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**Proceedings recorded by machine shorthand; transcript  
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**PROCEEDINGS**

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

7 Present for the Government are Jason McCullough,  
8 Erik Kenerson, and Conor Mulroe; present for Defendant 1 is  
9 Nicholas Smith; present for Defendant 2 is Norman Pattis;  
10 present for Defendant 3 is also Norman Pattis; present for  
11 Defendant 5 are Nayib Hassan and Sabino Jauregui; and  
12 present for Defendant 6 are Steven Metcalf and Roger Roots.  
13 Also present are Defendant 1, Mr. Nordean; Defendant 2,  
14 Mr. Biggs; Defendant 3, Mr. Rehl; Defendant 5, Mr. Tarrío;  
15 and Defendant 6, Mr. Pezzola.

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

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

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

20 Any questions before we proceed from any counsel?

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

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

1 for the United States.

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

9 THE COURT: Officer, you may proceed.

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

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

19 You may proceed.

20 OFFICER COONEY: January 6th definitely changed  
21 the way I saw the department. I took one of my fellow  
22 officer's overtime that day. I wasn't drafted to come in  
23 that early, but decided I would take his overtime and get an  
24 extra four hours which, for that day, would have been a  
25 12-hour day, which turned into an almost 19-hour day.

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

9               (Brief pause.)

10              Sorry.

11              (Brief pause.)

12              THE COURT: Take your time.

13              (Brief pause.)

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

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

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

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

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

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

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

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

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

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

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

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

12 INSPECTOR LOYD: Good morning, Your Honor.

13 THE COURT: Good morning, sir.

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

17 The January 6th riot started by the mob at  
18 12:53 p.m. when they violently attacked my personnel at  
19 Peace Circle. During this initial breach, one of my  
20 officers was knocked unconscious and several others received  
21 serious injuries. Watching this unfold from the Senate  
22 majority leader's office and then from the inauguration  
23 stage was horrifying. Just a few dozen of my officers  
24 fought thousands of protesters on the west front. Despite  
25 the overwhelming odds, my personnel did not quit. After

1 they lost the line at Peace Circle, they established another  
2 police line at the base of the lower west terrace. This  
3 wasn't good enough for the mob. The mob attacked my  
4 personnel again, driving us back to the base of the  
5 inauguration stage. I joined my personnel at the base of  
6 the stage and witnessed the most violent fighting in my  
7 33-year career. We were attacked with flagpoles, bear  
8 spray, hammers, and frozen water bottles, among other  
9 weapons.

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

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

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

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

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

9           Recent video has emerged that alleged my officers  
10 were tour guides for the protesters in the Capitol building.  
11 From 12:53 p.m. until approximately 6:00 p.m., the mob was  
12 in control of the exterior of the Capitol building. From  
13 2:10 p.m. until 4:30 p.m., the mob controlled the interior  
14 of the Capitol building. When a mob controls one-third of  
15 the United States Government, you will see disturbing videos  
16 of police officers being at the mercy of the rioters. The  
17 mob on January 6th was one team made up of tens of thousands  
18 of people. Individual defenses fall apart because  
19 defendants must assume the risks that they will be held  
20 responsible for all the crime committed by an entire mob.  
21 It doesn't matter what time individual defendants arrived at  
22 the crime scene or individual actions. They were one team  
23 for that particular event.

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

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

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

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

1 I wanted to thank all the police chiefs who  
2 immediately authorized their officers to respond to the  
3 Capitol. They lived up to the unwavering law enforcement  
4 motto, "first responder." The riot officially ended at  
5 8:30 p.m. on January 6th when one of my officers collapsed  
6 and died while walking back to our office. His body  
7 survived a few more hours into January 7th because his  
8 fellow officers lined up to give him CPR until the  
9 paramedics arrived. A machine at the hospital kept his body  
10 alive until his family could say good-bye in person. There  
11 was nothing natural about the way the officer fought or  
12 died, because I witnessed both.

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

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

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

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

3 Thank you, Your Honor.

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

7 Mr. Mulroe?

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

16 THE COURT: Please.

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

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

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

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

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

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

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

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

18 "Thank you, honorable jury.

19 "Sincerely, Mark L. Ode."

20 THE COURT: All right.

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

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

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

1 individual sentencings as we proceed this week.

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

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

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

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

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

1 counsel table.

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

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

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

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

1 government as a government and when you --

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

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

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

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

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

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

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

3 MR. MCCULLOUGH: Correct.

4 THE COURT: Okay.

5 MR. MCCULLOUGH: Correct.

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

8 MR. MCCULLOUGH: Is it sufficiently --

9 THE COURT: Sufficiently --

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

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

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

24 MR. MCCULLOUGH: I --

25 THE COURT: But certainly the overwhelming

1 majority of them.

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

6 THE COURT: Right, and in many other situations.

7 MR. MCCULLOUGH: Correct.

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

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

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

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

21 THE COURT: Right.

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

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

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

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

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

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

11 Let me hear from any defendant on this.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8           MR. SMITH:  Thank you, Your Honor.

