrian. The man pulled out a knife as he attempted to escape the conflict and, in his retreat, he stabbed multiple people, including Bertino. Exhibit-272, Exhibit-609-29, and transcript 9973. After the stabbings, a larger group of Proud Boys, including Mr. Pezzola, attacked the man until police intervened. Government Exhibit-272; transcript 10076.

The defendants mostly celebrated December 12th's events, but, as I mentioned earlier, Tarrio at least viewed the disorder as a chain of command problem. Exhibit-514-34. In that way, a reasonable jury might have interpreted the events of November and December 2020 as catalysts for Tarrio's decision to start the MOSD. Indeed, a reasonable juror might have concluded that other Proud Boys leaders' responses to the events of the 12th was the final straw solidifying the divide between Tarrio and chapter presidents that would rather have seen the organization take a step back.

In a lengthy message to the presidents chat, Mr. Tarrio explained, a lot of us have lost everything to this. Now we're fighting like women because we have made an offensive push in some social media posts. Do we have to reassess how we do things? Yes. This was a learning experience on how to march 1,000 guys down a street. I posted rules that, if they would have been followed, we

wouldn't have even been talking about it. So excuse me if I'm fighting back against retards that have no idea what went on. Not only the ones that weren't there, but the ones that didn't follow the plan. So fuck all you pieces of shit. Exhibit-514-39.

And as I'll discuss more later, the evidence can easily be interpreted -- this evidence can easily be interpreted as showing that the fallout from that event continued to motivate the defendants through January 6th. In particular, a rational jury might have found it marked a turning point in the defendants' and their co-conspirators' attitude toward the police; that it helped inspire Tarrio's decision to implement a more solid command structure within the MOSD; and that it otherwise reflected the defendants' intent to use targeted force or street violence to advance their political goals with respect to the election.

Before proceeding further, I just want to stop and take a moment to discuss how the evidence about the defendants', and the Proud Boys' in general, feud with Antifa fits into the larger puzzle here. The Government offered this evidence for a variety of reasons, including as circumstantial proof of the defendants' intent and motive on January 6th. But the defendants repeatedly objected that evidence of violent clashes with Antifa wasn't relevant to their intent to oppose the government by force. I allowed

the evidence for all the reasons that are already on the record, but I want to elaborate now why I think a reasonable juror might have concluded that the defendants' participation in and celebration of violence against Antifa was some evidence of their ultimate intent to use force against the Government.

Construed in the light most favorable to the Government, the record contained ample evidence that the Proud Boys' feud with Antifa and their political battles against the government and law enforcement became intertwined in this period after the election. When President Trump told the Proud Boys to stand back and stand by on the debate stage -- that was before the election -- he clarified that someone still needed to do something about Antifa. Exhibit-1101. This comment prompted Biggs to suggest that Trump had given them license to go eff them up. Exhibit-603-66.

Matthew Greene, a Proud Boy who attended the Stop the Steal rallies and was with Pezzola on January 6th, testified that the Proud Boys, quote, "viewed themselves almost as the foot soldiers of the right where Antifa were the foot soldiers of the left." That's the transcript at 5374. Jeremy Bertino went on to testify that they perceived D.C. police as protecting Antifa from the Proud Boys at the December rally. Transcript at 9966. Some in the

organization began calling police officers coptifa. For example, Exhibit-507-11. All in all, a reasonable jury might have concluded that the defendants viewed their conflict with Antifa as one piece of a larger political war, culminating in the disputed election results.

So all in all, a reasonable jury might have taken all that evidence -- that -- the defendants' individual statements regarding the intensity of their belief that the election had been stolen, their comments about an impending war and being left with no choice but to resort to violence, their growing disdain for law enforcement, and their participation in or celebration of the Proud Boys' violence against political opponents on the opposite side of that war as evidence of their shared motive and intent to form the charged conspiracy.

I'll now turn to the creation and management of the MOSD, which the Government argued to the jury was the manifestation of the defendants' and their co-conspirators' unlawful agreement. Put another way, a rational jury might have concluded that the defendants intended for the MOSD to be a vehicle by which they could carry out their unlawful ends.

There are several pieces to the puzzle here which, combined, would have permitted a rational jury to draw the conclusion I just said. First, there is some specific

evidence that directly informs Mr. Tarrio's intent which, as the chapter's founder and leader, is particularly relevant. Second, the defendants' and other MOSD leaders' conversations among themselves betray a shared desire to use or facilitate the use of force on January 6th. And third, conversations among the MOSD members, the defendants, and other leaders recruited to the chapter which further informed the chapter's true purpose or at least a purpose that a rational jury could infer.

First, Mr. Tarrio suggested early on that if it were up to him, he would coordinate an effort similar to the one that ended up happening on January 6th. In the election's immediate aftermath, on November 6th, a member of the official presidents chat asked "Okay, genius. What's your plan to stop this from unfolding?" Tarrio responded, quote, "not sit on Telegram. In those swing states, get to the election offices. No colors, but bring people." Exhibit-514-12. The idea mirrors what he directed on January 6th, but with a focus shifted to the Capitol.

Traditionally -- additionally, there's enough evidence for a reasonable jury to have concluded that Mr. Tarrio began the MOSD and recruited the other defendants as leaders specifically to prepare for January 6th. As I mentioned earlier, in the early morning hours of December 19th, Mr. -- former President Trump called his

supporters to be in Washington, D.C., tweeting, quote, "big protest in D.C. on January 6th. Be there. Will be wild." Exhibit-1102.

About two hours later, Tarrio texted Biggs that, quote, "the drinking stuff," closed quote, within the Proud Boys, quote, "helps mask and recruit," closed quote, but noted that "some chapters don't leave their bars and homes," closed quote. Biggs retorted that, quote, "they recruit losers who want to drink," closed quote, instead -- and suggested instead that they should, quote, "get radical and get real men." He said no one on their side, quote, "sees a drinking club. They see men who stand up and fight." A few hours later, he texted Tarrio again that he had purchased a ticket for early January. Exhibit-525-5.

Later that afternoon, Tarrio texted Biggs and Nordean in a group chat asking to -- for a video call. They spoke for about 15 minutes. A few hours after the call, Biggs messaged the group, quote, "Trump's calling the troops in on the 6th. Might be a big deal." Exhibit-518-1. And that evening, in the early morning hours of December 20th, Tarrio created an encrypted chat on Telegram with Biggs, Nordean, Rehl, Bertino, Stewart, and Donohoe. Exhibit-501-1. Tarrio positioned himself, Nordean, and Biggs at the top of the command structure. Rehl fell a tier below them. Exhibit-500-9. They would later add other

leaders, including Aaron Wolkind, a Proud Boy who worked with Rehl in the Philadelphia chapter. Exhibit-543-1. Based on this chain of events, a reasonable juror might have concluded that the defendants intended to take -- to create a separate chapter within the Proud Boys of real men like them who were willing to stand up and fight on January 6th.

The way Trump pitched the new -- the way Tarrio pitched the new chapter to the Proud Boys elders further suggested a relative -- a revolutionary motive. A jury could have concluded that the name "Ministry of Self-Defense," closed quote, was tongue in cheek. Tarrio proposed the chapter as a way, quote, "to hold unruly members accountable at events" because "rally boys will always be a thing. They just need to be able to control and harness themselves in large numbers," closed quote. That's -- well, that's Exhibit-500-72. He further told the group that the chapter's mission statement was, quote, "to standardize event organizing." But shortly thereafter, he messaged again: "whispers, 1776." Exhibit-500-72 and 74. From this, a reasonable juror might have concluded that the MOSD was not solely about organizing rallies better and holding rally boys accountable, but rather organizing rallies and directing them as a force and a revolutionary force. Buttressing this reasonable inference are Tarrio's earlier statements saying he'd be inclined to disguise his

true motives, once noting that he always sees -- always uses, quote, "plausible deniability," closed quote, to his advantage. That's Exhibit-500-15.

Although I'm jumping ahead a little bit, the last thing I want to discuss here is an important piece of evidence that received a great deal of attention at trial, the 1776 Returns document. On December 30th, Tarrio received a document from a girlfriend titled, quote, "1776 Returns," closed quote, that set out a plan to occupy government buildings in Washington, D.C., on January 6th to protest the election results. Exhibit-528-1. The document calls for -- called for groups of people to amass outside government buildings and overwhelm the defenses with a sudden surge of the crowd. Exhibit-528-1A. The document called this, quote, "storming the Winter Palace," closed quote, apparently referencing the Russian Revolution.

The Government offered evidence that Tarrio engaged with this document in some way; meaning, it may have shaped his intent. Special Agent Nicole Miller testified that Tarrio's phone records revealed that he interacted with the document and Googled "Winter Palace." Transcript 12966-67. Tarrio also twice invoked this relatively obscure reference. On January 3rd, a different woman remarked to Tarrio in a private text thread that if her kid, quote, "is anything like Tarrio, she's in so much trouble," closed

quote, because he'd, quote, "be like, mom, I'm going to go take the Capitol," closed quote. Tarrio responded immediately, quote, "the Winter Palace," closed quote. Exhibit-538-18. Tarrio also used the term in a private conversation with Bertino as the riot unfolded on January 6th. Exhibit-530-5. Tarrio thereafter Googled "the Winter Palace" and interacted with the document on his phone. From this evidence, a reasonable jury might have concluded that Tarrio designed the MOSD as a revolutionary force to oppose the transfer of power.

So now, I'll turn to evidence about how the chapter unfolded and prepared for January 6th, again, continuing to inform that conclusion and -- from which a reasonable jury might have inferred that the group indeed shared that unlawful purpose.

Around the time defendants formed the MOSD, they also began planning their trip to D.C. for the 6th. Certain facts in evidence may have suggested to the jury that they didn't see it as an ordinary rally. For one, Tarrio instructed the members of one Telegram chat group called, quote, "Operation D.C. Street Sweepers," closed quote, which included Nordean and Rehl, that they were not to wear Proud Boys colors on January 6th. That's Exhibit-537-19. This instruction would become a common refrain, plausibly suggesting to a jury the defendants' intent to obfuscate

themselves and evade identification by law enforcement.

