

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

1 UNITED STATES OF AMERICA .
 2 Plaintiff, .
 3 vs. . Docket No. CR 21-035-EGS
 4 .
 5 RONALD MCABEE . Washington, D.C.
 6 Defendant. . September 22, 2021
 7x 1:04 P.M.

TRANSCRIPT OF DETENTION HEARING

BEFORE THE HONORABLE SENIOR JUDGE EMMET G. SULLIVAN

UNITED STATES DISTRICT JUDGE

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Court Reporter: Cathryn J. Jones, RPR
Official Court Reporter
Room 6521, U.S. District Court
333 Constitution Avenue, N.W.
Washington, D.C. 20001

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

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P R O C E E D I N G S

THE DEPUTY CLERK: Your Honor, this is Criminal Case 21-335, United States of America versus Ronald McAbee. Will parties on the line, please identify yourself for the record starting with government counsel.

MS. KEARNEY: Good afternoon, Your Honor, Benet Kearney for the United States, and also on the line is AUSA Colleen Kukowski.

THE COURT: Good afternoon to you both. And for Mr. McAbee.

MR. GANT: Good afternoon, your Honor, Isaish Gant, Assistant Federal Public Defender in Nashville, Tennessee here on behalf of Mr. McAbee.

THE COURT: All right, counsel, good afternoon. Mr. McAbee, how are you today, sir?

THE DEFENDANT: I'm good, sir. How are you?

THE COURT: Good. All right. I read your pleadings. Let me hear from government counsel -- actually, let me hear from Mr. McAbee's attorney. I'm very concerned about what happened on January the 6th, vis-a-vis your client, but what is it that the magistrate judge missed? And what are the strong points you wish to emphasize -- actually, it's the government's appeal so let me hear from government counsel first.

MS. KEARNEY: Thank you, your Honor. I know your

1 Honor's familiar with the 96 seconds to two minutes that are
2 at issue in this case. We have several exhibits which I
3 think your Honor has seen at least versions of before which
4 I'm happy to play highlighting with respect to --

5 THE COURT: Why don't I give you that opportunity,
6 counsel, so we're all on the same page. Go right ahead.

7 MS. KEARNEY: Would you like me to play those now
8 or should I play those --

9 THE COURT: I'll leave it up to you.

10 MS. KEARNEY: Well, I'll answer the question, your
11 Honor, and I'll get to the exhibits. This defendant poses a
12 significant danger both with respect to his conduct on
13 January 6th itself, which is where these video clips come
14 in. When I play them what you'll see is the defendant
15 emerges from the crowd where these officers are already
16 being violently attacked. Advances towards those officers,
17 grabs one of them, that's Officer AW, and **assists another**
18 **rioter, co-defendant Clayton Mullins in pulling him in to**
19 **basically what is an angry mob.**

20 When he is interrupted by Officer CM, all attempts
21 to push him away from Officer AW he attacks Officer AW,
22 punching at him while he's wearing metal knuckle gloves.
23 This conduct is violent. It contributed to the injuries of
24 two officers. And it's made worse by the fact that at the
25 time the defendant was himself a sworn police officer. And

1 I'll address further down the road with respect to his
2 future dangerousness and why detention is necessary here.

3 THE COURT: Ms. Kearney, I just need you to
4 clarify, he was still an active law enforcement on
5 January the 6th, is that correct, or former?

6 MS. KEARNEY: That's correct. He was on medical
7 leave at the time due to an injured shoulder, but he did not
8 resign from the sheriff's office until March of 2021, I
9 believe.

10 Frankly, your Honor, and I'll address this later,
11 but you know, this was an individual who was in a physical
12 state such that he was not permitted to undertake active
13 duty. He was under medical advice not to go to work and yet
14 advanced to the Capitol on January 6th and participated in
15 this violent melee. But that's a point for another time.

16 So what I would like to do if your Honor will
17 indulge me is play five, six video clips and then highlight
18 in half speed this defendant's conduct because I think that
19 helps to make clear exactly what his involvement was.

20 THE COURT: That's fine, counsel.

21 MS. KEARNEY: Great, thank you, your Honor. The
22 first one is Government Exhibit one, and that is the
23 body-worn camera of Officer CM. Give me one moment to set
24 it up. As you're watching, your Honor, the defendant
25 appears at approximately second 40, but I'll play the entire

1 clip so that defense counsel can see the entire clip and
2 we'll examine from second 40 onward.

3 THE COURT: That's fine.

4 MR. GANT: May I ask if she's sharing the screen
5 because I don't see it on this end.

6 MS. KEARNEY: I thought I was. Sorry about that.
7 Can you see it now? Nothing's playing, but --

8 [Video played.]

9 THE COURT: Right. Yes, we can. I can anyway.

10 MS. KEARNEY: I'm just going to pause, your Honor,
11 just to draw your attention to the individual in the red
12 hat, jeans and a black shirt with a tactical vest. For the
13 record this is 162741 timestamp. That is the defendant,
14 your Honor.

15 THE COURT: All right. Thank you.

16 MS. KEARNEY: And your Honor, I'm going to pause
17 it there at 162808. At this point Officer CM's camera has
18 been knocked off and the rest is just audio unless defense
19 counsel wants to play something then I won't play it any
20 further.

21 THE COURT: All right.

22 MS. KEARNEY: All right. I'm just going to switch
23 applications for one second, so that I can slow down the
24 video. I apologize, your Honor, I'm not able to open any
25 other application, so I'll move to the next exhibit and will

1 clear it up and I can draw your attention to certain aspects
2 after that.

3 THE COURT: That's fine.

4 MR. GANT: Excuse me, are you viewing it again?
5 We don't see it on this end.

6 MS. KEARNEY: No, I apologize. I'm having
7 technical difficulties and I'm trying it another way. All
8 right. One second I'm going to show my screen. This is
9 Government's Exhibit two. And this is body camera footage
10 from Officer DP.