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

17          THE COURT:  But it -- okay.

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

21          THE COURT:  Well --

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

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

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

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

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

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

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

7 THE COURT: Right.

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

10 THE COURT: Well --

11 MR. SMITH: -- an analogous.

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

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

16 THE COURT: Mm-hmm.

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

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

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

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

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

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

5 THE COURT: All right.

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

8 THE COURT: Yes.

9 MR. SMITH: -- that I -- it sounds like  
10 Mr. McCullough was suggesting that although this -- if we  
11 were to take this "conspiracy to interfere with police  
12 officers" offense and break it down into its underlying  
13 offense, I think there he might have suggested, "Well, it  
14 might be appropriate in that case to apply 2A2.2 -- or  
15 2A2.4," rather, "But because it involves conspiracy, then  
16 we've got something larger here. We have a larger purpose  
17 at work." But, Your Honor, that's not how the guidelines  
18 work. There's a guideline that says when you have a  
19 conspiracy offense that does not have a specific guideline,  
20 you look to the other underlying offense, and the underlying  
21 offense here is interference with individual police  
22 officers. So the guidelines would seem to suggest there  
23 directly -- I'd --

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

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

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

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

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

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

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

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

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

16 THE COURT: Mm-hmm.

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

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

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

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

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

1 a congressman in the field. And I would also point out just  
2 the severity -- I think that's another thing that should be  
3 taken into consideration by the Court, not just the  
4 elements, but the -- not just the conduct, but the severity  
5 that Congress enacted with Count 4, this idea of  
6 18 U.S. Code 372, up to six years in prison. Congress did  
7 not indicate that this was a crime punishable by up to 20  
8 years in prison, like obstruction of justice would be. And  
9 so I would just suggest that 2A2.4 is the most analogous,  
10 clearly, of all the guidelines with regard to Count 4.

11 Thank you.

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

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

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

7 MR. MCCULLOUGH: Thank you, Your Honor.

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

11 THE COURT: Go ahead.

12 MR. MCCULLOUGH: I just wanted to make sure.

13 THE COURT: No, no, no, please.

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

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

21 MR. MCCULLOUGH: Correct.

22 THE COURT: Okay.

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

1 THE COURT: Right.

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

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

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

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

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

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

8 THE COURT: -- is your position?

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

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

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

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

11 MR. MCCULLOUGH: Well, Your Honor, I think we are  
12 talking about using the -- we are talking about the crime of  
13 231, which is interfering with an officer during a civil  
14 disorder. That's what -- that's the count of conviction.  
15 And so we're using the 2A2.4 guideline because it is the  
16 appropriate guideline to basically apply here, but it  
17 doesn't necessarily mean that you need a physical assault in  
18 order to --

19 THE COURT: Okay. So --

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

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

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

3 MR. MCCULLOUGH: Not my words, Your Honor.

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

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

14 THE COURT: Is it aggravated? I mean --

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

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

6           MR. MCCULLOUGH: And if -- I guess if Your Honor  
7 has -- I'm happy to expand on any of the, kind of, relevant  
8 conduct that Your Honor can consider, but I think, as Your  
9 Honor is prepared to rule on the Rule 29, Rule 33, you've no  
10 doubt, kind of, covered the landscape of facts. But, Your  
11 Honor, the -- with respect to the relevant conduct here that  
12 one can consider, as I said, the assault by Zachary Rehl,  
13 one can consider. Your Honor can consider the assault by  
14 Milkshake as he pushed up the concrete stairs and pushed  
15 behind the -- as Mr. Biggs and his cohort followed behind,  
16 and Mr. Pezzola followed behind. And, Your Honor, you can  
17 even consider -- I mean, I -- and I would submit to you that  
18 you can even consider the assault by Mr. Pezzola. Now, I,  
19 100 percent, you know, appreciate that the jury did acquit  
20 on that count, but that there is a delta between, you know,  
21 preponderance of the evidence for purposes of the -- for  
22 purposes of applying the guidelines and beyond a reasonable  
23 doubt for purposes of proving a conviction.

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

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

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

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

15               THE COURT: Right. I --

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

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

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

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

8 THE COURT: Fair.

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

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

25 Yes, sir, Mr. Smith.

1 MR. SMITH: Very briefly, Judge.

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

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

12 MR. SMITH: Yeah.

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

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

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

9 THE COURT: Is -- say again.

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

13 THE COURT: Right.

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

1 that point in time.

2 On Mr. Donohoe's bottle-throwing --

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

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

13 THE COURT: Right.

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

15 THE COURT: Correct.

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

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

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

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

2 THE COURT: Okay.

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

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

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

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

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

4 THE COURT: Yes, I agree --

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

12 THE COURT: All right.

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

17 So thank you, Your Honor.

18 THE COURT: All right. Mr. Roots --

19 Or Mr. Pattis?

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

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

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

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

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

21 THE COURT: Under the definition here.

22 MR. PATTIS: Correct.

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

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

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

4 THE COURT: Well, they were --

5 MR. PATTIS: And so --

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

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

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

3 THE COURT: All right. Mr. Jauregui?

4 MR. JAUREGUI: Good morning, Your Honor. Sabino  
5 Jauregui on behalf of Enrique Tarrío.

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

18 Thank you, Your Honor. As to the fence.

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

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

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

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

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

19 MR. ROOTS: Well, it's -- I think the sentencing  
20 guidelines are -- obviously, it's, sort of, an umbrella that  
21 the Sentencing Commission tries to place over this vast  
22 array of criminal laws, and they don't always fit very well.  
23 I do believe the right -- the most analogous guideline is  
24 2A2.4, which is resisting law enforcement, which also is  
25 probably the most analogous to, you know, 111(a) type