Biggs echoed the sentiment in another group titled Space Force chat which also included Tarrio. He told a member that, quote, "so many Proud Boys wanna cry about optics," closed quote, so they would be attending the January 6th rally, quote, "as concerned citizens who hate commies," closed quote. When one member commented that he was, quote, "confused by the thing on the 6th," wondering whether former President Trump would, quote, "cross the Rubicon" or whether he, quote, "just wanted a bunch of people to wave flags and stomp their feet," and another remarked that, quote, "maybe, shit's actually going down," closed quote, Biggs replied that he was not booking his ticket as a joke. He further noted Nordean and Tarrio would also be attending. That's Exhibit-517-1.

Back in the MOSD chat, the defendants and other co-conspirators discussed further preparations for the 6th, including purchasing tactical gear and sharing emergency contact lists in case of injury. Again, from this -- that's Exhibit-501-4, 25, and 13. From this, the jury might have concluded that the defendants were preparing for violence on the 6th. The conversations among MOSD leadership further supported a reasonable inference that they intended the chapter to be a, sort of, tactical force on January 6th. In one message thread in the leaders chat, Donohoe mentioned

that they should, quote, "hear the guys out on," quote, "escalation of force," closed quote, and, quote, "standard operating procedures." He further noted that he wanted to discuss a, quote, "quick reaction force," closed quote. In response, Bertino, Rehl, Donohoe, and a user called Twisted Zach discussed Proud Boys they saw acting violently at the December 12th rally. Exhibit-501-41. Additionally, Biggs suggested that the group should avoid posting anything online until after the 6th to avoid, quote, "giving away locations or their numbers," closed quote. That is Exhibit-501-12.

Additionally, throughout this period, the MOSD leaders expressed a hostility toward police that a reasonable jury might have found reflective of their shared objective to unlawfully oppose the Government's authority on January 6th. Specifically, the evidence supported a reasonable inference that the defendants were ready and willing to use force against law enforcement officers, protecting Congress's proceedings whom they viewed as traitors.

For example, on January [sic] 30th, Tarrio received a tip that he would be arrested for his actions at the rally back on December 12th. When he told the other MOSD leaders, Stewart said they "could have a fucking riot," closed quote, on the 6th if the Proud Boys didn't know the

arrest was coming. When Tarrio suggested that the Proud Boys, quote, "wouldn't punch cops," closed quote, Stewart responded, quote, "I'm not so sure. We are on the razor's edge," closed quote. Bertino then encouraged Tarrio not to make a statement the night before the arrest, but, quote, "just let it happen because," quote, "maybe, it's the shot heard round the world and the normies will fuck up the cops." Exhibit-501-40.

A conversation among the defendants and cooperators [sic] on January 6th -- on January 1st marked a notable shift in the group's disposition. After discussing another rally where police, in their view, sided with Antifa over the Proud Boys, Wolkind posited that the group's disposition -- quote, "disposition toward the police needs to be reevaluated," closed quote. Stewart remarked that, quote, "if would be an escalation that we would never be able to back away from," closed quote, but he was, quote, "ready for it." He also added that the Proud Boys could have, quote, "ran the police the fuck over in D.C. and they wouldn't have been able to do shit," closed quote, presumably referring to the rally back on December 12th. And at that point, Tarrio responded that he, quote, "had a plan for it but someone talked him out of it," closed quote. Biggs echoed that he wanted to, quote, "fuck shit up," closed quote, and was ready to, quote, "be the Zamboni and

roll over motherfuckers." Bertino said "#FuckTheBlue." And Stewart agreed, resolving that, quote, "they chose their fucking side, so let's get this done." Exhibit-501-50.

Then on January 3rd, the group discussed logistics for the 6th. Stewart sent a voice note suggesting, quote, "the main operating theater should be out in front of the House of Representatives. It should be out in front of the Capitol building. That's where the vote is taking place and all the objections," closed quote. Rehl noted that unless Tarrio was planning on giving a speech elsewhere, quote, "the Capitol is a good start," closed quote. Exhibit-501-56. Tarrio answered with a voice note the following day, saying, quote, "I didn't hear this voice note till now. You wanna storm the Capitol," closed quote. That's Exhibit-501-57.

Later that day, Tarrio landed in D.C. knowing he would be arrested. Just before his arrest, Tarrio spoke on the phone with Biggs for two minutes. After, he texted Biggs, quote, "whatever happens, make it a spectacle," closed quote. Biggs responded "yup." Exhibit-519-1.

After police arrested Tarrio in D.C. on January 4th, the other MOSD leaders tried to nuke the chats he was in, including all the MOSD chats, in case the police got access to his phone. For example, Exhibit-501-62. A reasonable jury might have believed that this conduct

displayed a consciousness of guilt relating to the charged conspiracy.

And one last thing I'll mention here is that a reasonable jury might have credited Jerry [sic] Bertino's testimony, the only MOSD leader to testify for the Government. He described at length his understanding of the group's beliefs about the election, law enforcement, and the need to use force. And he expressly testified that he and the defendants agreed implicitly to forcibly stop the election -- the -- or execution of a law. Transcript 10310. When pushed on cross-examination, he explained that there was no detailed plan in place for how to accomplish the goal but that they had formed an implicit agreement to do so all the same. That's Transcript 10307-10.

I'll turn now to the evidence from the MOSD membership chats that a reasonable jury might have believed to somehow reflect the defendants' conspiratorial intent, as well. Construing the evidence in the government's favor, the dynamic between MOSD leadership and membership reveals that defendants' and their -- reveals the defendants' and their co-conspirators' intent to deploy the MOSD membership to achieve the objective of their conspiratorial agreement, or at least so a rational jury could have concluded. Leadership instructed members to keep everything in the group private, to strictly adhere to a chain of command, to

stay on topic. And to, quote, "fit in or fuck off." See, for example, Exhibit-503-1, 503-3, 613-E and 614. As Stewart put it, members were to, quote, "turn their brains off and follow," closed quote. That's Exhibit-613-E.

The defendants and their co-conspirators withheld their objectives from the membership -- withheld their objectives from the membership. During an introductory Zoom call explaining the MOSD's purpose, leadership made clear that every event the group attended would have a strategic objective, including January 6th. But when the members asked about the objectives for January 6th, Tarrio refused to reveal it. Exhibit-613-D and -M.

A jury might have inferred that the leaders' undisclosed objective was part and parcel with the group's general tenor. I'm not going to go through every message, obviously, in detail, but -- there are many, but suffice it to say that MOSD members regularly advocated what appeared to be for violence on January 6th or otherwise suggest a -- suggested a willingness to use force. Notable examples include one member saying he was, quote, "ready to log into Minecraft," closed quote, upon entering the group, which the Government offered evidence to show was a euphemism for breaking the law or being violent. Exhibit-503-5. Another member, following an introductory Zoom call, remarked that he was honored to join the chapter and, quote, "wanted to

kick ass when it was time to kick ass." Exhibit-503-23. One discussed storming state capitols if they couldn't make it to D.C. 503-13. And just a few days before January 6th, a member remarked, quote, "gonna be war soon," to which another responded, "yes, sir, time to stack those bodies in front of Capitol Hill," closed quote. Exhibit-507-10. And when one member questioned, "what would" -- "what would" -- "do" -- "what would they do if 1 million patriots stormed and took the Capitol building," Stewart responded "They would do nothing because they can do nothing." Exhibit-507-16.

A reasonable jury -- a rational jury might have construed the MOSD members' repeated calls for using force as reflecting the leaders' motives and intent and the chapter's purpose for a few reasons. First, the defendants and other MOSD leaders had hand-selected each member of the MOSD, and a reasonable juror might have inferred from all the evidence that the defendants' pattern of selecting Proud Boys who were interested in using force was no coincidence. Indeed, as the Government noted throughout the trial, the defendants never rebuked -- second, as the Government noted throughout the trial, the defendants never rebuked these comments. Of course, a jury might have refused to draw any inference from the defendants' silence on these remarks. But construing the evidence in the Government's favor, the

opposite evidence -- the opposite inference is just as reasonably possible. The jury might have inferred that if the MOSD was truly supposed to be defensive and did not contemplate offensive force, one of the leaders would have stepped in to discourage this talk. After all, members were repeatedly instructed to stay on topic, and sometimes MOSD leaders did criticize members for straying into other unrelated issues. For example, Exhibit-525-7.

I'll now turn to how the events of January 6th unfolded, focusing on the roles Nordean, Biggs, Rehl, and other MOSD members played in leading the Proud Boys in a march to, around, and ultimately into the Capitol. In short, as I've said before, sometimes the best evidence of a conspiracy is the concerted action that, in fact, results. So a reasonable jury might have interpreted the concerted action I'm about to discuss -- particularly the defendants' and their co-conspirators' actions in leading their followers at critical breach points -- as evidence supporting the existence of the conspiratorial agreement.

After Tarrio's arrest, Nordean and Biggs took over command and assured the membership that, quote, "the rally's continuing." Exhibit-510-9. The evening of January 5th, Biggs told MOSD membership that he and Nordean had a plan, which they discussed with Tarrio. Exhibit-509-23. In a private encrypted message, Nordean instructed his men to

meet at the Washington Monument at 10 a.m. and that, quote, "from there," closed quote, the men would be, quote, "marching to the Capitol," closed quote. That's Exhibit-551. Donohoe, Bertino, and Stewart then echoed that in the MOSD member chat as well as the other chat group they created to -- they echoed that in the MOSD member chat as well as another chat group they created to communicate with everyone present in D.C., the, quote, "Boots on the Ground," closed quote, chat group. Exhibit-510-24 and 26, and Exhibit-512-5.

On the morning of January 6th, Donohoe, Stewart, Wolkind, and Bertino discussed their hopes for the day in the MOSD leaders chat. Wolkind wrote "I want to see thousands of normies burn that city to ash today." And, quote, "the state is the enemy of the people." Bertino responded, quote, "would be epic. We are the people," closed quote. And Stewart added "I will settle with seeing them smash some pigs to dust," noting, quote, "these normie-cons have no adrenaline control." Bertino said "fuck it. Let them loose." And Stewart remarked that the police, quote, "went too far when he [sic] arrested Tarrio as a scare tactic." Exhibit-509-26. The defendants revealed no disagreements with these sentence -- with these sentiments, and Bertino further testified that his conversations -- that his conversations with Proud Boys seemed desperate.