11 I apologize, I'm accessing it through the folder
12 that I shared with Mr. Coates, and so I apologize for the
13 irrelevant stuff around the edges.

14 THE COURT: That's fine.

15 [Video played.]

16 MS. KEARNEY: Thank you. I'm now going to play
17 Government's Exhibit 3.

18 THE COURT: All right.

19 MS. KEARNEY: Which is what we've been calling the
20  story fold video. It is an excerpt from a video posted on
21 YouTube that displays basically the opposite angle of the
22 officer's body camera footage.

23 With respect to this angle, your Honor, if you are
24 looking at the arch the defendant is on the right-hand side
25 and then moves to the center of the arch.

1 THE COURT: Thank you.

2 [Video played.]

3 MS. KEARNEY: I'm pausing at seconds 12, and
4 there's an individual behind that is co-defendant Witton.
5 There's an individual in a red hat and a black shirt that's
6 the defendant, your Honor.

7 THE COURT: Thank you.

8 MS. KEARNEY: I'm going to pause the video there,
9 your Honor, at the 119 mark. I don't believe the defendant
10 is in it after that point.

11 THE COURT: Very well.

12 MS. KEARNEY: I'm going to play Government's
13 Exhibit 4, which is the body camera footage of Officer AW.
14 And you'll see, your Honor, that AW ends up on his back in
15 the arch at a certain point in the video.

16 [Video played.]

17 THE COURT: Is that Mr. McAbee with the sweater
18 on?

19 MS. KEARNEY: Yes, with the patch that we
20 described.

21 THE COURT: Showing the word "sheriff," is that
22 correct?

23 MS. KEARNEY: That's correct, your Honor.

24 THE COURT: That's pretty outrageous.

25 MS. KEARNEY: Yes, your Honor, I think it

1 contributes to the determination of his level of
2 dangerousness.

3 THE COURT: I completely agree. These videos are
4 very disturbing.

5 MS. KEARNEY: And yet this is, your Honor, someone
6 who not only was employed as a sheriff's deputy at the time,
7 but chose to wear that insignia combined with other
8 extremists group insignia to the Capitol. And as I'll play
9 in another video, your Honor, to then invoke that status
10 when it suited him. He attempts to later get through the
11 arch by gesturing towards that patch itself.

12 But let me finish this video, your Honor. I think
13 we timed out the amount time Mr. McAbee spends over Officer
14 AW. It's clear that he has dragged Officer AW. You can
15 hear him grunt during that video. You can hear the officer
16 grunt in pain. And he spends approximately 25 seconds over
17 Officer AW with his arms holding him down. At this point in
18 the video, Your Honor, Officer AW has rolled to his side and
19 is attempting to get back into the arch.

20 [Video played.]

21 MS. KEARNEY: Two remaining exhibits, your Honor,
22 and then I'm only going to play a portion of them in the
23 interest of time. Because I think there's a lot of filler
24 in between, but should defense counsel like to display them
25 they're obviously available. The first is Government's

1 Exhibit 6A which is body camera footage from Officer SS.

2 [Video played.]

3 MS. KEARNEY: And the individual in the red hat in
4 front of -- Officer SS right now is looking at CM's back.
5 The individual in the red hat in front of CM is the
6 defendant.

7 THE COURT: Thank you.

8 [Video played.]

9 MS. KEARNEY: I'm going to pause at the 40 second
10 mark. The defendant isn't in it beyond that. And I'm also
11 going to play Government's Exhibit 6B starting at minute
12 120, and going until approximately 216. This your Honor,
13 just to provide you with context is from after the 427, 428
14 time period. At that point several minutes later rioters
15 attempt to bring an individual in distress to the arch.

16 [Video played.]

17 MS. KEARNEY: That's at 2 minutes, 18 seconds,
18 your Honor. And the defendant gestures towards the
19 sheriffs' patch in an effort to try and get through the
20 police line. I'm going to stop sharing now and I'll pull it
21 back up for some specific clips, but I think, you know,
22 these videos highlight, your Honor what the magistrate judge
23 in the Middle District of Tennessee overlooked. And that is
24 the nature of the attack at the time.

25 In his opinion magistrate judge suggested that

1 there was ambiguity in what the defendant was doing, that
2 perhaps he was, he was provoked. And therefore, while not
3 necessarily justifiable was significantly less dangerous
4 than other defendants who participated in this type of
5 violence.

6 And these videos make clear that is not so. I
7 have specific portions I can slow down and show your Honor
8 exactly what is going on. But it's clear, clear from these
9 videos that the defendant saw an assault in progress that
10 was started by his codefendants, that he approached the
11 archway and that he joined in that assault.

12 He stood over Officer AW while he was on his back,
13 while defendant Mullins was pulling the officer into the
14 crowd, grabs the officer's torso and his leg and dragged him
15 not to safety, not to provide assistance, but farther into
16 the crowd. He's working against the other officers who are
17 attempting to help AW in these videos.

18 THE COURT: Can you show that scene, please?

19 MS. KEARNEY: Yes, your Honor. There are several
20 angles. The first I would like to show is Exhibit one
21 starting at 40 seconds.

22 [Video played.]

23 MS. KEARNEY: So that officer that was just
24 grabbed that was Officer BM.

25 THE COURT: Yes.

1 MS. KEARNEY: And I'm going to slow this down to
2 half speed. The sound would be distorted, but it's easier
3 to see.

4 THE COURT: Thank you.

5 [Video played.]

6 MS. KEARNEY: I'll pause it at 107. The next one
7 is Exhibit two starting at approximately --

8 THE COURT: I'm sorry, I'm sorry. If you were
9 showing something we didn't see it. I didn't see it.

10 MS. KEARNEY: I apologize, your Honor. To go back
11 to Exhibit one at approximately 40 seconds.

12 [Video played.]