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

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

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

5 THE COURT: All right. Very well.

6 Mr. Smith?

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

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

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

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

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

17 MR. MCCULLOUGH: Bootstrapping --

18 THE COURT: Yeah.

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

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

17 THE COURT: No.

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

24 THE COURT: You don't have to recount.

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

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

9 THE COURT: Okay.

10 MR. MCCULLOUGH: Thank you, Your Honor.

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

15 THE DEPUTY CLERK: All rise.

16 (Brief recess taken.)

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

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

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

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

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

22           MR. MCCULLOUGH: Thank you, Your Honor.

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

1 thing here.

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

5 THE COURT: And only those counts.

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

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

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

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

5 MR. MCCULLOUGH: Correct.

6 THE COURT: Okay.

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

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

22 With respect -- and so --

23 (Brief pause.)

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

25 THE COURT: Well --

1 MR. MCCULLOUGH: -- questions or --

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

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

14 THE COURT: Okay.

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

18 THE COURT: Sure. Right. But just --

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

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

23 MR. MCCULLOUGH: Imagine --

24 THE COURT: -- purposes of this.

25 MR. MCCULLOUGH: So then we get to offense level

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

6 You then apply -- so the distinction between 3A1.4  
7 adjustment and the Note 4 adjustment, of course, is that the  
8 3A1.4 -- sorry, I think I said Note 4 adjustment. I meant  
9 Note 4 upward departure. My apologies. The distinction  
10 between the two is that under 3A1.4, the adjustment, you --  
11 it has a process by which you increase the offense level to  
12 a minimum of 32 and then you also apply the criminal history  
13 category of VI. And so the calculations that we've set  
14 forth in our sentencing memo refer to that calculation, and  
15 that is how we get to the guidelines ranges that are set  
16 forth on, effectively, Page 2 of our omnibus.

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

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

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

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

11 MR. MCCULLOUGH: That's --

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

14 MR. MCCULLOUGH: So --

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

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

22 THE COURT: Right.

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

1       come to the same practical destination whether you apply  
2       3A1.4 adjustment to Count 6 or you apply the Note 4 upward  
3       departure to Count 1.

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

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

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

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

20              MR. MCCULLOUGH: Thank you, Your Honor.

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

25              MR. SMITH: Thank you, Your Honor.

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

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

18                 THE COURT: Right.

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

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

3 THE COURT: Okay.

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

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

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

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

17 THE COURT: Right.

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

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

10 THE COURT: Oh, no.

11 MR. SMITH: There have to be some --

12 THE COURT: I think you're --

13 MR. SMITH: -- facts.

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

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

4           THE COURT: Right.

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

12          THE COURT: Right.

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

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

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

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

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

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

4 THE COURT: All right. I understand your  
5 argument.

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

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

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

25 THE COURT: Say again.

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

3 THE COURT: Okay.

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

7 There's also other evidence, Your Honor --

8 THE COURT: All right. Mr. Smith --

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

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

12 MR. SMITH: On the departure provision, Your  
13 Honor, number one, the argument's waived because the --  
14 Mr. McCullough seems to be making some argument about how  
15 Section 3 -- the Government argues that Section 3A1.4,  
16 quote, applies when it's used as an adjustment, but it's not  
17 3A1.4 that is applying when it's used as a departure. It's  
18 still 3A1.4 either way.

19 THE COURT: Okay.

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

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

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

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

7 THE COURT: All right.

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

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

14 MR. SMITH: Okay.

15 THE COURT: -- proceed.

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

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

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

7 THE COURT: For a departure.

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

10 THE COURT: Right.

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

20 THE COURT: All right.

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

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

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

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

14 THE COURT: Yeah.

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

16 THE COURT: Okay. And --

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

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

1 a particular case?

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

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

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

15 THE COURT: Okay. I just --

16 MR. SMITH: And so --

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

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

25 THE COURT: Right.

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

3           THE COURT:  Well --

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

6           THE COURT:  Obviously.

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

13          THE COURT:  Listen --

14          MR. SMITH:  -- as --

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

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

7           THE COURT: I'm not --

8           MR. SMITH: Yeah.

9           THE COURT: I hear you.

10          MR. SMITH: Thank you, Judge.

11          THE COURT: I understand the argument.

12          MR. SMITH: Thanks.

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

15          MR. JAUREGUI: (Indicating.)

16          THE COURT: Your client wasn't present.

17          (Laughter.)