Transcript at 10137 to 38.

Later that morning, a large group of Proud Boys met at the Washington Monument. Transcript 5482. Consistent with the MOSD leaders' instructions, the group did not dress in Proud Boys colors, but many wore tactical equipment. Transcript at 5481 and Exhibit-1000 at -- and Exhibit-1000. Nordean and Biggs, with Rehl by their side, riled the crowd before the march, particularly against the police. Nordean contrasted Tarrio's charges with law enforcement's treatment of the person who had stabbed Bertino and others at the December rally, saying, quote, "we put our lives and safety and everything on the line and these people put us in jail. It's time to just say no," closed quote. And adapting the pro-law enforcement tag line, quote, "back the blue," closed quote, to the Proud Boys' colors, he encouraged the group to, quote, "back the yellow. Back the yellow, gentlemen." Again, that's Exhibit-1000. On his heels, Biggs announced, quote, "after what they did to our boy Enrique, we're going to let D.C. know we're goddamn here. So let's go fucking kick some goddamn ass," closed quote. After a pause, he added, "metaphorically speaking, but you know what I mean," closed quote, at which the crowd laughs.

At around 10:45 a.m., Nordean, Biggs, and Rehl marched the Proud Boys group, including MOSD members, down

the National Mall and toward the Capitol and away from former President Trump's speech. Along the way, Nordean escalated his rhetoric. As the group walked past the front face of the Capitol, Nordean announced, quote, "we represent the spirit of 1776," closed quote, and threatened to, quote, "remind those," closed quote, who had forgotten their oaths what they mean. Again, it's Exhibit-1000. As the group marched past Capitol Police officers, members of the group taunted the officers, yelling "treason" and warning "don't make us go against you."

When the marching group reached the east side of the Capitol, one man yelled out "Let's take the fucking Capitol," closed quote. The man was chastised and told not to yell that. Nordean responded into the microphone "It was Milkshake, man, you know? Idiot." Another man said "Don't yell it, do it." But no one, including Mr. Nordean, instructed otherwise. That's Exhibit-1000.

Rehl, who had led the marching group alongside Nordean and Biggs, also helped coordinate the group as they marched toward the Capitol. Exhibit-1000. He also communicated with MOSD leaders who were not present in D.C. about the group's progress. For example, Exhibit-509-29.

Shortly before noon, Nordean, Biggs, and Rehl led the marching group back around the Capitol to a group of food trucks. They waited there for about 30 minutes, and

then Nordean organized the group to finish the march back to the Capitol right before the electoral count was set to begin. Exhibit-1000 and 1001.

Biggs, Nordean, Rehl, and the member [sic] in the marching group then played integral roles in breaching police lines at the Peace Circle, the first security breach of the Capitol invasion. As they approached the sparse and mostly peaceful crowd already gathered, Biggs led the marching group in chants that included "Whose Capitol? Our Capitol" and "1776." Example -- Exhibit-1001. Within minutes, the crowd grew and became more agitated, and then they surged forward toward a barricade manned by five officers. Exhibit-1001. As the crowd surged forward, and construing the evidence in the Government's favor, Nordean and Biggs can be seen trying to organize the men to follow their lead, and just after that the men and the entire crowd plowed through the barricade. Meanwhile, Rehl moved to the front of the crowd and, again, construing the evidence in the Government's favor, because he vigorously disputed this at trial, yelled, quote, "fuck them, storm the Capitol," as he went through the barricade, as well.

After the first barricades fell, the defendants and other Proud Boys led the way onto the Capitol grounds. Rehl moved to the front of the crowd surrounded by other Proud Boys. Transcript 12318 to 19, Exhibit-44-D [sic].

Biggs filled -- filmed a selfie-style video as he charged up the walkway, capturing Nordean celebrating with the Proud Boys hand gesture and Biggs defiantly announced that they had, quote, "gone through every barricade this -- thus far. Fuck you." Exhibit-404F [sic]. Nordean and Biggs moved through the crowd in a stack formation -- that is, with the hands -- with their hands on the shoulders of the man in front of them -- with other Proud Boys to reach the very front of the crowd. Transcript 12322-23 and Exhibit-492-FX.

The next barrier was a waist-high black fence blocking off a secured area. Biggs beckoned Nordean. And, again, viewing the evidence in the Government's favor, the two combined with others to pull the fence out of the ground. Exhibit-445-BX. Nordean and Biggs charged forward with Rehl not far behind. Biggs waved the crowd forward. Exhibit-445-BY.

Shortly before 1:30 p.m., as the police began to regain control of the west plaza, Biggs and Nordean, along with other members of the Proud Boys, regrouped on the Capitol lawn. Biggs filmed a selfie-style video with Nordean and several other Proud Boys, cheering that they had just, quote, "stormed the Capitol," and claiming that January 6th was a day in infamy. Exhibit-404-LL.

At approximately 1:30, law enforcement had regained some control of the west plaza. Recognizing as

much, Rehl reported in a text message to others that the crowd was at a standstill. Exhibit-547-5. Shortly thereafter, Nordean, Biggs, Donohoe, Mr. Pezzola, and several other Proud Boys reunited at the base of the stairs leading up to the upper west terrace. A Proud Boy named Daniel Lyons Scott, who had marched behind the defendants to the Capitol, shoved two officers up the stairs, prompting the crowd's final push up to the building. See Exhibit-451X and transcript 12467. The crowd overwhelmed the officers and pushed up the scaffolding.

In the hours that followed, Nordean, Biggs, and Rehl all entered the Capitol. Biggs, in fact, did so twice. When he exited the building a second time, he filmed himself and the crowd on the east side of the Capitol and remarked, quote, "we've taken the Capitol," closed quote. Exhibit-405-I.

From all this evidence, a rational jury could have inferred that the defendants' coordinated actions that day were the product of an agreement to use force to stop the transition of power, specifically, by halting the electoral count vote. A jury might have inferred an intent to use force from the simple fact that each of Nordean, Biggs, and Rehl personally used force in some way and celebrated and encouraged violence by others as they advanced toward the Capitol. Nordean and Biggs personally helped destroy a

black fence erecting a barrier between the Capitol, law enforcement, and everyone else assembled there, which I'll discuss more later with respect to Count C [sic]. While inside the building, Rehl texted another group, quote, "civil war started," closed quote. Exhibit-547-5. And although this wasn't part of the Government's case in chief, the Government ultimately introduced evidence on Rehl's cross-examination that, at some point during a clash on the west front, Rehl shot pepper spray or some other chemical toward law enforcement. For example, Exhibit-2008. Or at least that's what a reasonable jury could have inferred from that evidence.

Beyond that, I'm not going to rehash all the so-called tools evidence right now. But suffice it to say, I think a reasonable jury might have inferred it was no coincidence that a number of the men who had been in the MOSD and Boots on the Ground chat groups, or else who joined up with the defendants for their march from the Washington Monument, ended up playing key roles in violent clashes with law enforcement in several places, including at several breach points in or around the Capitol. In addition, even though the jury acquitted Mr. Pezzola of seditious conspiracy and hung as to him on the 1512(k) count, the jury still may have considered his conduct persuasive evidence of the conspiracy as, well, what a coincidence it is that a

member of both the MOSD and the marching group happened to play a key role, again, in several breach points, including, most obviously, breaking the window into the Capitol which so many rioters streamed into it. Along the similar lines, again, the jury might have inferred it was no coincidence that an individual who initiated the first breach of the Capitol grounds did so within three minutes of putting his arm around and speaking to Mr. Biggs. That's Transcript 12241 at [sic] 45 and Exhibit-1001.

Meanwhile, off-site, but closely monitoring the day's events, the other MOSD leaders communicated publicly and amongst themselves about what happened that day. A reasonable jury might have concluded from these messages that the MOSD leaders had executed an agreement to stop the certification and even considered it a success, at least temporarily. Several leaders, including Tarrio, directed those on the ground not to back down. Additionally, Tarrio and others took credit for the day's events.

First, after Nordean, Biggs, Rehl, and other Proud Boys pushed past the first barrier, Bertino told MOSD leaders to, quote, "form a spear," closed quote; meaning, a formation that would allow them to, quote, "drive their way through a cloud -- a crowd," closed quote. That's Exhibit-1137; transcript at 10145. Then in the MOSD members chat, he instructed, quote, "storming the Capitol right

now," closed quote, and echoed the same in Boots on the Ground, telling the men to, quote, "get there," closed quote. Those are Exhibits-510-33 and 512-8. At trial, the Government asked Bertino whether he was surprised to see an MOSD leader -- specifically, Donohoe -- at the front of the crowd as it first entered into -- as it first crossed a restricted area. Bertino explained that he wasn't surprised because they, quote, "always led the way and the normies were always behind them." Transcript at 10144.

Then just after 1:30 and back in the MOSD leaders chat, Stewart shared news that the Madison building on Capitol Hill was being evacuated. Wolkind replied, quote, "ops success," closed quote. 509-34. At the same time, after the crowd advanced up the scaffolding toward the building, Stewart instructed the MOSD leaders to, quote, "accelerate," closed quote. Exhibit-510-36.

Tarrio, on the other hand, watched the riot unfold from [sic] TV from a hotel room outside the city. He posted several encouraging messages on his social media, including, quote, "proud of my boys and my country," closed quote, and, quote, "don't fucking leave," closed quote. Exhibit-600-59. In another post, he shared a photo of cowering lawmakers with the caption, quote, "When the people fear the government, there is tyranny; when the government fears the people, there is liberty." Exhibit-600-60 and -63.

Tarrio also tried to call both Nordean and Biggs while they were inside the Capitol building. Biggs returned his call and the two spoke for about 42 seconds. Exhibit-653-1; transcript -- trial transcript at 12646. In a private message, Bertino texted Tarrio, quote, "brother, you know we made this happen," closed quote. Tarrio responded, quote, "I know," closed quote. Then he added "this is it," closed quote. Bertino responded, quote, "1776, motherfucker." And Tarrio responded, mirroring the 1776 Returns document I've already discussed, quote, "the Winter Palace," closed quote. Exhibit-530-5. Later, Tarrio echoed the sentiment in the Proud Boys elders group chat, saying, quote, "make no mistake, we did this," closed quote. And when another elder asked, "what do we do now," Tarrio replied, quote, "do it again," closed quote. That's Exhibit-500-86. Late in the evening, Tarrio posted a video of himself standing in front of the Capitol ominously with the caption "Premonition." Exhibit-600-64.