13 MS. KEARNEY: What you see at approximately 48
14 seconds is the defendant --

15 THE COURT: We can't see anything. I can't see
16 it.

17 MS. KEARNEY: It's not shared. I apologize, your
18 Honor.

19 THE COURT: All right. Take your time.

20 [Video played.]

21 MS. KEARNEY: I'll back up to approximately 40
22 seconds. And what you see here, your Honor, is there is an
23 officer who reaches out in an attempt to bring AW back to
24 safety. And the defendant rather than working with the
25 officer, you know, defense counsel in Tennessee argued that

1 he was actually attempting to render aid. The defendant is
2 pulling AW in the opposite direction. He's pulling him
3 towards co-defendant Mullins and towards this mob out here.

4 THE COURT: It appears that way to the Court as
5 well.

6 MS. KEARNEY: I'm sorry?

7 THE COURT: It appears that way to this Court as
8 well.

9 MS. KEARNEY: This, your Honor, is Officer CM's
10 body camera footage, and so these hands and this baton
11 belongs to Officer CM. And it's actually difficult to see,
12 your Honor, because the officer turns away as he's being
13 struck, but you see the defendant also swing towards that
14 officer as well.

15 THE COURT: And it's clear if you can see the,
16 those gloves with spikes with them or whatever the studs.
17 Is that what you're referring to?

18 MS. KEARNEY: Yes, those are hard-knuckled gloves.
19 As you see in the defendant's text messages which we submit
20 as Exhibit B, which he purchased specifically for this
21 occasion. I'd also like to play a small sample of
22 Government's Exhibit 2 starting at 28, which is a different
23 angle. The drag of Officer AW into the crowd I think is
24 clearer from here.

25 [Video played.]

1 MS. KEARNEY: Your Honor, there you see him grab
2 Officer AW's thigh and essentially pull him further into the
3 crowd.

4 THE COURT: It appears that way to the Court as
5 well. It also appears the DC police officers are depicted
6 to the right of the screen in yellow and white and black.
7 And there's an officer there with, on his helmet appears to
8 be MPD it. So it appears clearly to this Court that the
9 defendant is pulling the officer back into the crowd of
10 other terrorists.

11 MS. KEARNEY: And finally, your Honor, I think
12 Officer AW's footage is particularly powerful. I'm not
13 going to slow this one down because I think the sound here
14 is important. I'm going to start at 55.

15 [Video played.]

16 MS. KEARNEY: Your Honor at the beginning of that
17 section starting around seconds 55 or 57, you can hear
18 Officer AW groan as he's being moved. It's clear from the
19 movement on the screen that his body is being lifted and
20 it's being moved. You can hear him groan as that happens.
21 I'll stop sharing now.

22 THE COURT: I'm sorry, I couldn't hear anything.
23 I don't know if you had the volume muted or not.

24 MS. KEARNEY: Oh, I did not have it muted, but I'm
25 not sure how to fix that problem. If you want to review it

1 on your own computer it would be starting around second 55
2 of government's exhibit --

3 THE COURT: That's fine. That's fine. I accept
4 the government's proffer as to what it depicts. That's
5 fine.

6 MS. KEARNEY: Okay. And so frankly, your Honor,
7 as I was arguing earlier I think these specific clips
8 highlight how the magistrate judge in the Middle District of
9 Tennessee did not fully consider the gravity and the
10 severity of the defendant's actions on January 6th.

11 In addition, I think he discounted the future
12 dangerousness that this defendant presents. Putting aside
13 these actions on that day this is a defendant who was a
14 sworn law enforcement officer, was, you know, under medical
15 advice not to engage in work, who expressed in his text
16 messages that his wife and others were reluctant for him to
17 go on January 6th, and yet he persevered and did.

18 This is a defendant who in preparation for
19 traveling to Washington, D.C. on the 6th, ordered metal
20 knuckled gloves, a weapon. His traveling companion sent him
21 text messages of his own quote "arsenal," which consisted of
22 knives, brass knuckles, a magazine. The defendant made no
23 effort to dissuade that associate, associate one in our
24 papers, from bringing those items to the Capitol. Now to be
25 clear, your Honor, I don't know which or whether any of

1 those were brought, but their text messages certainly make
2 clear they thought it was a good idea.

3 This is a defendant who continued to express pride
4 in ownership of what he had done. You'll see in exhibits
5 either text messages the days after January 6th, where he
6 says the Latin equivalent of liberty or death, and that he
7 has shed blood for his country and would do so again. The
8 exact quote, Your Honor is on, I apologize, page, page 3 of
9 the text messages associate two, which I think was
10 Government's Exhibit F, but I don't remember.

11 And he says to associate two, "I've shed blood for
12 my country by the hands of the swamp. I will shed much more
13 in the days to come. But I will not forget the oath I swore
14 years ago to protect the America once knew, libertatem vel
15 mortem, which is liberty or death."

16 And so this is the defendant who was not caught up
17 in a 90 second moment. This is a defendant who planned for
18 precisely that moment, and then continued to express pride,
19 satisfaction with that moment and the intention and
20 willingness to do so again.

21 THE COURT: Thank you, counsel. Mr. Gant.

22 MR. GANT: Judge Sullivan, your reaction to seeing
23 these videos, and I'm sure you've seen other videos about,
24 that occurred on January 6th, 2021. But your reaction,
25 Judge, was the same reaction that Judge Frensley had. If

1 the Court please at page 127, the transcript, if I might
2 just with your Honor's permission read what he said.

3 THE COURT: Sure.

4 MR. GANT: "The question I have to decide today is
5 a very narrow and specific question, and that is whether or
6 not there are conditions that will reasonably assure the
7 safety of the community if Mr. McAbee is released, is to be
8 released in this case."

9 Goes on to say, "but what I think is really
10 important and make clear for the record is that the decision
11 that I have to make today is not a decision about whether or
12 not Mr. McAbee engaged in conduct that's alleged in the
13 indictment, or whether Mr. McAbee is guilty of the conduct
14 alleged in the indictment, or whether or not he should be
15 punished for the conduct alleged in the indictment, or what
16 punishment he should receive for that conduct that's
17 alleged."