18          MR. JAUREGUI: Judge, my client wasn't present.

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

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

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

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

20 THE COURT: All right.

21 MR. JAUREGUI: Thank you.

22 THE COURT: All right.

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

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

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

1 are enumerated. So Counts 6 and 7 actually would go to  
2 Subdivision (B) of this note, but instead what is being  
3 referenced is the first part. And if the first part, you  
4 take that intent and you take that seditious conspiracy and  
5 the two conspiracies that Mr. Pezzola was not convicted of,  
6 it's our position that the first part, (A), of Note 4 should  
7 not apply to Mr. Pezzola for specifically that reason, that  
8 requisite intent reason, and that could be a fact-specific  
9 inquiry that Your Honor knows the evidence and can go  
10 through. Mr. Pezzola walked away from the crowd for over an  
11 hour. Mr. Pezzola then ended up branching off with other  
12 people from New York, not these other co-defendants.

13 Count 6 specifically does -- was not shown to have been  
14 committed by Mr. Pezzola, but it would actually only rely on  
15 co-conspirator liability. And I ask Your Honor to take that  
16 into consideration when taking such a -- when considering  
17 such a drastic approach and what this terrorist enhancement  
18 actually means. Terrorism has a real, true meaning, and I  
19 don't want to get into the spirit because Your Honor already  
20 said, shouldn't we be going to Congress about that? But the  
21 spirit and essence of these crimes in no way should even  
22 come close to comparing -- to being applied here.

23 Mr. Pezzola did not physically touch a fence, was  
24 not actually alleged to have physically touched a fence --

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

1 the fence part.

2 MR. METCALF: Yes.

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

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

6 THE COURT: Okay.

7 MR. METCALF: So Your Honor, the nature,  
8 circumstances of Count 7 -- I know I'm going to say -- or  
9 we've argued this ad nauseam -- even argued it to the  
10 jury -- that should have been a misdemeanor offense. \$700.  
11 So the threshold between felony and misdemeanor there is  
12 \$1,000. One pane of glass was shown, and testified to, to  
13 be in the \$700 range. Two puts you at \$1,400. We believe  
14 that another individual, not a co-conspirator in this case,  
15 was responsible for the first pane of glass and Mr. Pezzola  
16 was responsible for just one. Now, that becomes relevant  
17 because to, kind of, branch off what Attorney Smith said,  
18 we're talking about a misdemeanor here or our argument that  
19 this should be a misdemeanor. I'll wait for your decision  
20 this afternoon or -- on the 2933, but I know Your Honor's  
21 not going to agree with me, but that is our position. This  
22 is a lower-level offense when taken -- when the facts are  
23 fully considered. And whether you agree or disagree, that's  
24 the kind of offense level that we're talking about here.

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

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

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

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

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

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

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

17 THE COURT: All right.

18 MR. METCALF: Thank you.

19 THE COURT: Thank you, Mr. Metcalf.

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

25 MR. MCCULLOUGH: Thank you, Your Honor.

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

16           Look at what the Seventh Circuit said in  
17 Christianson -- it's a case we cited in our brief, 586 F.3d  
18 532 -- "the purpose of the defendant's actions was to  
19 further" -- in that case, ELF, Environmental Liberation  
20 Front -- "political agenda, the end to industrial society.  
21 The method they chose to communicate this desire was not  
22 peaceful protest with speeches, songs, and a petition  
23 outside the facility but instead a violent attack against  
24 the facility. Because the defendants do not look the part  
25 of our current conception of a terrorist does not separate

1       them from that company."

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

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

7               MR. MCCULLOUGH: Okay.

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

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

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

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

21          THE COURT: Right.

22          MR. MCCULLOUGH: The -- I do know and -- that  
23          Ms. -- sorry, that Mr. Smith pointed out this question that  
24          Judge Friedrich had raised as to whether Note 4 goes beyond  
25          3A1.4. It was raised. I -- Your Honor, I think that -- the

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

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

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

5 THE COURT: All right.

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

7 THE COURT: Yes, Mr. Smith.

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

15 THE COURT: Okay.

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

1 guidelines range if the Court were to apply --

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

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

13 THE COURT: Right.

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

16 THE COURT: Right.

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

19 THE COURT: Or the --

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

21 THE COURT: No, no, no. Right.

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

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

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

11           THE COURT: Sure. No, no, obviously.

12           MR. SMITH: So --

13           THE COURT: Right. Right.

14           MR. SMITH: So just --

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

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

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

25           (Brief recess taken.)

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

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

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

18           To recap, the third superseding indictment charged  
19 each of the five defendants here with nine counts: Count 1,  
20 seditious conspiracy, in violation of 18 United States Code  
21 2384; Count 2, conspiracy to obstruct an official  
22 proceeding, in violation of 18 United States Code Section  
23 1512(k); Count 3, obstruction of an official proceeding, in  
24 violation of 18 United States Code Section 1512(c)(2);  
25 Count 4, conspiracy to use force, intimidation, or threats