Finally, and very briefly, I'll discuss how the defendants reacted to the events of January 6th. For -- a reasonable jury might have interpreted their conduct as both revealing their intent for the day and showing consciousness of guilt. I won't walk -- but all in all, as evidence of the agreement. I won't walk through all the specific messages, of course, the defendants sent, but in broad

strokes, they and other MOSD leaders expressed pride in what had happened on January 6th while emphasizing it didn't go far enough. In an interview, Biggs called January 6th a warning shot, noting that the founding fathers were, quote, "considered terrorists," closed quote. Exhibit-611-D. Tarrio told the Proud Boys chapter presidents that, quote, "God didn't put him at the Capitol for a reason, because they would still be there," closed quote. That's Exhibit-514-59. Rehl bemoaned the day -- that the day felt like a waste because the politicians didn't, quote, "get scared and realize they need to answer for this fraud," closed quote. In his view, "everyone should have showed up armed and took the country back the right way," closed quote. Exhibit-544-4. And after former President Trump gave a speech disavowing the violence, Nordean scoffed, saying, quote, "no excuse for violence? Ever? Nah, I'm good." Exhibit-515-4. From these statements and several others, a reasonable jury might have concluded that the defendants, again, did -- went to the Capitol as part of their agreement and not simply reflecting a situation where they got swept up in violence that was unexpected.

Additionally, the jury might have concluded that their conduct showed consciousness of guilt, again, further bolstering the idea of a conspiratorial agreement. After people began getting arrested, MOSD leaders tried to nuke

chat histories or remove members from groups after word got out that arrests were impending. For example, Exhibits-509-41, 509-42, 532-2, and 500-107. And although this came up in the defendants' case, I'll add that when Mr. Pezzola and another member of the defendants' marching group, William Pepe, both got charged with conspiracy to obstruct an official proceeding in late January, Tarrio asked the -- the evidence showed that Tarrio asked Bertino to instruct Pezzola to say he wasn't with the Proud Boys. That's trial transcript 19253.

As I mentioned, the Government had to prove that each of Tarrio, Nordean, Biggs, and Rehl participated in a conspiracy with the knowledge of and the specific intent to further its unlawful goals; that is, the seditious conspiracy to forcibly oppose the Government's authority and interfere with an execution of the law, all to stop the peaceful transfer of presidential power.

By and large, the evidence I've already discussed at length, in my view, gets the job on this element, specifically, the evidence about how the MOSD came to be. The MOSD was Tarrio's creation, through consultation with Biggs and Nordean. So as far as the MOSD represents the conspiracy, it also represents evidence of these defendants' knowledge of the conspiracy's objectives or, again, at least that is what a rational jury could have found.

More -- furthermore, the statements I've recounted at length -- specifically, those revealing the defendants' beliefs that violence might be necessary to resist the election results -- and their repeated references to battle and civil war -- show their awareness of the agreement's objectives. Nordean's and Biggs's on-the-ground leadership, directing a group of 200 or so Proud Boys to the Capitol and through several breach points further confirms their intent to advance that unlawful objective.

As for Mr. Rehl, even though Tarrio did not consult him directly before creating the MOSD, he was one of the first leaders added to the group and he recruited others from his chapter. He helped lead the MOSD Zoom call. And on January 6th, he led the Proud Boys group side by side with Nordean and Rehl through significant periods of the march and the attack on the Capitol. And when the group reached the first barrier at the Peace Circle, he yelled for the group to charge forward and, again, viewed in the light most favorably to the Government, to storm the Capitol.

So again, that's far from all the evidence on which a reasonable jury might have relied on to find that each of the defendants joined the conspiracy with a knowledge of and intent to further its unlawful objectives. But in light of the nature -- I think this is evidence on which the jury could find both that the conspiracy existed

and that supported Tarrio's, Biggs's, Nordean's, and Rehl's knowledge of its objectives. In this case, the evidence of those two things is more or less coextensive.

I'm going to now turn to the defendants' arguments in response to all of that. But I am going to take a brief break for all of you, and particularly for the court reporter. So we'll take 10 minutes and I'll finish up when we come back.

THE DEPUTY CLERK: All rise.

(Brief recess taken.)

THE DEPUTY CLERK: We're back on the record in Criminal Matter 21-175, United States of America v. Ethan Nordean, et al.

THE COURT: All right. I'll turn now to the defendants' specific arguments --

MR. METCALF: Your Honor, if I may real quick, Mr. Tarrio's attorneys --

THE COURT: Oh, I'm so sorry. I did not see that.

MR. METCALF: Can I go out and get them?

THE COURT: Please. You may.

MR. METCALF: Thank you, Your Honor.

(Brief pause.)

THE COURT: All right. I'll turn now to the defendants' specific arguments on this charge. I'll start with Mr. Nordean, who makes both legal and factual

arguments. I won't spend too much time on the legal arguments because they reiterate -- I -- issues I resolved long ago and they really don't have any place in this type of motion, but in any event, they reiterate issues I resolved a long time ago.

First, he argues the Government did not present sufficient evidence to prove seditious conspiracy to prevent, hinder, or delay the execution of a law and Congress, he says, does not execute federal law. Of course, he did raise this argument in his motion to dismiss the third superseding indictment and I rejected it. There, I did explain that Congress executes the Twelfth Amendment and the Electoral Count Act because, by undertaking what those laws require, it carries into effect their ultimate objects: the certification of the Electoral College vote and the transition of executive power from one president to the next. That's ECF No. 586 at 14. So I just incorporate that analysis here and reject that argument for the same reasons I already did.

Next, Nordean reiterates his argument at the motion to dismiss stage about the proper scope of a seditious conspiracy charge. He argues, again, that the Government's evidence was insufficient because, quote, "longstanding precedent holds that preventing a law's execution refers to efforts to stop a law in all its

applications and at all times, and not to challenge an -- a law's application to a set of facts in a particular instance." That's ECF No. 822 at 6. But as I held in rejecting Nordean's motion to dismiss, the conspiracy for which Nordean was charged -- and now convicted -- was, quote, "a conspiracy to hinder" -- was, in my opinion, "a conspiracy to hinder execution of the Twelfth Amendment and the Electoral Count Act in all their applications and on a nationwide basis." ECF No. 586 at 8. So again, I'll just incorporate that analysis here and reject the same arguments for the same reasons.

Next, Mr. Nordean argues that the jury lacked sufficient evidence on the force element of seditious conspiracy. He first notes that the jury did not convict him for Pezzola's destruction of the Capitol window in Count 7 or for Donohoe's assault on an officer charged in Count 8 or Pezzola's assault while stealing a riot shield charged in Count 9. And he further contends that the evidence did not support his conclusion -- his conviction on Count 6 for destroying the black metal fence, an issue I'll discuss later. In full, then, Nordean argues that there, quote, "was no seditious use of force to which Nordean could have agreed which was supported by sufficient evidence," closed quote. ECF No. 822 at 6 and 7.

The problem with this argument is that seditious

conspiracy does not require the use of force. It requires an agreement to use force. Nothing in the statute requires the jury to predicate a seditious conspiracy conviction on a particular forceful act that ultimately occurs. So from the evidence I've already outlined at length, the Government has presented sufficient evidence for the jury to conclude that Nordean had entered an agreement to use force on January 6th to stop the transition of power. And besides, for reasons I'll discuss in a little bit, I do think there was sufficient evidence that supported Nordean's conviction on Count 6 that would fill the bill.

Moreover, even if the jury's verdicts as to Nordean on Counts 7, 8, and 9 were somehow inconsistent with its conviction on seditious conspiracy, it's not for me, in evaluating a Rule 29 motion, to try to read a jury's mind and reconcile its verdicts. That's United States v. Dykes, 406 F.3d 717 at 77 -- 722, a D.C. Circuit case from 2005.

Last, on this offense, Mr. Nordean points out that, quote, "witnesses testified and video evidence demonstrated that Nordean took positive steps to prevent a protester from assaulting a law enforcement officer outside the Capitol," closed quote, by placing his hand on the man's shoulder. ECF No. 822 at 7. I agree that is a reasonable way to view the evidence from Mr. Nordean's -- in the light most favorable to Mr. Nordean. But as the Government

responds, a reasonable jury might have interpreted that action multiple ways, including ones that favor the Government. For example, they could have believed Nordean would have the protester channel his efforts elsewhere. And even if Nordean were holding the man back, a reasonable jury could find that that somehow didn't cancel out his own statements and conduct elsewhere, and, ultimately, on balance, still have the evidence support the conviction.

Next, Mr. Tarrio joins all of Mr. Nordean's arguments, but adds that he was not at the Capitol on January 6th, as he has reiterated here today, and did not communicate with the other defendants between his arrest on January 4th until after the initial breach. First of all, on the second point, I think the record does belie that. Nicholas Quested, a jury who was with -- a journalist who was with Mr. Tarrio on and before January 6th, testified that Tarrio contacted, or at least attempted to reach, Nordean on the phone after he was released from jail on the 5th. That's transcript at 5417 through 18 and transcript at 5421. Biggs relayed to the MOSD leadership that he spoke with Tarrio on the evening of the 5th and that they discussed plans. That's Exhibit-509-23. And then Tarrio regained access to his Telegram account. Once he did, he rejoined the MOSD leaders chat. That's Exhibit-509-25 and 28.

Additionally, Tarrio's absence from the Capitol is simply neither here nor there. The evidence I've already outlined amply demonstrates how a reasonable jury could find that Tarrio initiated and directed the charged conspiracies right up until the time -- at least all the way through, but certainly without being hindered until he was arrested. As for the substantive offenses on the ground, a reasonable jury -- a rational jury readily could have convicted Tarrio based on Pinkerton liability, as I instructed the jury. So his argument on this point, I don't think, gets him anywhere.