18 He talks about, Judge Sullivan, how horrific these
19 videos are. He speaks of how he reviewed each of these
20 videos and talked about his disdain for the conduct that he
21 saw. So your reaction is the same reaction that Judge
22 Frensley had. What difference here, Judge is this, and I
23 say this most respectfully.

24 THE COURT: Sure.

25 MR. GANT: When you look at, for example,

1 Government's Exhibit 1 that's the body camera CM. And
2 again, your Honor, I'm sure if you haven't you will
3 certainly review this. But what government counsel says is
4 that that's the video where Mr. McAbee reaches over and he
5 assists other folks in dragging the body of that officer
6 down the railing. If you look at that video, what you will
7 see Judge is this, Mr. McAbee puts his hand on the thigh of
8 that officer and he reaches over. When you slow that up you
9 do not see him grabbing that officer.

10 Next, the government says well, what the
11 government is relying on Judge is the horrific nature of
12 this conduct as the basis for saying you need to lock this
13 guy up, but we know you can't do that. You have to be able
14 to say I'm only trying to determine whether or not there are
15 conditions or a combination of conditions that will assure
16 the safety of any person in the community. That's my fold.

17 But what the government is saying, Judge Sullivan,
18 to you is this, this man went to Washington bent on mayhem.
19 And they suggest as a proof of that is these gloves with the
20 brass, silver knuckles. The fact that he had on a flak
21 jacket. Judge, again if you go back to that very first
22 video, CM I think it is, and you will see as you're looking
23 at that video on the left of that video you'll see an
24 individual, red cap, glasses, clearly it's Mr. McAbee, reach
25 down over a rail and he picks up the baton.

1 First, he's hit in the back, in the back of the
2 head by something, but he leans over and picks up a baton.
3 And the very next second you see Mr. McAbee in that same
4 video no baton. You never see him wield that baton not one
5 time.

6 Government talks about well, he's got these gloves
7 with these silver hard knuckles. The two videos that your
8 Honor will see where Mr. McAbee engaged in any kind of
9 offensive conduct with Capitol police was when he,
10 Mr. McAbee, gets pushed, he pushes back. He did that. But
11 Judge if he went to Washington, D.C. on January 6th bent on
12 causing some kind of mayhem why didn't he use those knuckled
13 gloves to hit anybody? You never see him do that.

14 Now again, the government says well, he pushed the
15 officer. In fact, Judge, if you will look at -- and again,
16 I'm not suggesting your Honor hasn't. But if you look at
17 the government's last pleading docket entry 116, that's
18 their reply to my response.

19 And it's interesting Judge in that you go from
20 their motion here in the Middle District of Tennessee to
21 their emergency motion. And when you read it it has Mr.
22 McAbee basically in nonstop motion, but when you read their
23 reply especially at page 4, where it says, the defendant's
24 words in the days leading up to January 6th, and his attire
25 on that day demonstrate that he engaged in prior planning

1 before arriving at the Capitol, that he carried and used a
2 dangerous weapon during the riot.

3 Now the dangerous weapon were the gloves with the
4 knuckles. It goes on to say, "The defendant attempted to
5 purchase metal knuckled gloves to use January 6th, but he
6 learns that he couldn't get them delivered in time. He
7 asked associate number one to procure them for him." It
8 then says, "He, the defendant, the accused, considered
9 bringing an additional makeshift weapon a T-handled tire
10 puncture." Considered not brought, but considered.

11 It then goes on to say, your Honor, "And expressed
12 no concern when associate one announced his intention to
13 bring knives, brace knuckles, and mace." Again, what
14 they're saying now is not that he, Mr. McAbee did something,
15 he did not do something. He did not stop his associate. So
16 there's kind of an attempted backing off of the
17 aggressiveness that they say he posed. They go on to say,
18 "He also planned to wear and did wear a ballistic vest."

19 Now what the government is saying to you Judge
20 when you look at these videos, if you look at the videos in
21 a mindset that says Mr. McAbee did something you're going to
22 see that. But when you look at it in an objective fashion
23 clearly you can say to yourself now wait a minute, is he
24 dragging an individual. The other video, Judge, where you
25 see Mr. McAbee is supposedly laying on the officer and

1 supposedly laid on the officer for 25 seconds.

2 Your Honor, look at that video. You can tell from
3 the video he could not have been doing that. Why? Because
4 when, in the video you see the full chest of Mr. McAbee.
5 And you see him hovering over the officer, but if he was
6 pressed up against that officer for 25 seconds, Judge, the
7 body camera would not have been able to film him like it
8 did. He wouldn't have been able to because he would have
9 covered up the lens. But again, if you're looking at that
10 video with an eye for saying that Mr. McAbee did something
11 then you might, you might arrive at that conclusion.

12 The other thing is this, Judge, when you look at
13 each and every one of these videos in particular let's talk
14 about SS number one. You see Mr. McAbee and he's pushing.
15 He's extending his arms, not striking at anybody but
16 extending his arms. Okay. In SS, when he's pushing and
17 extending his arms what does he do? Doesn't swing at
18 anybody. Doesn't ball up his fists. Doesn't do anything
19 aggressive. He drops to his knees and attempts to assist
20 one of the protesters who's down and whose been trapped.

21 Again, that would be consistent with what your
22 Honor may well learn from the character letters which were
23 submitted as exhibits here. But not one single video, not
24 one, can be looked at and said definitively that this young
25 man engaged in any aggressive conduct.

1 Next, the government wants to make a big deal out
2 of Mr. McAbee pointing to the sheriff written on his vest.
3 Again, your Honor, when you look at that video and you
4 listen to it, when you hear the language what Mr. McAbee is
5 doing is saying look I'm hurt. I just want to get in. I
6 need some medical attention. And let me in and he shows
7 his, the word sheriff in an attempt to get in to get some
8 kind of help, not in an attempt to get in to somehow cause
9 further insurrection. But if that's what you're looking for
10 you'll see it. But if you look at this, if you look at this
11 in an objective fashion, and it's difficult to do.