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

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

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

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

13 Rule -- Federal Rule of Criminal Procedure 29  
14 allows a defendant to move for a judgment of acquittal on  
15 any offense for which the evidence is insufficient to  
16 sustain a conviction. After a jury has rendered a verdict,  
17 a defendant carries a very heavy burden to show it should be  
18 set aside. Courts, quote, "must affirm the verdict if,  
19 considering the evidence in the light most favorable to the  
20 Government, it determines that any rational trier of fact  
21 would have reached the same verdict." That's United  
22 States v. Hale-Cusanelli, 628 F. Supp. 3d 320 at 324, a  
23 D.D.C. case from 2022 quoting United States v. Wahl,  
24 290 F.3d 370 at 375, a D.C. Circuit case from 2002. Courts  
25 must draw, quote, "no distinction between direct and

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

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

13 So we'll begin with Count 1, seditious conspiracy.  
14 To prove an offense under 18 United States Code Section  
15 2384, as charged in this case, the Government had to prove  
16 the defendants conspired to do at least one of two things:  
17 one, oppose by force the authority of the United States; or,  
18 by force, prevent, hinder, or delay the execution of any law  
19 of the United States. As I instructed the jury, to satisfy  
20 its burden, the Government had to prove both that the  
21 charged conspiracy existed and that each defendant  
22 intentionally participated in the conspiracy with knowledge  
23 of its unlawful goals and with the specific intent to  
24 further its unlawful objectives. So I'll begin by outlining  
25 the evidence on which a rational jury could have determined

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

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

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

1 agreement.

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

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

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

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

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

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

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

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

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

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

15           So in the Telegram chat -- in the Telegram group  
16 for Proud Boys chapter presidents in which members  
17 celebrated former President Trump's comment, Mr. Tarrio  
18 responded, quote, "guys, stand by." Exhibit-514-3. About  
19 an hour later, in a response to one member's question about  
20 what exactly former President Trump's comment meant,  
21 Stewart, a soon-to-be MOSD leader, responded, quote, "I read  
22 it as stand by. Don't engage immediately, but be ready to  
23 go," closed quote. That's 514 -- Exhibit-514-7.

24 Separately, on Parler, Biggs announced that, quote, "Trump  
25 basically said, go fuck them up," closed quote, likely

1 referring to Antifa. Exhibit-603-66.

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

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

25           Criticism of Biggs did not debate -- abate, but

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

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

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

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

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

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

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

25          At the same time, and along similar lines, the

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

12 Nordean made similar comments. In mid-December  
13 2020, he echoed the views of someone in the elders chat who  
14 said, quote, "there wasn't much reason to ally before other  
15 than punching commies, but now there's a real reason. We  
16 are months away from gulags. It's now or never. We fight  
17 or we get locked up." Nordean responded, "perfectly said,  
18 my brother." Exhibit-500-40.

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

1 Then, again, a few days later, during another podcast with  
2 Jeremy Bertino, Nordean explained that, quote, "when police  
3 officers or government officials are breaking the law,"  
4 quote, "you have to use force," closed quote.

5 Exhibit-609-B. In his view, doing so was the point of,  
6 quote, "the organized militia part of our Constitution,"  
7 closed quote. Again, that was Exhibit-609-B.

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

15 The defendants' words became actions at two  
16 so-called Stop the Steal rallies in D.C. on November 14th,  
17 2020, and December 12th, 2020, both of which were  
18 coordinated to protest the election results.

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

1 were Antifa.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18           Matthew Greene, a Proud Boy who attended the Stop  
19 the Steal rallies and was with Pezzola on January 6th,  
20 testified that the Proud Boys, quote, "viewed themselves  
21 almost as the foot soldiers of the right where Antifa were  
22 the foot soldiers of the left." That's the transcript at  
23 5374. Jeremy Bertino went on to testify that they perceived  
24 D.C. police as protecting Antifa from the Proud Boys at the  
25 December rally. Transcript at 9966. Some in the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 The Government offered evidence that Tarrío  
18 engaged with this document in some way; meaning, it may have  
19 shaped his intent. Special Agent Nicole Miller testified  
20 that Tarrío's phone records revealed that he interacted with  
21 the document and Googled "Winter Palace." Transcript  
22 12966-67. Tarrío also twice invoked this relatively obscure  
23 reference. On January 3rd, a different woman remarked to  
24 Tarrío in a private text thread that if her kid, quote, "is  
25 anything like Tarrío, she's in so much trouble," closed

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

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

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

1 themselves and evade identification by law enforcement.

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

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

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

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

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

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

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

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

4 Then on January 3rd, the group discussed logistics  
5 for the 6th. Stewart sent a voice note suggesting, quote,  
6 "the main operating theater should be out in front of the  
7 House of Representatives. It should be out in front of the  
8 Capitol building. That's where the vote is taking place and  
9 all the objections," closed quote. Rehl noted that unless  
10 Tarrío was planning on giving a speech elsewhere, quote,  
11 "the Capitol is a good start," closed quote.

12 Exhibit-501-56. Tarrío answered with a voice note the  
13 following day, saying, quote, "I didn't hear this voice note  
14 till now. You wanna storm the Capitol," closed quote.  
15 That's Exhibit-501-57.

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

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

1 displayed a consciousness of guilt relating to the charged  
2 conspiracy.