Last, I'll address Biggs's and Rehl's arguments that they presented jointly through shared counsel. By and large, their arguments on this count reiterate the First Amendment argument that I've rejected more times than I can recount during these proceedings. I will say I know that it is an argument that is genuinely held and made in good faith. They argue that because -- I just -- it's genuinely held, it's made in good faith, but I don't think it reflects the current state of the law. They argue that because the political speech leading up to the riot -- leading up to the attack was neither incitement nor a true threat, that it was First Amendment protected. Of course, as I've said many times, I think that's true so far as it goes. But the defendants go on to assert that, quote, "given the

centrality of the First Amendment and the importance of political speech in the American tradition, the Government was required to prove more than it did to warrant getting the case to the jury. At the very least, in a conspiracy relying on First Amendment protected speech and activity to prove intent, the Government should be required to rely on more than protected activity as circumstantial evidence of intent." That's ECF No. 828 at 10.

Again, I think this is a genuinely held argument made in good faith, but I don't think that standard -- that argument for this increased evidentiary standard has no basis in the law at the moment. They cite no cases for this proposition that the nature of the Government's evidence somehow required it to do more. And I've -- as I've explained during this case many times, the Supreme Court has squarely held, in Wisconsin v. Mitchell, that, quote, "the First Amendment does not prohibit the evidentiary use of speech to establish the elements of the crime or to prove motive or intent." That's 508 U.S. 476 at 489, a Supreme Court case from 1993. In fact, the Supreme Court drew that principle from an earlier case, Haupt v. United States, 330 U.S. 631 at 1947 [sic]. In that case, the defendant had been tried for treason and the Government offered evidence of the defendant's conversations with others expressing sympathy toward Germany and Adolf Hitler and hostility

toward the United States. The court held that those statements were, quote, "clearly admissible on the question of intent and adherence to the enemy," Id. at -- that's -- same case at 642.

Now, obviously, we're not talking about Germany and Hitler here. But that's exactly how the Government used the defendants' statements here. The defendants were neither charged or -- nor convicted of incitement or any other offense that targets the speech itself. Instead, the defendant [sic] used the defendants' statements as evidence of their motive and intent vis-à-vis January 6th and to show the character of their unlawful agreement, with the agreement being the offense. That's entirely consistent with Wisconsin v. Mitchell and related cases. Not only that, but at the defendants' request, I provided several First Amendment-based limiting instructions, and the parties thoroughly litigated a First Amendment jury instruction that I gave the jury. So defendants' additional arguments on this First Amendment point simply offer me no reason to upset the jury's verdict.

That's Count 1. However, subsequent counts are going to go much quicker.

I'll turn now to the obstruction counts. Obstruction of an official proceeding under 18 United States Code 1512(c)(2) and conspiracy to commit the same under

1512(k). On Count 2, the jury convicted Mr. Tarrio, Mr. Nordean, Mr. Biggs, and Mr. Rehl of conspiracy to obstruct an official proceeding, but hung on that count as to Mr. Pezzola. But it convicted each defendant under 1512(c)(2). I'm going to address these offenses together because so many of the defendants' arguments on one apply to the other.

As I instructed the jury, to convict the defendants of conspiracy to obstruct an official proceeding, they had to find that -- one, that the defendant conspired or agreed with at least one other person with the goal of committing the crime of constructly [sic] obstructing an official proceeding; and, two, that the defendant joined or entered into that agreement with an awareness of and an intent to further its unlawful goal. Then, on the substantive 1512(c)(2) offense charged in Count 3, the jury had to find, one, that the defendant attempted to or did obstruct or impede an official proceeding; that is, Congress's electoral certification proceedings; two, that the defendant intended to obstruct that proceeding; three, that the defendant acted knowingly, with awareness that the natural and probable effect of his conduct would be to obstruct or impede the official proceeding; and, four, that the defendant acted corruptly.

Before turning to the evidence supporting these

offenses and the defendants' arguments about it, I'll briefly address Biggs's and Rehl's suggestion that the jury's verdict convicting the defendants on Counts 2 and 3 carries with it a very real potential for a violation of the Double Jeopardy Clause. They argue that if the agreement to act occurs concurrently or at the same time as the decision to act is reached, there is no principal distinction between the conspiracy and the substantive charge, meaning the same conduct is arguably punished twice. ECF No. 828 at 11. This is a creative argument, but one that I just don't think gets them anywhere.

First of all, the defendants don't actually argue there is a double jeopardy problem here or cite the relevant standard under Blockburger v. United States. They only ask that I should consider that risk. Second, for all the reasons I outlined at the outset, a reasonable jury very well might have concluded that the defendants formed their unlawful agreement long before the 6th. And, third, 1512(k) and 1512(c)(2) are two different offenses. Applying the Blockburger elements test, 1512(k) requires an agreement and 1512(c) does not. And 1512(c)(2) requires actual obstruction or attempted obstruction which 1512(k) does not. There really is simply no risk of double jeopardy -- at least as that is defined in the case law -- here at all.

Turning to the evidence supporting the jury's

verdict, I'll start with the 1512(k) conspiracy. Look, the same evidence supporting the defendants' convictions for seditious conspiracy supports the convictions under 1512(k) as well. A reasonable jury might have found that the same evidence I just plowed through show that the defendants made several -- that -- made several distinct agreements. First, to use force to oppose the Government's authority and interfere with an execution of the law, but, second, here, to accomplish those goals by means of corruptly obstructing Congress's electoral count. So I'll just incorporate all my findings I've already discussed for the purposes of this count. However, I do want to point out a few key pieces of evidence on which a reasonable jury might have relied to find that the defendants and their co-conspirators intended to target the certification proceedings specifically.

Before the 6th, the defendants showed they knew -- that they knew the proceeding would be taking place, and its significance. Mr. Rehl once explained on Parler that January 6th would be, quote, "the day where Congress gets to argue the legitimacy of the Electoral College votes," closed quote. And Biggs shared the names of congressmen whom he expected to, quote, "object on January 6th," closed quote. Exhibits-602-40 and 603-53. Furthermore, as I noted before, a few days before the 6th, Stewart sent a voicemail to the MOSD leaders chat remarking that, quote, "the main operating

theater should be out in front of the Capitol building. That's where the vote is taking place and all the objections." Exhibit-501-56. Mr. Rehl and Mr. Tarrio expressly acknowledged listening to this message. Exhibits-501-56 and 57. And last, a reasonable jury might have inferred that the defendants had come to a mutual understanding to obstruct the electoral count from their physical conduct that day which was laser-focused on the Capitol instead of joining thousands of other supporters of former President Trump to watch his speech at the Ellipse.

Turning now to the substantive 1512(c) count, I'll first address the convictions for defendants Nordean, Biggs, and Rehl together, then discuss Mr. Tarrio and then Mr. Pezzola.

As to Nordean, Biggs, and Rehl, the events I've -- the evidence I've already outlined about their conduct on the 6th and leading up to it supports their convictions for the substantive 1512(c)(2) count, as well. Specifically, I've discussed the substantial evidence demonstrating, at least to a rational jury, the defendants' knowledge of the proceeding and intent to disrupt it and their conduct -- that is, charging through barriers and entering the Capitol -- how that contributed to the proceeding's interruption.

Now, Biggs and Rehl contend otherwise, but they

don't argue anything specific about the actual evidence supporting their convictions. Instead, they mostly launch a series of policy arguments that, I think, ultimately don't move the needle on a Rule 29 motion. They suggest that the Government has overcharged this case by distorting Section 1512(c)(2) beyond 1512(c)(1)'s focus on evidence impairment crimes. Of course, the D.C. Circuit has conclusively resolved that issue in United States v. Fischer where a -- well, conclusively resolved it for the moment, I suppose, and in this Circuit -- where a panel majority held that 1512(c)(2) was not limited to evidence impairment crimes. They suggest -- they, Mr. Biggs and Mr. Rehl, suggest Fischer was wrongly decided, asserting that, quote, "the use of a statute fashioned to respond to manipulation of official proceedings by means of influencing the integrity of the evidence in the context of the January 6th riot prosecutions is the sort of improbably broad interpretation of a criminal statute of which the Supreme Court has disapproved," closed quote. That's ECF No. 828 at 16.

But all of that being said, it goes without saying that Fischer binds me. In any event, their argument that Fischer's holding applies only to cases involving assaults is not persuasive at all. The lead opinion in that case simply noted that an assault on law enforcement officers,

quote, "clearly meets the test of independently unlawful conduct," closed quote, to show the defendant acted corruptly. That's the Fischer case at page 340. The court's discussion of assaultive conduct had nothing to do with whether 1512(c)(2) was confined to evidence impairment crimes like those in (c)(1).

The last element the Government had to prove was that the defendants acted corruptly. This element, of course, was the subject of considerable attention in this case, to say the least. And after detailed briefing and much argument, I did instruct the jury that to find a defendant acted corruptly, they would have to conclude that he used independently awful -- unlawful means or acted with an unlawful purpose or both. I further instructed that, quote, "a defendant must not -- must also act with consciousness of wrongdoing," meaning "with an understanding or awareness that what the person is doing is wrong." Then, after considering the parties' arguments about the D.C. Circuit's recent decision in Fischer, I added for the jury that acting corruptly often, quote, "involves acting with the intent to secure an unlawful advantage or benefit either for oneself or for another person." That's ECF No. 767 at 31 through 32.

So construing the evidence in the Government's favor, I do think that sufficient evidence supported a

reasonable inference that the defendants here acted corruptly. First, they used independently unlawful means to obstruct the proceedings. At minimum, these defendants' convictions for destroying the black fence -- which was erected to secure the building and Congress's business inside it from protesters -- satisfies this element. Nordean and Biggs directly participated in tearing the fence down, and the jury found Rehl equally responsible as a co-conspirator. Furthermore, factoring in details from the defense case, although Mr. Rehl did not face an assault charge for pepper-spraying an officer during a clash on the west front, a reasonable jury might have concluded that doing so was an independently unlawful means of obstructing the proceedings inside the building.