12 THE COURT: Counsel, let me stop you though.
13 Isn't the Court allowed to draw appropriate inferences from
14 what the Court sees with its own eyes? Or am I suppose to
15 just forget about what I see with my own eyes?

16 MR. GANT: No, Judge, you are not to --

17 THE COURT: My job, I clearly understand what my
18 job is today. It's not to determine proof beyond a
19 reasonable doubt or not, or whether the government has
20 proved allegations beyond a reasonable doubt. The standard
21 is very narrow. It's very narrow. You agree though I can
22 draw appropriate inferences from what is clearly depicted on
23 the screen, correct?

24 MR. GANT: Yes, sir, I would.

25 THE COURT: All right. Okay.

1 MR. GANT: What I say to your Honor is this, when
2 you look at those videos and you draw appropriate inferences
3 from what you see I suggest to you that if you look at the
4 videos objectively you'll say to yourself wait a minute, I'm
5 not so sure he's grabbing anybody, but clearly it can be
6 argued that he is. You know, I don't want your Honor to
7 think that I don't, I don't believe that that can be a
8 conclusion that can be drawn. I understand that.

9 But if what the government is saying to you,
10 Judge, is this individual Mr. McAbee ought to be locked up
11 and he ought to be locked up because he poses a danger to
12 the community they have to come forward with clear and
13 convincing evidence that he is a danger. And if that
14 evidence is not clear and convincing, but subject to some
15 interpretation then I suggest to you they have not met their
16 burden.

17 Judge, again this is not your first January 6th
18 case, and I'm sure you've seen lots of videos. What I say
19 to your Honor is this, Judge Frensley just like your Honor
20 was appalled by the conduct that's shown in these videos.
21 And he was able to say to himself though I can't look that.
22 I can't be, I can't allow my motions over what I see to
23 cloud my one objective here today. And that objective was
24 to determine whether or not there were conditions.

25 THE COURT: Tell me what the conditions would be

1 if the Court were incline to release your client? What
2 would give the community comfort in knowing that your client
3 does not present himself to be a danger to the community?

4 MR. GANT: Yes, your Honor. One of the conditions
5 that you could impose would be home confinement. That is,
6 is he can't leave that house going anywhere but to court, to
7 church, to work or to his lawyer's office. Your Honor could
8 impose electronic monitoring to be sure that he's not going
9 anywhere. Your Honor can impose restrictions like preclude
10 him from using the internet or any other platform in order
11 to view and or participate and or promote the kind of
12 activity that government believes he was involved in.

13 Your Honor likewise can impose a petition where
14 every day, every week, twice a week that he is reporting to
15 a probation officer who's supervising his conduct. So there
16 are a number of conditions, your Honor, that you can impose
17 that I suggest to you would for all intents and purposes
18 preclude Mr. McAbee from engaging in the kind of conduct the
19 government suggests he's engaged in.

20 THE COURT: All right. Thank you, counsel.

21 As with most of these cases these are very
22 difficult issues because many of the cases the individuals
23 charged with violent conduct have been pillars of the
24 community like your client. Your client was a sworn law
25 enforcement officer. People have attested to his good

1 character, et cetera. These are not easy questions for any
2 judge to resolve. Mr. Kearney, would you like to respond?
3 Or maybe it's more appropriate to give the government a
4 chance to respond in writing after this hearing. What's
5 your pleasure? I'm not ordering that, but I want to give
6 you a choice.

7 MS. KEARNEY: No, Your Honor, I think I can
8 respond now.

9 You know, to Mr. Gant's suggestion that there are
10 conditions that can be set. Frankly, this is a defendant
11 that has taken oaths before. He sworn oaths in multiple
12 sheriff's offices that he would uphold the law. His job was
13 on the line when he went to the Capitol on January 6th. He
14 went against medical advice. He went against his wife, who
15 I note that the magistrate judge in Tennessee appointed as
16 his third party custodian, he went despite her protestations
17 that she didn't want him to go.

18 You know, this is someone who uses his badge of
19 authority when it works for him and disregards it when it
20 does not. This is someone who has expressed a
21 disinclination to abide by laws he does not agree with. I
22 note that he is on Facebook wearing Three Percenters
23 insignia that he did so on the day of January 6th. That he
24 flies a black flag outside of his residence which is used to
25 connote a lack of surrender if you will.

1 And that he chose on January 6 not only to wear a
2 tactical vest which to his dangerousness I think suggests
3 just exactly what he expected would happen, but that he
4 chose to wear his sheriff's patch while doing it. He saw no
5 conflict between his oath to uphold the law and to abide by
6 the law and what he did on January 6th. And I think that
7 indicates an unwillingness to abide by any such conditions
8 even if they were to cut off his internet, to put him on GPS
9 or anything like that.

10 THE COURT: All right. Thank you, counsel.
11 Mr. Gant, anything further?

12 MR. GANT: May I just address a couple of her
13 remarks?

14 THE COURT: Of course, sure.

15 MR. GANT: One of the things, Judge, that I know
16 the government wants to be careful about arguing his --
17 Mr. McAbee because of his beliefs when they talk about the
18 black flag outside of his home. They talk about anything
19 that has to do with what he believes. Certainly his beliefs
20 are not a basis to lock him up.

21 The suggestion that the government is making here
22 with this argument is that there's a suggestion that he may
23 belong to some antigovernment organization. That's
24 speculation, Judge, there's nothing to suggest that he is.
25 The fact that he wears an emblem Three Percenters doesn't

1 mean that in fact in the record of this case when Mr. McAbee
2 learns of the mission of the Three Percenters he disavows
3 and distancing himself from them.