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

15 I'll turn now to the evidence from the MOSD  
16 membership chats that a reasonable jury might have believed  
17 to somehow reflect the defendants' conspiratorial intent, as  
18 well. Construing the evidence in the government's favor,  
19 the dynamic between MOSD leadership and membership reveals  
20 that defendants' and their -- reveals the defendants' and  
21 their co-conspirators' intent to deploy the MOSD membership  
22 to achieve the objective of their conspiratorial agreement,  
23 or at least so a rational jury could have concluded.

24 Leadership instructed members to keep everything in the  
25 group private, to strictly adhere to a chain of command, to

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

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

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

1 kick ass when it was time to kick ass." Exhibit-503-23.

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

11 Exhibit-507-16.

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

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

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

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

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

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

1 Transcript at 10137 to 38.

2 Later that morning, a large group of Proud Boys  
3 met at the Washington Monument. Transcript 5482.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 member of both the MOSD and the marching group happened to  
2 play a key role, again, in several breach points, including,  
3 most obviously, breaking the window into the Capitol which  
4 so many rioters streamed into it. Along the similar lines,  
5 again, the jury might have inferred it was no coincidence  
6 that an individual who initiated the first breach of the  
7 Capitol grounds did so within three minutes of putting his  
8 arm around and speaking to Mr. Biggs. That's Transcript  
9 12241 at [sic] 45 and Exhibit-1001.

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

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

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

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

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

1           Tarrío also tried to call both Nordean and Biggs  
2 while they were inside the Capitol building. Biggs returned  
3 his call and the two spoke for about 42 seconds.

4 Exhibit-653-1; transcript -- trial transcript at 12646. In  
5 a private message, Bertino texted Tarrío, quote, "brother,  
6 you know we made this happen," closed quote. Tarrío  
7 responded, quote, "I know," closed quote. Then he added  
8 "this is it," closed quote. Bertino responded, quote,  
9 "1776, motherfucker." And Tarrío responded, mirroring the  
10 1776 Returns document I've already discussed, quote, "the  
11 Winter Palace," closed quote. Exhibit-530-5. Later, Tarrío  
12 echoed the sentiment in the Proud Boys elders group chat,  
13 saying, quote, "make no mistake, we did this," closed quote.  
14 And when another elder asked, "what do we do now," Tarrío  
15 replied, quote, "do it again," closed quote. That's  
16 Exhibit-500-86. Late in the evening, Tarrío posted a video  
17 of himself standing in front of the Capitol ominously with  
18 the caption "Premonition." Exhibit-600-64.

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

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

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

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

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

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

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

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

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

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

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

9 THE DEPUTY CLERK: All rise.

10 (Brief recess taken.)

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

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

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

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

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

20 THE COURT: Please. You may.

21 MR. METCALF: Thank you, Your Honor.

22 (Brief pause.)

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

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

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

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

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

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

25 The problem with this argument is that seditious

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

12 Moreover, even if the jury's verdicts as to  
13 Nordean on Counts 7, 8, and 9 were somehow inconsistent with  
14 its conviction on seditious conspiracy, it's not for me, in  
15 evaluating a Rule 29 motion, to try to read a jury's mind  
16 and reconcile its verdicts. That's *United States v. Dykes*,  
17 406 F.3d 717 at 77 -- 722, a D.C. Circuit case from 2005.

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

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

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

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

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

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

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

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

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

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

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

1 1512(k). On Count 2, the jury convicted Mr. Tarrío,  
2 Mr. Nordean, Mr. Biggs, and Mr. Rehl of conspiracy to  
3 obstruct an official proceeding, but hung on that count as  
4 to Mr. Pezzola. But it convicted each defendant under  
5 1512(c)(2). I'm going to address these offenses together  
6 because so many of the defendants' arguments on one apply to  
7 the other.

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

25 Before turning to the evidence supporting these

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

12 First of all, the defendants don't actually argue  
13 there is a double jeopardy problem here or cite the relevant  
14 standard under Blockburger v. United States. They only ask  
15 that I should consider that risk. Second, for all the  
16 reasons I outlined at the outset, a reasonable jury very  
17 well might have concluded that the defendants formed their  
18 unlawful agreement long before the 6th. And, third, 1512(k)  
19 and 1512(c)(2) are two different offenses. Applying the  
20 Blockburger elements test, 1512(k) requires an agreement and  
21 1512(c) does not. And 1512(c)(2) requires actual  
22 obstruction or attempted obstruction which 1512(k) does not.  
23 There really is simply no risk of double jeopardy -- at  
24 least as that is defined in the case law -- here at all.

25 Turning to the evidence supporting the jury's

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

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

1 theater should be out in front of the Capitol building.

2 That's where the vote is taking place and all the

3 objections." Exhibit-501-56. Mr. Rehl and Mr. Tarrío

4 expressly acknowledged listening to this message.

5 Exhibits-501-56 and 57. And last, a reasonable jury might

6 have inferred that the defendants had come to a mutual

7 understanding to obstruct the electoral count from their

8 physical conduct that day which was laser-focused on the

9 Capitol instead of joining thousands of other supporters of

10 former President Trump to watch his speech at the Ellipse.