So too, a reasonable jury readily could have concluded that the defendants were aware that what they were doing was wrong. The defendants positioned themselves opposite law enforcement. They shook and dismantled barriers against law enforcement's commands. They engaged with officers in different ways, calling them pigs and traitors. And they maintained positions at the helm of a mob they witnessed physically assaulting officers. This is, of course, viewing the evidence in the light most favorable to the Government. A reasonable jury might have concluded that someone directly opposing law enforcement in the way

that the evidence showed would know what they are doing as wrong. And just as powerfully, their discussions about deleting Telegram messages after the fact show a consciousness of wrongdoing.

Nordean argues that the Government failed to prove that he conspired to or, in fact, acted corruptly because it did not prove that he intended to procure an unlawful benefit that he knew to be unlawful. And he points to Judge Walker's concurrence in Fischer, which takes that view. After briefing and argument, I held that Judge Fischer's [sic] concurrence did not control, and I was not otherwise persuaded to adopt his view. I'll incorporate my earlier analysis on that point here which is found at Pages 19171 through 81 of the trial transcript. Biggs and Rehl also take issue with the Fischer court's reading of the "corruptly" element as a general matter, but they don't argue that the jury lacked sufficient evidence to conclude that they acted with the requisite intent under the definition I provided.

But even if the Government had to prove the defendants intended to procure an unlawful advantage or benefit, a reasonable jury might have concluded that the defendants acted with that intent. As the lead opinion in Fischer recognized, quote, "intentions of helping their preferred candidate overturn the election results would

suffice to establish a hope or expectation of either benefit to oneself or a benefit of another person." 64 F.4th at 340 -- Page 340 of Fischer.

Nordean further argues that even under the 1512(c)(2) definition I provided the jury, the Government's evidence was insufficient. In so doing, he disregards cooperating witness testimony as incredible and suggests that the Telegram messages are not probative because they don't reveal an express agreement to obstruct the electoral count. I've already discussed the ways the Telegram messages are probative of Mr. Nordean's intent, so I won't rehash that again. But as for the cooperators' testimony, it is up to the jury to make credibility determinations. Mr. Nordean may disagree, but the jury has acted within its province to find their testimony credible if indeed it even did. That evidence -- but in any event, the evidence on the whole here would pass muster under Rule 29 whether or not it did.

Nordean further points out that the cooperating witnesses like Bertino and Matthew Greene told the Government during its investigation that the Proud Boys didn't have a plan or agreement to stop the count. That's true, but that's not, at least in the case of Bertino, what he told the jury. During Nordean's own cross-examination, Bertino expressly stated that he and the defendants had

formed such an agreement, and he was cross-examined about those earlier statements to the FBI. That's transcript at 10310. It was up to the jury to decide what weight to give his testimony, given those inconsistencies, but a reasonable jury could credit his trial testimony and discredit his earlier statements to law enforcement. And considering Matthew Greene was not in MOSD membership, a reasonable jury might have concluded that his lack of awareness about a broader conspiracy encompassing all of the defendants was not all that probative either way. As for there not being evidence of a specific plan, as the instruction I gave the jury reflects, the law is clear that a jury not find that the defendants agreed on all the details of their criminal scheme.

Last, Nordean argues that some evidence was inconsistent with Nordean's participation in a 1512 conspiracy. He highlights that, one, Travis Nugent, who was part of the Proud Boys' marching group, heard Nordean telling the group that he was hung over and he wanted to go back to their Airbnb; two, that Nordean also told Nugent after the Peace Circle breach that he was moving forward to find his friends; three, that another defense witness, Michale Graves, had arranged with Nordean to meet back at their Airbnb between 3 or 4 p.m. on the 6th; four, that Nordean told some in the marching group that they would

attend the rally at the Ellipse after walking to the Capitol; and that, five, that he let himself be filmed at all.

First, I'll notice -- I'll note that almost none of this evidence informs my analysis of Nordean's first Rule 29(a) motion after the close of the Government's case since, obviously, it involves testimony from Mr. Nordean's case in chief. But with respect to the renewed motion at the end of the trial and his Rule 29(c) motion here, a reasonable jury might well have concluded that most of the testimony to which Nordean points is not at all inconsistent with the charged conspiracies. Moreover, as I mentioned just a moment ago, it's the jury's job to weigh the evidence and, at this stage, construing it in the Government's favor, as I must, the jury could have reasonably concluded that the evidence of what actually occurred at the Capitol that day and all the other evidence I've described outweighed some of the evidence Mr. Nordean highlights here. As for Nordean allowing himself -- and, certainly, his stray comments about the venturing elsewhere.

As for Mr. Nordean allowing her -- himself to be filmed throughout the day, I'll just add that a reasonable juror might have concluded that Eddie Block, a defense witness who filmed the Proud Boys' march, in fact, did avoid recording conversations involving planning for the day. At

one point, when Mr. Block approached Mr. Nordean and others speaking in a small group near the Capitol, he retreated, saying, quote, "I better get out of here. You guys are talking about stuff I don't want to hear," closed quote. That's Exhibit-1000. So in all, none of Nordean's arguments convinced me that the jury's verdict cannot stand.

As for Mr. Tarrio, the analysis is straightforward. It does not matter that he was not at the Capitol that day under the law. I instructed the jury on Pinkerton liability. Nordean, Biggs, and Rehl obviously committed the substantive offense of obstructing an official proceeding during and in furtherance of the conspiracy to do the same. So too, as the conspiracy's object, the offense was a reasonably foreseeable consequence of Tarrio's unlawful agreement with the other defendants. So through Pinkerton liability, I -- again, I think there's a basis for Mr. Tarrio's conviction here, even though he was not at the Capitol that day.

Finally, we turn to Mr. Pezzola. To this point, I've said little about Mr. Pezzola because Count 3 was the first count on which the jury convicted him. I'll note that although Mr. Pezzola purports to challenge Count 3 in his post-trial motion, his only argument is that he "was wrongfully convicted of Count 3 because, among other factors, there was not a single link to Pezzola committing

conspiracy with any other individual to obstruct an official proceeding," closed quote. That's ECF No. 824 at 2. But Count 3 was not a conspiracy count. The jury did not convict Mr. Pezzola on the 1512(k) count. So his argument does not make any sense.

Even so, just to preserve the record, I'll just highlight the evidence that leaves no question in my mind that the evidence supported Mr. Pezzola's conviction for obstructing an official proceeding. After robbing a Capitol Police officer of his riot shield, an act we'll discuss more later, at least for which there was evidence -- sufficient evidence -- Pezzola was one of the first rioters to charge up the scaffolding and into the building. He then used the riot shield to smash open a window near the Senate wing door, which was the mob's first point of entry into the building. That's Exhibit-425. No doubt, a jury could conclude that this conduct, in fact, obstructed the proceedings inside.

A reasonable jury could also have concluded that Pezzola acted with corrupt intent. At the top of the scaffolding stairs, Pezzola yelled profanities and threats at the officers holding the line, according to the evidence at trial. He said "You'd better be fucking scared. Yeah, you better be fucking scared. We ain't fucking stopping. You had better decide what side you're on, motherfuckers.

You think Antifa's fucking bad? Just you wait." That's Exhibit-429-CX.

After the rioters overwhelmed officers at the top of the stairs, Pezzola and a small group made a beeline for the Senate wing door, which further respect -- reflects his intent to disrupt the proceedings inside. And finally, if there was any question about his intent remaining, he removed it through a selfie video he filmed and sent to other Proud Boys once inside. With a cigar in his mouth, he cheered, quote, "victory smoke in the Capitol, boys. I knew we could take this motherfucker over if we just tried hard enough. Proud of your motherfucking boy." That's Exhibit-403-G. That was enough to send Count 3 to the jury, clearly. On these facts, a jury easily could have concluded -- a rational jury -- that Pezzola intentionally and corruptly obstructed Congress's certification proceedings.

With that, we'll move on to Count 4.

The jury convicted all the defendants for conspiracy to use force, intimidation, or threats to prevent officers of the United States from discharging their duties, in violation of 18 United States Code 372. As I instructed them, to reach this verdict they had to find that each defendant agreed with at least one other person to, by force, intimidation, or threat, A, prevent a member of

Congress or a federal law enforcement officer from discharging a duty; or, B, induce a member of Congress or federal law enforcement officer to leave the place where that person's duties were required to be formed [sic]. The jury found that the conspiracy captured both of these goals.

As for defendants Tarrio, Nordean, Biggs, and Rehl, all the same evidence supporting the first two conspiracy convictions supports the verdict here, as well. So I'll just incorporate all that evidence about their intent and conduct that I've already discussed for purposes of this count. Only Nordean offers any argument on this count specifically, incorporating the same arguments he made at the motion-to-dismiss stage. He, once again, argues that 372 does not encompass a conspiracy directed at members of Congress or Capitol Police. And I'll just incorporate my earlier analysis reflecting that argument here. That's ECF No. 586 at 21 -- at 21 through 30. He further argues that the Government's evidence on this count was insufficient because, at one time, evidence appeared to pick Nordean -- depict Nordean, again, holding someone back from attacking a police officer. But, again, as I've already explained, a reasonable jury might have concluded that Nordean's hand on the rioter's shoulder was not inconsistent with the charged conspiracies at all or, in any event, just simply may have weighed the evidence such that they felt a conviction was

warranted.

But the jury also convicted Pezzola on the conspiracy count -- but the jury also convicted Pezzola on this conspiracy account [sic]. Again, Mr. Pezzola does not directly challenge his conviction on this count in his motion, only Counts 3, 6, 7, 9, and 10. That's ECF No. 824 at 1. Even so, just to secure the record, given Mr. Pezzola's oral motions during trial, let me walk through some of the evidence supporting his conviction on this count.

First, to the extent that the jury's verdict on this count is inconsistent with its inability to reach a verdict as to him on Count 2 or its acquittal of him on Count 1, I reiterate it is -- the law is clear: It's not my job at the Rule 29 stage to try to reconcile the verdicts, nor it -- is it a basis to attack the conviction on a count that the evidence otherwise supports. That's United States v. Dykes, 406 F.3d 717 at 722, a D.C. Circuit case from 2005.

