DOMINIC PEZZOLA GUESSES WRONG, GETS LABELED A TERRORIST FOR HIS TROUBLES

As I've been following, the detention challenges for January 6 defendants have raised real questions about how the government and the courts will treat the event. The government and Jessica Watkins have provided additional briefing on whether her actions merit a rebuttable presumption of detention; they will revisit these issues today in a hearing before Judge Amit Mehta.

As I've noted, the Watkins case is close because the people with whom she conspired with did not, themselves, commit the acts of violence the government is using to argue for pre-trial detention.

Not so Dominic Pezzola, the Proud Boy who was the first to break a window to enter the Capitol. Earlier this week, he filed a motion to review bail arguing, in significant part, that the witness on whose testimony the government relied to establish intent of future violent crimes was the guy who recruited him into the Proud Boys, someone Pezzola claims bragged of macing a cop during the insurrection.

Pezzola guessed wrong about the witness, the government says. As far as the government knows, there was no tie between this witness and Pezzola prior to January 5 (which suggests this is someone Pezzola met the night before the attack).

> The defendant speculates that W-1 is a "cooperating witness" with deeper ties to the Proud Boys than the defendant. The defense is incorrect. W-1 has not been charged with a crime in connection with the events of January 6, 2021, and the government is unaware of any

> affiliation between W-1 and the Proud Boys or any indication that W-1 knew the defendant prior to January 5, 2021.

But, having been given a chance to respond to Pezzola's bid for release, the government has solidified the argument they're making in other cases, in which they have less direct evidence than they have against Pezzola.

In Magistrate Robin Meriweather's initial judgement denying Pezzola bail, she judged that no conditions of bail would eliminate the public safety risk posed by Pezzola. But she found that Pezzola had presented sufficient evidence to overcome a rebuttable presumption of detention, and specifically found that his family ties to Rochester, NY, made him less of a flight risk.

When Pezzola requested a review of Meriweather's decision, he argued that Judge Timothy Kelly should accept Meriweather's rulings in his favor, but revisit her judgment that he posed a threat to society.

That's not how it works, noted prosecutor Eric Kennerson.

> Although he acknowledges that this Court's review is *de novo*, the defendant asks this Court not to reconsider certain findings made by the Magistrate Judge, including her finding that the presumption in favor of detention was rebutted and her decision not to address the government's arguments regarding the defendant's risk of flight. ECF No. 19 at 1-2. Because this Court's review is *de novo* across the board, the government asks the Court to apply the statutory presumption of detention, which we submit has not been rebutted for the reasons stated below, and find by a preponderance of the evidence that the defendant is a serious risk of flight.

He used his response to a request a

reconsideration of those earlier decisions relying, in part, on the indictment that was obtained on the same day he had submitted his earlier motion for detention, in which Kennerson noted that, "The government acknowledges that the defendant is not charged with these offenses at the time this memorandum is submitted," presumably knowing that Pezzola would be charged with such crimes within hours.

Relying on the indictment, Kennerson argued that Pezzola committed two crimes — felony destruction of government property (for breaking the window of the Capitol) and robbery of US Government property (for stealing a cop's riot shield, which he used to break the window) — that constitute crimes of violence bringing a presumption of detention, and then labeled the conduct a crime of terrorism.

> Felony destruction of property, under the facts as laid out above, is a federal crime of terrorism. Title 18, U.S.C., Section 2332b(g)(5), defines "federal crime of terrorism" as an offense that "is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct" and is included in an enumerated list of statutes, which includes § 1361. See 18 U.S.C. §§ 2332b(g)(5)(A) & (B). The Grand Jury found probable cause in Count Seven of the Indictment to believe that the defendant intended to obstruct an official proceeding by committing, among other things, acts of civil disorder and breaking a window. The defendant has conceded that his conduct was calculated to influence or affect the conduct of government—specifically the certification of the Electoral College vote—and his actions show that he participated in doing so by intimidation and/or coercion. Moreover, because § 1361 is listed in § 2332b(g)(5)(B), there is a rebuttable presumption that

> no conditions or combination of conditions can assure community safety or the defendant's appearance. See 18 U.S.C. § 3142(e)(3)(B).
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> Felony destruction of government property is also a crime of violence. For purposes of the bail statute, as relevant to these offenses, a crime of violence is defined as "an offense that has an element of the use, attempted use, or threatened use of physical force against the person or property of another," if that crime is punishable by ten years or more in prison. See 18 U.S.C. § 3142(f)(1)(A) & 16. Section 1361 of Title 18 of the U.S. Code meets those requirements. It is punishable by ten years if the property damage was greater than $1,000, and its elements include the use of physical force against the property of another. See United States v. Khatallah, 316 F. Supp. 2d 207, 213 (D.D.C. 2018) (Cooper, J.) (holding that destruction of government property under a substantially similar statute, 18 U.S.C. § 1363, satisfies a substantially similar elements clause statute to qualify as a crime of violence).
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> Robbery of U.S. Government Property is also a crime of violence. See United States v. Alomante-Nunez, 963 F.3d 58, 67 (1st Cir. 2020), citing Stokeling v. United States 139 S. Ct. 544 (2019) (holding that common-law robbery meets the elements test of a different, but substantially similar statute, to qualify as a crime of violence). But see United States v. Bell, 158 F. Supp. 3d 906, 919 (N.D. Cal. 2016) (holding that § 2112 does not meet the elements test, although that opinion was issued prior to the Supreme Court's decision in Stokeling).

Kennerson's filing repeatedly tied the violence to the admitted ends of delaying the vote certification, relying among other things on a citation to Pezzola's own filing.

> The defendant concedes in his motion that smoked the victory cigar because "he considered the objective achieved, stopping the certification of the election pursuant to the instructions of the then President." ECF No. 19 at 4.
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> [snip]
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> The defense's admission that the defendant's objective that day was to stop the certification of the Electoral College vote does not help his position. In essence, he took an active role at the front of a mob that displaced Congress, in an attempt to stop that body from certifying the result of a Presidential election. As Judge Lamberth recently found, "[s]uch conduct threatens the Republic itself." See United States v. Munchel, et. al., No. 21-cr-118 (RCL), ECF No. 24 at 11. See also United States v. Meggs, No. 5:21-mj-1036-PRL (S.D. Fla.) (Lammens, M.J.), ECF No. 17, at 4 ("The [January 6] attack wasn't just one on an entire branch of our government (including a member of the executive branch), but it was an attack on the very foundation of our democracy.")
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> [snip]
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> The defendant's actions show that as recently as a month and a half ago, he was willing to partake in and take advantage of violence to achieve his political ends. The Court can have no assurance that he will refrain from doing so again, despite his alleged disavowal of the Proud Boys since he has been detained.

The cases for detention against the January 6 defendants are all over the map, with more evidence of direct violence in some cases and more evidence of coordination with a terrorist group in others. As the government tries to detain members of the latter — including Watkins and her co-conspirator Thomas Caldwell — they have inched closer to using the terrorism label to describe what happened on the day.

In Pezzola's case, they're doing so with a defendant who actions played a singularly important role in the success of the insurrection, someone who directly engaged in violence, and someone who has already admitted that the goal was to intimidate Congress.

All these other cases will be influenced by (and in some cases, will build on) these earlier seminal cases. By asking for reconsideration of bail, Pezzola gave the government an opportunity to present the evidence they had not yet made public earlier in this prosecution.