11 Turning now to the substantive 1512(c) count, I'll

12 first address the convictions for defendants Nordean, Biggs,

13 and Rehl together, then discuss Mr. Tarrío and then

14 Mr. Pezzola.

15 As to Nordean, Biggs, and Rehl, the events I've --

16 the evidence I've already outlined about their conduct on

17 the 6th and leading up to it supports their convictions for

18 the substantive 1512(c)(2) count, as well. Specifically,

19 I've discussed the substantial evidence demonstrating, at

20 least to a rational jury, the defendants' knowledge of the

21 proceeding and intent to disrupt it and their conduct --

22 that is, charging through barriers and entering the

23 Capitol -- how that contributed to the proceeding's

24 interruption.

25 Now, Biggs and Rehl contend otherwise, but they

1 don't argue anything specific about the actual evidence  
2 supporting their convictions. Instead, they mostly launch a  
3 series of policy arguments that, I think, ultimately don't  
4 move the needle on a Rule 29 motion. They suggest that the  
5 Government has overcharged this case by distorting  
6 Section 1512(c)(2) beyond 1512(c)(1)'s focus on evidence  
7 impairment crimes. Of course, the D.C. Circuit has  
8 conclusively resolved that issue in United States v. Fischer  
9 where a -- well, conclusively resolved it for the moment, I  
10 suppose, and in this Circuit -- where a panel majority held  
11 that 1512(c)(2) was not limited to evidence impairment  
12 crimes. They suggest -- they, Mr. Biggs and Mr. Rehl,  
13 suggest Fischer was wrongly decided, asserting that, quote,  
14 "the use of a statute fashioned to respond to manipulation  
15 of official proceedings by means of influencing the  
16 integrity of the evidence in the context of the January 6th  
17 riot prosecutions is the sort of improbably broad  
18 interpretation of a criminal statute of which the Supreme  
19 Court has disapproved," closed quote. That's ECF No. 828 at  
20 16.

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

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

7 The last element the Government had to prove was  
8 that the defendants acted corruptly. This element, of  
9 course, was the subject of considerable attention in this  
10 case, to say the least. And after detailed briefing and  
11 much argument, I did instruct the jury that to find a  
12 defendant acted corruptly, they would have to conclude that  
13 he used independently awful -- unlawful means or acted with  
14 an unlawful purpose or both. I further instructed that,  
15 quote, "a defendant must not -- must also act with  
16 consciousness of wrongdoing," meaning "with an understanding  
17 or awareness that what the person is doing is wrong." Then,  
18 after considering the parties' arguments about the D.C.  
19 Circuit's recent decision in Fischer, I added for the jury  
20 that acting corruptly often, quote, "involves acting with  
21 the intent to secure an unlawful advantage or benefit either  
22 for oneself or for another person." That's ECF No. 767 at  
23 31 through 32.

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

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

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

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

5 Nordean argues that the Government failed to prove  
6 that he conspired to or, in fact, acted corruptly because it  
7 did not prove that he intended to procure an unlawful  
8 benefit that he knew to be unlawful. And he points to Judge  
9 Walker's concurrence in Fischer, which takes that view.

10 After briefing and argument, I held that Judge Fischer's  
11 [sic] concurrence did not control, and I was not otherwise  
12 persuaded to adopt his view. I'll incorporate my earlier  
13 analysis on that point here which is found at Pages 19171  
14 through 81 of the trial transcript. Biggs and Rehl also  
15 take issue with the Fischer court's reading of the  
16 "corruptly" element as a general matter, but they don't  
17 argue that the jury lacked sufficient evidence to conclude  
18 that they acted with the requisite intent under the  
19 definition I provided.

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

1 suffice to establish a hope or expectation of either benefit  
2 to oneself or a benefit of another person." 64 F.4th at  
3 340 -- Page 340 of Fischer.

4 Nordean further argues that even under the  
5 1512(c)(2) definition I provided the jury, the Government's  
6 evidence was insufficient. In so doing, he disregards  
7 cooperating witness testimony as incredible and suggests  
8 that the Telegram messages are not probative because they  
9 don't reveal an express agreement to obstruct the electoral  
10 count. I've already discussed the ways the Telegram  
11 messages are probative of Mr. Nordean's intent, so I won't  
12 rehash that again. But as for the cooperators' testimony,  
13 it is up to the jury to make credibility determinations.  
14 Mr. Nordean may disagree, but the jury has acted within its  
15 province to find their testimony credible if indeed it even  
16 did. That evidence -- but in any event, the evidence on the  
17 whole here would pass muster under Rule 29 whether or not it  
18 did.