4 The point I want to make, Judge, and I'm going to
5 shut up because I know we're out of time here.

6 THE COURT: No, I'm not trying to cut you off,
7 counsel.

8 MR. GANT: I'm not suggesting that you are. When
9 I start repeating myself I know it's time to
10 [indiscernible].

11 THE COURT: But look, I'm going to stop you there
12 you're starting to repeat yourself. Because I have a bad
13 habit of doing that myself, so I know a repeater when I hear
14 one.

15 MR. GANT: Thank you, Judge.

16 THE COURT: All right. Anything further? No, no,
17 if you have any new points to make go ahead and make them,
18 counsel.

19 MR. GANT: The only point I'm trying to make here
20 is this, when the government says, for example, Mr. McAbee
21 cannot be trusted to follow conditions that would be imposed
22 by the Court because, for example, here he was a sworn
23 police officer and he's out there in this crowd protesting.
24 Certainly a police officer has a right to express his or her
25 dislike some policy of the government. Nothing wrong that.

1 But what the government is suggesting is he went
2 there, did that knowing he can lose his job. There's no
3 evidence that he would have lost his job. In fact, from
4 January to March he was still employed, so to make that
5 argument I suggest, Judge, is mere speculation. Thank you
6 for your patience.

7 THE COURT: Counsel makes a good argument. Had
8 the sheriff's department where he worked knew that he was in
9 DC on January the 6th with some metal spiked gloves on
10 contrary to medical directives to remain at home, you know,
11 I guess that would have caused him a lot of concern and
12 stress about his ability to abide by the very solemn oaths
13 he's taken in the past.

14 And counsel makes a very good point that as a law
15 enforcement officer abide by the Constitution, et cetera,
16 et cetera, he raised his right hand. Probably put his left
17 hand on a Bible more than once and sworn to administer
18 justice. So if he didn't do that on January the 6th, how
19 can Court take any comfort in knowing that he will abide by
20 the Court's directives to do certain things going forward?

21 And I will tell you now that if I were to release
22 him I would not point his wife as third party custodian. I
23 don't know her. My guess is she knows her husband dearly.
24 She's not going to pick the phone up to let me know that
25 he's not complying with the conditions of release. And I

1 say that respectfully and give her the benefit of loving her
2 husband. She's just not going to do it. It's asking too
3 much of a spouse.

4 I may have done it in the past a couple of times
5 to release someone to -- in fact, I don't think I've ever
6 done that. But that's the big question. You know, he's
7 taken these oaths to be a law enforcement officer. The
8 government contends he's broken those oaths by coming to
9 Washington dressed as he was dressed. And shown videos
10 depicting him doing certain things on the Capitol on
11 January the 6th.

12 So again, how can the Court take any comfort in
13 the fact he will follow the Court's directives to be law
14 abiding going forward and comply with any conditions of
15 release the Court imposes?

16 MR. GANT: Just from roughly May, June, July, Mr.
17 McAbee was aware that there was a potential that he might be
18 charged with some illegal activities with regard to
19 January 6th rioting at the Capitol, and yet Judge he didn't
20 go anywhere. When law enforcement arrested him and searched
21 his house he was at the same house that he'd been before and
22 after January 6th.

23 THE COURT: Let me just stop you there for a
24 second. That is an issue that has perplexed this Court for
25 the 37 years I've been a judge. And the marshals will tell

1 you by and large when they're looking for someone they'll go
2 to the person's home or they'll telephone the landline at
3 the home, and just say don't put your family in jeopardy of
4 something happening if we were to come to your house to
5 arrest you, just return yourself in. By and large people
6 never leave their homes.

7 That's just the way it is. And law enforcement
8 officers will be the first to tell you that. They have
9 learned how to minimize danger to themselves, to spouses and
10 children of people they're interested in arresting by just
11 picking the phone up and calling them. If the person is
12 responsible himself they'll just turn themselves in.

13 I don't know what happened in this case did your
14 client turn himself in?

15 MR. GANT: No, your Honor, he did not.

16 THE COURT: I'm not going to hold that against
17 him. That's fine. He was arrested. That's fine. They
18 probably had a warrant, that's fine. But it's not unusual
19 that a person would be at home. That's the point the Court
20 is making. That's something I've been amazed at for the
21 past 37 years. People don't go anywhere for the most part,
22 for the most part. Now every now and then people will take
23 off and leave the country and they leave his wife and
24 children and that's it. But for the most part people go
25 home. But go ahead I didn't mean to cut you off.

1 MR. GANT: I made my final point. Appreciate your
2 Honor's patience.

3 THE COURT: That's fine. This is a significant
4 issue. We've spent, I don't know, we started around one
5 o'clock. It's after two now. And your client's liberty
6 interest is at stake and that always concerns this Court. I
7 want to think about it some more. I want to look at those
8 tapes again with my staff, and I want to be fair and will be
9 fair to your client.

10 It is very disturbing what's depicted on the
11 screens. But I agree with you counsel it's the government's
12 burden to prove by clear and convincing evidence. And you
13 know, clear and convincing evidence is, that's the
14 evidentiary basis that's appropriate for the Court to draw
15 inferences. I'm not going to speculate about anything.
16 It's the government's burden.

17 But I want to be fair to your client as well, so
18 I'm not going to decide the issue this afternoon. I'm not
19 going to take it under advisement I can tell you that. This
20 is my plan. This is my suggestion. The motion that's filed
21 does toll speedy trial. I recognize that's also an
22 infringement on your client's rights, but the stakes are
23 high here. He wants to be returned to the community.

24 By and large he has, he has served in a very law
25 abiding manner. I haven't heard anything contrary that

1 would persuade me that he was, that he was not by all
2 accounts a conscientious, law-abiding public servant. So in
3 every case I want to be clear and I do want to give it some
4 more thought.

5 My suggestion and maybe counsel have a better
6 suggestion we have another status hearing sooner rather than
7 later. I recognize Mr. Gant, you're probably in the process
8 now of obtaining whatever discovery, whatever additional
9 discovery the government has. Maybe you concluded that
10 process, I don't know. I just don't know.