To that end, I do think a rational jury could have concluded that even if Pezzola didn't conspire with the other defendants in the leader -- in the lead-up to January 6th, that he joined their unlawful agreement to achieve the objectives set out in Count 4 at least closer to or as of January 6th. Jeremy Bertino added Pezzola, who had

only recently joined the Proud Boys, to the MOSD on January 2nd. Pezzola had just visited Bertino in North Carolina and told Bertino he was among the men who attacked the man who had stabbed Bertino on December 12th. That's trial transcript 10076. And on the 6th, Pezzola joined the defendants' marching group to the Capitol. Once there, he led the charge up to the Capitol alongside some of the defendants and Donohoe, another MOSD leader and co-conspirator. The Government's evidence showed Pezzola and Donohoe carrying the stolen riot shield across the Capitol grounds. That's Exhibit-450X and trial transcript 12390 through 91. Indeed, Donohoe claimed that the riot shield -- claimed the riot shield for the MOSD, posting in the leaders chat, quote, "got a riot shield," closed quote. That's Exhibit-509-33. Pezzola further posed for a photo with the riot shield while holding up the Proud Boys' hand sign. Exhibit-475.

Pezzola's comments once inside the Capitol are perhaps the most revealing. Again, as I mentioned before, after leading the charge into the building, forcing members of Congress to leave the place where they were performing their duties, he announced his view that credit for this result belonged a collective effort. He recorded a view announcing "I knew we could take the Capitol over if we tried hard enough," closed quote, and added a Proud Boys

slogan, "proud of your mother fucking boy." Again, that's Exhibit-403G.

Beyond that, the evidence about Pezzola's conduct at the top of the scaffolding further evidences his intent to advance a 372 conspiracy specifically. Again, he yelled threats at law enforcement officers, and once the police line gave way, charged headlong toward the Senate wing door. From there, he immediately helped other rioters smash in the window and gain entry to the building.

From this evidence and from Mr. Pezzola's concerted actions with the defendants on the 6th, a reasonable jury could have concluded that he joined this unlawful agreement to, through force or intimidation, induce members of Congress or law enforcement officers to leave the place where they were to perform their duties and prevent them from exercising those duties.

None of the defendants directly challenged their conviction on Count 5 for obstructing officers during a civil disorder, at least on paper. And for good reason. The evidence I've described to this point provides ample support for that verdict as to Nordean, Biggs, Rehl, and Pezzola for their direct participation on the ground on January 6th and as to Tarrio under Pinkerton liability as I've explained. So I'll move on to defendants' conviction on Count 6 for destroying a black metal fence, in violation

of 18 United States Code Section 1361. To convict the defendants on this count, the jury had to find that they willfully injured, damaged, or destroyed property belonging to the United States, or attempted to do so. Furthermore, the jury had to decide whether the damage exceeded $1,000 in value, the dividing line between the statute's misdemeanor and felony provisions.

As I've already explained, after moving through the first barrier, the defendants moved toward -- moved forward onto the grounds as Mr. Biggs recorded himself announcing that they had, quote, "gone through every barricade," closed quote, at this point. Exhibit-404F [sic]. The defendants and the crowd, according to the evidence, approached a black metal fence separating themselves from the officers protecting the Capitol, including Officer Shae Cooney who testified at trial. At first, Biggs and Nordean were standing several feet apart, but Biggs beckoned to -- Nordean to him. The two of them seemed to have tested the fence's strength, and then Biggs pulled the mask over -- pulled a mask over his face. That's Exhibit-445-BX. Officer Cooney testified that as the crowd started pulling the fence, Nordean shouted "pigs" and "traitors" at the officer. That's transcript at 7087 through 88.

From there, the Government presented videos from

several angles that, construing the evidence in the light most favorable to the Government, show Nordean and Biggs tearing apart two adjoining sections of the fence. Exhibit-445-BX, Exhibit-492-G, Exhibit-417X, and Exhibit-417X [sic]. In these videos, the jury could see Nordean and Biggs with their hands down -- I'm sorry, with their hands on the fence where two segments joined together. It would see them jostle and pull down on the fence segments and see them move forward among the first group of the mob to surge forward between those two segments. And Officer Cooney testified to the same, particularly Nordean's conduct. That's transcripts at 7013 and 7149.

Now, no doubt, dismantling the fence was a group effort. But from the video evidence and Officer Cooney's testimony, the jury had more than sufficient evidence on which to convict Nordean and Biggs for their direct participation in the fence's destruction. And because a reasonable jury could have found that tearing down a barrier between the rioters and the Capitol was reasonably foreseeable and furthered the conspiracy or conspiracies for which the jury convicted Tarrio, Rehl, and Pezzola, the jury convicted them on Count 2 despite Rehl's argument that he was no more responsible for the fence than anyone else in the crowd.

Nordean argues that his conviction for destroying

the fence rests on insufficient evidence because video evidence depicted him only touching the fence while others pulled it down, and Officer Cooney's testimony otherwise was not credible. That's ECF No. 822 at 7. But it's up to the jury to decide credibility, and it's not for me to disturb that finding here. Similarly, Biggs argues there was no evidence that he intended to destroy the fence. But, again, based on the video footage and Officer Cooney's testimony, a jury had enough evidence -- a rational jury had enough evidence to conclude the opposite.

The Government also offered enough evidence for a reasonable jury to conclude that the damaged fence cost more than $1,000 under 18 United States Code Section 1361's felony provision. A representative from the Architect of the Capitol, Jason McIntyre, testified that the fence at issue was a, quote, "temporary fence that they," quote, "install in the days leading up to the presidential inaugural on the west front." That's the transcript at 11478. The fence was in, quote, "like new," closed quote, condition before the 6th but, quote, "completely dismantled, closed quote," and a, quote, "total loss," closed quote, afterward. Transcript 11479 through 80.

I'm not going to walk through all the math here. That's why I went to law school. But McIntyre testified that the cost to repair each panel of the fence was $585.36.

So the cost to replace two panels Nordean and Biggs directly damaged would be $1170.72. Additionally, I instructed the jury on aiding and abetting liability. The evidence would further allow a reasonable jury to find that the defendants aided and abetted the other rioters in damaging the entire fence, or at least more than those -- just those two panels, making them responsible for more damage.

Nordean further argues that he can't be liable for over $1,000 in damage because, quote, "no evidence showed that the fence segment connected to him was itself broken or damaged as opposed to merely pulled down." ECF No. 822 at 8. But McIntyre testified that the whole fence was a total loss and the jury was allowed to credit that testimony.

I'll briefly add very briefly that in a segment of his reply brief that I struck for exceeding the local rule's page limits, Pezzola included two newly-discovered photos purportedly depicting the black fence standing after the defendants have -- would have gone through it. But he does not explain where this photo came -- photos came from, they have no timestamp, so it's not at all clear where on the ground this black fence was standing. So even if Pezzola had raised this issue, these photos don't cast any doubt on the jury's verdict or, as he argues, warrant a new trial.

The remaining counts concern only Mr. Pezzola. First up is his conviction on Count 7 for destroying a

Capitol window in violation of 18 United States Code Section 1361, causing damage over $1,000. Pezzola does not dispute that he smashed in a Capitol window with a riot shield, nor could he as video footage the jury watched multiple times during the trial shows him doing exactly that. For example, Exhibit-425. Instead, he argues that he is only responsible for destroying one window panel, which McIntyre valued at $774, instead of both panels in the shattered window. Specifically, he argues that one panel was already broken beyond repair when another rioter put a two-by-four through it before Pezzola merely detached the panel from its frame. Exhibit-425, again. He further argues that the Government's valuation of the damage is, closed -- is, quote, "outrageous," closed quote. That's ECF No. 84 [sic] at 3 through 4.

First, the jury had -- a rational jury could have held Pezzola responsible for destroying both window panes. Even if the other rioter's damage to one of the panes means that Pezzola was not the principal offender as to that pane, the evidence at least supported a finding that he aided and abetted the other rioter in destroying the entire window to create an opening for the -- to the Capitol. The video footage alone was enough to send that count to the jury. But then, on direct examination, Pezzola testified that when he saw, quote, "another kid break the window," he was "kind

of, like, oh, I guess this is what we're doing," closed quote, supporting at least somewhat an aiding-and-abetting theory of liability. That's transcript 19075.

Second, the jury reasonably -- the jury, again, was entitled to credit McIntyre's testimony that each window cost $774 to replace. Although Pezzola notes that he had an expert -- a counter-expert prepared, I excluded that expert's testimony because Mr. Pezzola's notice -- his expert notice was both untimely and substantively deficient under Rule 16. So again, on Count 7, the evidence was sufficient.

The last counts I have to address relate to Mr. Pezzola's theft of Officer Ode's riot shield. I'll address these together because they arise out of the same incident.

The jury convicted Mr. Pezzola of assaulting, resisting, or impeding Officer Ode in violation of 18 United States Code Section 111(a) and for robbery for taking his riot shield in violation of 18 United States Code Section 2112. To convict Pezzola of the assault in Count 9, the jury had to find that he intentionally and forcibly assaulted, resisted, opposed, impeded, intimidated, or interfered with a Capitol Police officer who was engaged in the performance of his official duties and with the intent to commit another felony. I further instructed the jury

that another felony meant any of Counts 1 through 7 and Count 10. To convict Pezzola of robbery, the jury had to find that Pezzola, by force or violence, took and carried away Officer Ode's shield against his will and that Pezzola intended to permanently deprive the United States of that shield. And I do think, like all the other counts, sufficient evidence supported the jury's verdict on both counts.

Beginning with the Government's evidence, video and photographs plainly show Mr. Pezzola forcibly ripping the riot [sic] from Officer Ode's hands. So -- see, for example, Exhibit-203, 229X, 444AX. Officer Ode further testified that a man matching Mr. Pezzola's description, together with another person, forcibly took the shield from him. Trial transcript 7487 through 88 and -91. The Government also offered a video where someone in the video asked Mr. Pezzola, "You stole a riot shield?" And he responded "Yeah." Exhibit-442-A. Then Mr. Pezzola himself testified that he tried to take the shield from Officer Ode's possession while it still was in his hands. Trial transcript 19375-77.