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

1 formed such an agreement, and he was cross-examined about  
2 those earlier statements to the FBI. That's transcript at  
3 10310. It was up to the jury to decide what weight to give  
4 his testimony, given those inconsistencies, but a reasonable  
5 jury could credit his trial testimony and discredit his  
6 earlier statements to law enforcement. And considering  
7 Matthew Greene was not in MOSD membership, a reasonable jury  
8 might have concluded that his lack of awareness about a  
9 broader conspiracy encompassing all of the defendants was  
10 not all that probative either way. As for there not being  
11 evidence of a specific plan, as the instruction I gave the  
12 jury reflects, the law is clear that a jury not find that  
13 the defendants agreed on all the details of their criminal  
14 scheme.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6 As for defendants Tarrío, Nordean, Biggs, and  
7 Rehl, all the same evidence supporting the first two  
8 conspiracy convictions supports the verdict here, as well.  
9 So I'll just incorporate all that evidence about their  
10 intent and conduct that I've already discussed for purposes  
11 of this count. Only Nordean offers any argument on this  
12 count specifically, incorporating the same arguments he made  
13 at the motion-to-dismiss stage. He, once again, argues that  
14 372 does not encompass a conspiracy directed at members of  
15 Congress or Capitol Police. And I'll just incorporate my  
16 earlier analysis reflecting that argument here. That's ECF  
17 No. 586 at 21 -- at 21 through 30. He further argues that  
18 the Government's evidence on this count was insufficient  
19 because, at one time, evidence appeared to pick Nordean --  
20 depict Nordean, again, holding someone back from attacking a  
21 police officer. But, again, as I've already explained, a  
22 reasonable jury might have concluded that Nordean's hand on  
23 the rioter's shoulder was not inconsistent with the charged  
24 conspiracies at all or, in any event, just simply may have  
25 weighed the evidence such that they felt a conviction was

1 warranted.

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

11 First, to the extent that the jury's verdict on  
12 this count is inconsistent with its inability to reach a  
13 verdict as to him on Count 2 or its acquittal of him on  
14 Count 1, I reiterate it is -- the law is clear: It's not my  
15 job at the Rule 29 stage to try to reconcile the verdicts,  
16 nor it -- is it a basis to attack the conviction on a count  
17 that the evidence otherwise supports. That's *United States*  
18 *v. Dykes*, 406 F.3d 717 at 722, a D.C. Circuit case from  
19 2005.

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

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

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

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

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

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

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

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

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

25 From there, the Government presented videos from

1 several angles that, construing the evidence in the light  
2 most favorable to the Government, show Nordean and Biggs  
3 tearing apart two adjoining sections of the fence.

4 Exhibit-445-BX, Exhibit-492-G, Exhibit-417X, and  
5 Exhibit-417X [sic]. In these videos, the jury could see  
6 Nordean and Biggs with their hands down -- I'm sorry, with  
7 their hands on the fence where two segments joined together.  
8 It would see them jostle and pull down on the fence segments  
9 and see them move forward among the first group of the mob  
10 to surge forward between those two segments. And Officer  
11 Cooney testified to the same, particularly Nordean's  
12 conduct. That's transcripts at 7013 and 7149.

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

25 Nordean argues that his conviction for destroying

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

11 The Government also offered enough evidence for a  
12 reasonable jury to conclude that the damaged fence cost more  
13 than \$1,000 under 18 United States Code Section 1361's  
14 felony provision. A representative from the Architect of  
15 the Capitol, Jason McIntyre, testified that the fence at  
16 issue was a, quote, "temporary fence that they," quote,  
17 "install in the days leading up to the presidential  
18 inaugural on the west front." That's the transcript at  
19 11478. The fence was in, quote, "like new," closed quote,  
20 condition before the 6th but, quote, "completely dismantled,  
21 closed quote," and a, quote, "total loss," closed quote,  
22 afterward. Transcript 11479 through 80.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 A few specifics. Defense witnesses who marched  
6 with the defendants on January 6th, including Travis Nugent  
7 and Eddie Block, confirmed that the group viewed Biggs and  
8 Nordean as leaders. Trial transcript 14636 through 37 and  
9 14991 and 14997. Nugent further testified that Proud Boys  
10 followed Nordean because he was famous for his fighting  
11 ability. Transcript 14627 through 28. And during what  
12 happened on January 6th, Nugent asked Nordean whether they  
13 were really doing this when the barricades came down and, by  
14 his telling, Nordean just turned and walked toward the  
15 Capitol. Nugent testified that he simply followed a chain  
16 of command -- his chain of command. Transcript at 14643  
17 through 45. All of this supports the Government's theory  
18 about how Nordean and the other defendants led the Proud  
19 Boys on the 6th.

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

1 14559. Jorge Mesa, who testified for Tarrío that the Proud  
2 Boys' purpose in attending the January 6th rally was to  
3 peacefully protest, testified that January 6th was a  
4 glorious event and, quote, "the most patriotic act in this  
5 country in the last hundred years." Transcript at 15426  
6 through 27.

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

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

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

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

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

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

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

13           As for Rule 33, Federal Rule of Criminal Procedure  
14 33(a) states that the court "may vacate any judgment and  
15 grant a new trial if the interest of justice so requires,"  
16 closed quote. Despite this broad discretion, the D.C.  
17 Circuit has instructed that, quote, "granting a new trial  
18 motion is warranted only in those limited circumstances  
19 where a serious miscarriage of justice may have occurred,"  
20 closed quote. That's *United States v. Wheeler*, 753 F.3d 200  
21 at 208, a D.C. Circuit case from 2014.

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

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

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

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

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

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

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

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

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

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

20 \* \* \* \* \*

21 CERTIFICATE OF OFFICIAL COURT REPORTER

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

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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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