11 What's an appropriate time frame? I may write on
12 this as well. What's an appropriate time frame for the next
13 status hearing? I'm not talking about two months from now.
14 What's your recommendation, Mr. Gant and also Ms. Kearney?

15 MR. GANT: Judge, may I make an inquiry before I
16 answer your Honor's question?

17 THE COURT: Sure.

18 MR. GANT: Judge, I had been thrown into this case
19 much deeper than I had anticipated I would be. I am not
20 sure after your Honor rules on this motion whether or not I
21 will still be counsel of record in this case, so I say that
22 simply to say tomorrow there is a hearing scheduled in this
23 matter and I assume it's going to require that Mr. McAbee
24 appear for that as well. It's been difficulty to get this
25 hooked up but we'll get it done, but I would suggest that

1 your Honor can do this say in a week.

2 THE COURT: That's pushing it. Let's do this, you
3 say there's a hearing tomorrow in this case in Kentucky?

4 MS. KEARNEY: We have a status conference in the
5 larger Sobol case, your Honor.

6 THE COURT: All right. You know, I learned early
7 on don't tell people the date by which you're going to
8 resolve something because if for some reason it's not
9 resolved on that date your phone's burned up and I learned
10 and I never forget that, I did it once. I will -- let's do
11 this, let's scheduled a status hearing two weeks from today
12 and I will endeavor to issue an appropriate decision before
13 that date or either on that date.

14 I'm sure the parties will continue with their
15 discovery efforts. Is the hearing before the magistrate
16 judge in Kentucky is that correct or not or what?

17 MS. KEARNEY: No, in the larger case, Mr. Sobol
18 and Mullins in a status conference.

19 THE COURT: The consolidated, right, right, right.
20 Okay. Well, I certainly can't resolve the issue before
21 tomorrow. So unless someone has a better suggestion I'll
22 continue the hearing on this issue for two weeks. I
23 recognize, Mr. Gant, you'll participate tomorrow in the
24 larger hearing, correct?

25 MR. GANT: Yes, your Honor.

1 THE COURT: I'm sorry, I thought you were talking
2 about a hearing before a magistrate judge. I'm aware now
3 that the larger hearing is tomorrow. On the sole issue of
4 detention I'll continue the case for two weeks before I
5 make -- I can separate that issue out from the other issues.
6 Someone have a better suggestion go ahead and tell me.

7 I do want to go back and look at the tapes again
8 and focus again on your arguments and the arguments that
9 counsel has made. I think the big issue is the combination
10 of conditions. That's the huge issue before the Court. Is
11 there a combination of conditions that can give the
12 community the comfort that it wants and deserves that
13 Mr. McAbee will not be a danger to the community.

14 That's the big issue. And again, this case is
15 complicated. Because up to January the 6th, he was a pillar
16 of the community by all accounts. I'm not aware of any
17 infractions prior to January the 6th. I don't think the
18 government has argued that, right, Ms. Kearney?

19 MS. KEARNEY: That's correct.

20 THE COURT: I have never presided over cases in
21 which I've letters numbering in the, you know, scores of
22 letters coming in. I've never had that experience with
23 scores of people written letters to me saying, vouching for
24 someone's character in the community. Maybe every now and
25 then. But in these cases by and large most of the

1 participants were pillars of the community before
2 January 6th, and people have attested. Friends and family
3 members and others have attested to their good character in
4 the community which makes the issue of detention extremely
5 difficult to resolve.

6 But I will talk to you tomorrow, Mr. Gant and Ms.
7 Kearney in the larger case. Let's pick a date. Mark, we
8 don't have Zoom issues two weeks from today. You want to
9 suggest the date and the time for the hearing, Mark, on the
10 sole issue of detention.

11 THE DEPUTY CLERK: October 6th at one o'clock p.m.

12 THE COURT: Is that a bad date? If it's a bad
13 date for anyone I can certainly accommodate you.

14 MR. GANT: Judge, I don't have my calendar with
15 me, but I can make that work.

16 THE COURT: Are you sure? Now look, if you want
17 to take a minute and talk with your staff that's fine. I
18 want to accommodate you as well, counsel. You want to take
19 a minute or so to check?

20 MR. GANT: I think that will work.

21 THE COURT: Okay. If you get back to your office
22 and you realize that you've got something else pressing that
23 you can't move just let Mark know and we're happy to
24 accommodate you as well as Ms. Kearney. Is that a good date
25 for the government, counsel?

1 MS. KEARNEY: That's a good date for the
2 government.

3 THE COURT: Mr. McAbee, you are presumed to be
4 innocent. Even though we've been talking a lot about
5 January 6th, you're presumed to be innocent. You never have
6 to prove your innocence if you go to trial. It's the
7 government's burden to, always the government's burden, rest
8 with the government to go to trial to prove guilt beyond a
9 reasonable doubt.

10 So presumption of innocence means a lot. It means
11 a lot. I take the matter very seriously and that's why my
12 staff and I are willing to spend the additional time and
13 effort to go back over the tapes, to go back over the
14 written pleadings, focus on what the magistrate judge said
15 at his hearing, to rely upon the government's
16 supplemental -- to go back and take a look at the
17 government's supplemental motion and your attorney's
18 arguments.

19 And your attorney has done an excellent job of
20 making the strong arguments for you and the stakes are high.
21 Now I don't take that lightly. It's your liberty interest
22 and everyone's liberty interest is of special importance to
23 the Court, so I want to be fair about it.

24 We'll continue the matter for two weeks. I'll see
25 you tomorrow probably on the Zoom hearing with Mr. Gant and

1 the other individuals with who you've been joined and we'll
2 talk about planning in that case other than for the
3 detention issue which is separated out from the other
4 issues. Okay.

5 You are presumed to be innocent and be mindful the
6 Court is well aware of that and the Court takes that very
7 seriously. You're not presumed to be guilty by any stretch
8 of the imagination. All right.