Although Mr. Pezzola does not offer any direct argument about Count 9, he does argue that he did not use force to deprive Officer Ode of the shield, a necessary element for Counts 9 and 10. Instead, he claims he simply

picked the shield up off the ground after another rioter actually took it by force. That's ECF No. 824 at 4. But I don't think, as I have just laid out, there is any question that the evidence permitted the jury to conclude otherwise.

Second, Mr. Pezzola argues that he was not guilty of robbery, only the lesser included charge of theft, because he did not intend to permanently deprive the government of the riot shield. And to be sure, Mr. Pezzola did return it to law enforcement before leaving the Capitol. That's ECF No. 824 at 4. But, again -- I know this is a refrain, but it is what I have to do -- construing the evidence in the light most favorable to the Government, a reasonable jury could have concluded that Mr. Pezzola took the shield with the intent to steal it, but then changed his mind as he was leaving the Capitol.

First, considering only the evidence in the Government's case in chief, Mr. Pezzola carried the shield around for quite a while; the evidence was about 90 minutes. And rather than use it as a shield, he did use it to break into the Capitol building. This is at least circumstantial evidence of an intent to permanently deprive the Government of this property. Then, on the defense case, again, Pezzola testified that he returned to use the shield -- he returned the shield when a line of officers, quote, "reached out towards," quote, him and, quote, "grabbed onto," quote, the

shield as he was making his way out of the building. He further called it a, quote, "last-minute decision to give it back," closed quote. That's the trial transcript 19412-13. So I do think, even at the close of all the evidence, there would have been sufficient evidence to support the jury's verdict on this count, as well.

Before proceeding to the Rule -- so that is -- well, before proceeding to the Rule 33 motions for a new trial, let me just speak very briefly about the defense case in chief. I have discussed some of the defendants' evidence in addressing their arguments throughout this ruling. But because they originally moved, under Rule 29(a), both after the Government's case and after the close of the evidence, and because Mr. Nordean expressly invokes Rule 29(c) in his motion here, I want to touch on why I still sent the case to the jury after the defense case and why nothing in the defense case changes my analysis or that conclusion that that was appropriate.

In broad strokes, the defense witnesses did not do that much to reflect key elements -- to refute key elements of the Government's case and, at times, strengthened it. For example, when Nordean and Tarrio called members of the MOSD to testify that they weren't aware of a plan to storm the Capitol, the Government clarified that they weren't chapter leaders and, thus, in little position to know the

defendants' or other MOSD leaders' intent. Additionally, some of these witnesses became combative and evasive on cross-examination such that it was -- that a reasonable juror might have questioned their credibility.

A few specifics. Defense witnesses who marched with the defendants on January 6th, including Travis Nugent and Eddie Block, confirmed that the group viewed Biggs and Nordean as leaders. Trial transcript 14636 through 37 and 14991 and 14997. Nugent further testified that Proud Boys followed Nordean because he was famous for his fighting ability. Transcript 14627 through 28. And during what happened on January 6th, Nugent asked Nordean whether they were really doing this when the barricades came down and, by his telling, Nordean just turned and walked toward the Capitol. Nugent testified that he simply followed a chain of command -- his chain of command. Transcript at 14643 through 45. All of this supports the Government's theory about how Nordean and the other defendants led the Proud Boys on the 6th.

Additionally, several additional defense witnesses offered testimony that supported the Government's theory about how the defendants harnessed violence within the Proud Boys, and the Government showed they supported violence on the 6th. For example, Nugent testified that, to him, rally boy meant protest, which meant violence. Transcript at

14559. Jorge Mesa, who testified for Tarrio that the Proud Boys' purpose in attending the January 6th rally was to peacefully protest, testified that January 6th was a glorious event and, quote, "the most patriotic act in this country in the last hundred years." Transcript at 15426 through 27.

Another -- and the last thing I'll note is that a reasonable jury might have discredited any of Rehl's and Pezzola's self-serving testimony. Jurors might have concluded their testimony was incredible for several reasons, but particularly because the Government impeached Rehl's direct examination testimony that he did not assault anyone on the 6th with footage apparently of him pepper-spraying a police officer. And when confronted with the footage, Mr. Rehl repeatedly tried to say it wasn't him when a reasonable juror could easily -- readily have concluded that it was, based on his distinctive clothing. Transcript 18740-41 and Government's Exhibit-2008.

As for Pezzola, a jury might have viewed the marked shift in his demeanor between direct and cross as reflecting poorly on his credibility. After expressing remorse and taking responsibility for his actions on January 6th on direct, he them took aim at the trial itself at a later point, calling the proceedings corrupt and the charges fake. Trial transcript 19331.

Again, construing the evidence in the Government's favor, a reasonable jury might have taken the evidence presented by the defense on the whole as supporting, rather than refuting, the Government's case. But at the very least, it provided no reason not to send the case to the jury.

One last point. I want to briefly address Mr. Pezzola's reply brief, some of which I struck for failure to adhere to the local rule's page limit.

On the merits, Mr. Pezzola's -- even putting aside the page limit problems, on the merits, Mr. Pezzola's arguments are largely untethered to his actual convictions. He takes aim at the case as a whole instead of the evidence supporting his own convictions which, notably, did not include seditious conspiracy. His arguments are scattershot, conclusory, and simply fail to grapple with the record in any meaningful way. He argues that the tools theory amounts to unconstitutional collectivist punishment. I've already explained many, many times the basic theory of relevance supporting the Government's use of non-hearsay statements and conduct by certain individuals that the defendants recruited to the MOSD and marched to the Capitol, and I incorporate those rulings here. The basic principles of relevance supporting those rulings are not novel and do not implicate constitutional concerns.

And last, Pezzola's accusations of Brady evidence related to CHS material are simply baseless. I addressed and denied a similar motion by Pezzola during trial. As I've said, counsel for Mr. Pezzola's repeated and unsubstantiated accusations of government misconduct in this regard are not only meritless, but inappropriate for court and, frankly, as a matter of pure professionalism.

So for all of these reasons, I do find that all the evidence was sufficient to sustain all of the above convictions, again, whether measured at the close of the Government's case or at the close of all the evidence. So for all those reasons, the Rule 29 motions are denied.

As for Rule 33, Federal Rule of Criminal Procedure 33(a) states that the court "may vacate any judgment and grant a new trial if the interest of justice so requires," closed quote. Despite this broad discretion, the D.C. Circuit has instructed that, quote, "granting a new trial motion is warranted only in those limited circumstances where a serious miscarriage of justice may have occurred," closed quote. That's United States v. Wheeler, 753 F.3d 200 at 208, a D.C. Circuit case from 2014.

The defendants' arguments on this point -- and the defendants who have moved for a new trial are defendants Biggs, Rehl, and Pezzola -- they fall far short of this standard. First, Biggs and Rehl argue that the publicity

incident to Congress's report on the events at the Capitol on January 6th and former President Trump's toxic invocation of the Proud Boys and the repeated use of secret proceedings during trial served as a distraction, warranting a new trial even in the absence of any particular showing of prejudice. ECF No. 828 at 23 through 24. None of this shows a serious miscarriage of justice. I have to emphasize repeatedly, none of it.

First, former President Trump mentioning the Proud Boys in a debate was competent evidence in this case which the Government showed impacted the defendants' -- reflected the defendants' state of mind and, really more accurately, their motive related to January 6th. Second, the time I took to address matters outside the jury's presence -- often at the defendants' behest -- hardly shows injustice, not to mention the time that the jury sat in recess often turned on the defendants' own lengthy arguments that I permitted them to make because I wanted to make sure they were heard. And there were certain other times that I took up matters under seal to protect the integrity of the proceedings before me. To risk the proceedings by failing to do so would have been a miscarriage of justice, not the other way around.

Third, no pre or mid-trial publicity shows a miscarriage of justice in this case. As everyone in this courtroom is aware, I conducted an extensive voir dire

lasting about two weeks. During that process, I filtered out jurors who may have been unduly impacted by what they had heard or read about the Proud Boys from the January 6th Committee hearings or in any other way. Importantly, no defendant identifies any juror that I qualified, let alone that was seated in this trial, for whom the record at all supports any inference of bias based on publicity they cite or for any other reason. Not only that. At Mr. Biggs's request, I frequently admonished the jury to avoid all press coverage about the defendants, the case, or January 6th generally. And, at one point, I began giving him -- them that instruction -- a reminder of that instruction every night when they left the courthouse. The defendants offer absolutely no evidence whatsoever that the jury violated that instruction.

Defendant Pezzola, on the other hand, argues he's entitled to a new trial because new evidence shows that, quote, "100 Antifa agitators," including someone by the name of Landon Copeland, attended the January 6th rally. But this new evidence is nothing more than vague claims by a single person that have apparently appeared somewhere on the Internet. Pezzola also points to other supported -- supposed Antifa agitators in portions of his reply brief that I struck for failure to comply with the local rules. I'm not going to spend a lot of time on this. Mr. Pezzola's

claims about Antifa are speculative and fantastical. And even if they were true, they wouldn't have much to do with this case. Even if a group of Antifa members conspired to bring about violence or committed acts of violence on the 6th, that doesn't mean the evidence doesn't show that the defendants in this case did the same. So Pezzola's argument on this point gets him nowhere. And, again, they're based on, as far as I can tell, again, something somebody said somewhere on the Internet which is just not a competent basis for Mr. Pezzola to make the argument or even for me to grant him any relief.

That is the end of my oral ruling. I know you're all very pleased with that. It's 4:30. I will see some of you tomorrow at 10:00, some of you tomorrow in the afternoon, and others of you later in the week. Until then, the parties are dismissed.

THE DEPUTY CLERK: All rise. This Honorable Court is adjourned.

(Proceedings concluded at 4:35 p.m.)

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**CERTIFICATE OF OFFICIAL COURT REPORTER**

**I, TIMOTHY R. MILLER, RPR, CRR, NJ-CCR, do hereby certify that the above and foregoing constitutes a true and accurate transcript of my stenographic notes and is a full, true and complete transcript of the proceedings to the best of my**

**ability, dated this 30th day of August 2023.**

**/s/Timothy R. Miller, RPR, CRR, NJ-CCR**
**Official Court Reporter**
**United States Courthouse**
**Room 6722**
**333 Constitution Avenue, NW**
**Washington, DC 20001**

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