9 THE DEFENDANT: Yes, sir.

10 THE COURT: All right. Mr. Gant, you made some
11 good arguments. I'm going back to the drawing board, look
12 at everything which I should do, talk to my staff and
13 endeavor to make the right decision for the right reasons.
14 No one is asking for an opportunity to supplement anyone's
15 written submission, is that correct?

16 MR. GANT: That's correct, your Honor.

17 THE COURT: All right. Fine. Thank you very much
18 everyone. And unless anyone else has any other issues to
19 discuss I'm going to wish everyone well. Be safe and
20 healthy. I'll see everybody tomorrow. All right.

21 MR. GANT: Thank you, Judge same to you.

22 MS. KEARNEY: Thank you, your Honor.

23 THE COURT: Take care, counsel. Bye bye.

24 [Thereupon, the proceedings adjourned at 2:15
25 p.m.]

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CERTIFICATE

I, Cathryn J. Jones, an Official Court Reporter,
for the United States District Court of the District of
Columbia, do hereby certify that the foregoing 37 pages is a
true and correct transcript of the remotely reported
proceedings in the above-entitled matter.

Please note: This hearing occurred during the
COVID-19 pandemic and is therefore subject to the
technological limitations of court report remotely.

In witness whereof, I have hereto subscribed my
name, this the 24th day of May, 2022.

/s/_Cathryn J. Jones
Cathryn J. Jones, RPR
Official Court Reporter

<p>MR. GANT: [25] 3/10 6/3 7/3 16/21 17/3 17/24 22/15 22/23 22/25 24/3 26/11 26/14 27/7 27/14 27/18 29/15 30/14 30/25 32/14 32/17 33/24 35/13 35/19 37/15 37/20</p> <p>MS. KEARNEY: [46]</p> <p>THE COURT: [64]</p> <p>THE DEFENDANT: [2] 3/15 37/8</p> <p>THE DEPUTY CLERK: [2] 3/1 35/10</p>	<p>6</p> <p>601 [1] 1/17</p> <p>615 [1] 1/22</p> <p>637-2260 [1] 1/14</p> <p>6521 [1] 2/2</p> <p>6A [1] 10/1</p> <p>6B [1] 10/11</p> <p>6th [26] 3/20 4/13 5/5 5/14 15/10 15/17 15/19 16/5 16/24 19/11 19/24 20/5 23/17 25/13 25/23 26/6 28/9 28/18 29/11 29/19 29/22 34/15 34/17 35/2 35/11 36/5</p>	<p>aid [1] 13/1</p> <p>aided [1] 2/7</p> <p>all [22] 3/14 3/17 4/6 4/20 6/15 6/21 6/22 7/7 7/18 12/19 22/25 24/17 24/20 26/10 27/16 32/1 33/6 34/16 37/8 37/10 37/17 37/20</p> <p>allegations [1] 22/20</p> <p>alleged [4] 17/12 17/14 17/15 17/17</p> <p>allow [1] 23/22</p> <p>allowed [1] 22/13</p> <p>already [1] 4/15</p> <p>also [8] 3/7 10/10 13/13 13/21 14/5 20/18 31/21 32/14</p> <p>always [2] 31/6 36/7</p> <p>am [2] 22/14 32/19</p> <p>amazed [1] 30/20</p> <p>ambiquity [1] 11/1</p> <p>AMERICA [3] 1/3 3/3 16/14</p> <p>amount [1] 9/13</p> <p>Andrew's [1] 1/13</p> <p>angle [3] 7/21 7/23 13/23</p> <p>angles [1] 11/20</p> <p>angry [1] 4/19</p> <p>announced [1] 20/12</p> <p>another [5] 4/17 5/15 7/7 9/9 32/6</p> <p>answer [2] 4/10 32/16</p> <p>anticipated [1] 32/19</p> <p>antigovernment [1] 26/23</p> <p>any [16] 6/19 6/24 15/25 18/16 19/8 21/25 24/10 25/1 26/7 27/17 28/19 29/12 29/14 34/16 37/7 37/18</p> <p>anybody [4] 19/13 21/15 21/18 23/5</p> <p>anyone [2] 35/13 37/18</p> <p>anyone's [1] 37/14</p> <p>anything [9] 12/15 14/22 21/18 26/9 26/11 26/18 27/16 31/15 31/25</p> <p>anyway [1] 6/9</p> <p>anywhere [4] 24/6 24/9 29/20 30/21</p> <p>apologize [7] 6/24 7/6 7/11 7/12 12/10 12/17 16/8</p> <p>appalled [1] 23/20</p> <p>appeal [1] 3/23</p> <p>appear [1] 32/24</p> <p>APPEARANCES [1] 1/11</p> <p>appears [7] 5/25 13/4 13/7 14/4 14/5 14/7 14/8</p> <p>application [1] 6/25</p> <p>applications [1] 6/23</p> <p>appointed [1] 25/15</p> <p>Appreciate [1] 31/1</p> <p>approached [1] 11/10</p> <p>appropriate [8] 22/13 22/22 23/2 25/3 31/14 32/11 32/12 33/12</p> <p>approximately [7] 5/25 9/16 10/12 12/7 12/11 12/13 12/21</p> <p>arch [6] 7/24 7/25 8/15 9/11 9/19 10/15</p> <p>archway [1] 11/11</p> <p>are [28] 3/15 3/16 3/22 4/1 4/15 7/4 7/23 9/3 11/16 11/19 13/18 14/5 17/6 17/19 18/14 22/16 24/16 24/21 25/1 25/9 26/20 27/8 31/22 35/16 36/3 36/12 36/20 37/5</p> <p>argued [3] 12/25 23/6 34/18</p> <p>arguing [2] 15/7 26/16</p> <p>argument [3] 26/22 28/5 28/7</p> <p>arguments [5] 34/8 34/8 36/18 36/20</p>
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