

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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UNITED STATES OF AMERICA,	)	Criminal Action
	)	No. 21-278
vs.	)	
	)	
DANIEL HERENDEEN,	)	April 1, 2022
	)	11:36 a.m.
Defendant.	)	Washington, D.C.

\* \* \* \* \*

**TRANSCRIPT OF SENTENCING HEARING  
BEFORE THE HONORABLE BERYL A. HOWELL,  
UNITED STATES DISTRICT COURT CHIEF JUDGE**

**APPEARANCES:**

FOR THE GOVERNMENT: ANITA EVE  
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FOR THE DEFENDANT: COLLEEN PECHMAN FITZHARRIS  
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ALSO PRESENT: CARMEN NEWTON, Probation Officer  
CHRISTINE SCHUCK, Pretrial Agent

Court Reporter: Elizabeth Saint-Loth, RPR, FCRR  
Official Court Reporter

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

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

1  
2 THE COURTROOM DEPUTY: Matter before the Court,  
3 Criminal Case No. 21-278, United States of America versus  
4 Daniel Herendeen.

5 Your Honor, for the record, Probation Officer  
6 Ms. Newton and Pretrial Agent Christine Schuck are connected  
7 via telephone and video.

8 THE COURT: You may be seated.

9 THE COURTROOM DEPUTY: Counsel, please state your  
10 names for the record, starting with the government.

11 MS. EVE: Your Honor, would you like me to use  
12 this microphone?

13 THE COURT: You can step forward to the podium.  
14 And if -- are you vaccinated and boosted?

15 MS. EVE: I'm boosted.

16 THE COURT: Then, when you are speaking, you can  
17 take your mask off. If you are unvaccinated, you are going  
18 to have to keep it on.

19 MS. EVE: Well, I got all of the shots that were  
20 available.

21 Anita Eve, on behalf of the United States.

22 THE COURT: All right. Thank you.

23 MS. FITZHARRIS: Good morning, Your Honor.  
24 Colleen Fitzharris, on behalf of Daniel Herendeen. He's  
25 seated to my left -- or my right, sorry.

1 THE COURT: All right. Thank you.

2 Good -- it's still morning.

3 Good morning, Mr. Herendeen.

4 THE DEFENDANT: Good morning.

5 THE COURT: All right. We're here this morning  
6 for the sentencing of the defendant, Daniel Herendeen, who  
7 pleaded guilty to Count 2 of the indictment against him for  
8 entering, remaining in a restricted building or grounds in  
9 violation of 18 U.S.C. Section 1752(a)(1), which is a  
10 Class A misdemeanor.

11 This sentencing hearing is being held in person,  
12 but the public access line is being made available for  
13 persons to listen to these proceedings remotely.

14 Anyone listening to the sentencing hearing over  
15 the public teleconference line is reminded that, under my  
16 Standing Order 20-20, recording and rebroadcasting of court  
17 proceedings, including those held by videoconference, is  
18 strictly prohibited. Violation of these prohibitions may  
19 result in sanctions, including removal of court-issued media  
20 credentials, restricted or denial of entry to future  
21 hearings, or any other sanctions deemed necessary by the  
22 presiding judge.

23 All right. As I do at all sentencing hearings, I  
24 review what I have reviewed, in connection with the  
25 sentencing this morning, to make sure that everybody has all

1 of the same documents, and I haven't missed anything.

2 So I have reviewed the probation office's  
3 presentence investigation report docketed at ECF 73; the  
4 sentencing recommendation by the probation office docketed  
5 at ECF 74.

6 I have also reviewed the government's original  
7 sentencing memo docketed at ECF 79, which was replaced by an  
8 amended sentencing memorandum docketed at ECF 80; and the  
9 government's supplemental filing with certain corrections  
10 docketed at ECF 82.

11 I have also reviewed the five videos listed in the  
12 government's reports itemizing the video evidence in this  
13 case docketed at ECF 50 and, as supplemented for sentencing,  
14 with the government's report docketed at ECF 83.

15 I have also received and reviewed the sentencing  
16 memoranda submitted on behalf of the defendant docketed at  
17 ECF 77; along with the defendant's letter to me, and a  
18 letter from his grandfather, his mother, and current  
19 stepfather docketed at ECF Nos. 77-2, -3, and -4; and a  
20 sealed supplemental sentencing memorandum submitted by the  
21 defendant docketed at ECF 78.

22 Does the government have all of these documents?

23 MS. EVE: Yes, Your Honor.

24 THE COURT: And does the defense?

25 MS. FITZHARRIS: Yes, Your Honor.

1 I believe I submitted one additional letter that  
2 the Court did not reference, but perhaps would --

3 THE COURT: Which letter is it?

4 MS. FITZHARRIS: It's a letter from Mr. Koslofsky  
5 [sic], who is his friend. I filed it as a notice of  
6 supplemental exhibit.

7 THE COURT: Could you look at the docket? I have  
8 not seen that; that's why I do this.

9 Do you have an extra copy?

10 MS. FITZHARRIS: I'm sorry, Your Honor. I printed  
11 the original memo, but not the letter. I apologize.

12 THE COURT: Do you know what the docket number is?  
13 And when did you file it?

14 MS. FITZHARRIS: I filed it -- I filed it on  
15 March 21st. So it should be Docket 81, I believe.

16 THE COURTROOM DEPUTY: Here it is.

17 THE COURT: All right. Okay. So my law clerk  
18 will get a copy of that. That's why I do that, because  
19 every once in a while something slips through the cracks.  
20 There have been so many supplementals in this case.

21 Yes. Could you print it out, Ms. Gumiel?

22 THE COURTROOM DEPUTY: Yes.

23 THE COURT: Okay. So, Mr. Herendeen, please stand  
24 just right where you are.

25 So I like to tell defendants how my sentencing

1 hearings proceed so you know what's coming up -- you and  
2 your family members, if you have family members here.

3 My sentencing hearings proceed in four steps.

4 At the first step, I determine whether the  
5 government or you or your counsel have any objections to the  
6 factual or other portions of the presentence investigation  
7 report; and, if there are objections or corrections that  
8 need to be made, I resolve those objections.

9 At the second step -- at the second step, I have  
10 to determine how the federal guidelines apply to your case.  
11 This is a Class A misdemeanor, the federal sentencing  
12 guidelines apply to Class A misdemeanors. So based on your  
13 criminal history and your offense conduct, I determine how  
14 the guidelines apply and what the advisory sentencing range  
15 is that applies in your case.

16 The third step is to hear from the government,  
17 then from your counsel and then, lastly, from you if you  
18 wish to address me directly. I have reviewed your letter.  
19 But if you want to speak to me orally, that's your time to  
20 do that.

21 And then the last step is where I will explain the  
22 sentence I am about to impose, and impose sentence.

23 Do you have any questions about what's going to be  
24 happening during the hearing?

25 THE DEFENDANT: No, Your Honor.

1 THE COURT: All right. Okay. So let's start with  
2 the first step -- you may be seated.

3 The final presentence investigation report and the  
4 sentencing recommendation were filed in this matter on  
5 February 23, 2022. And I understand from the PSR that the  
6 government has no objections regarding any of the factual or  
7 other determinations set out in the PSR; is that correct?

8 MS. EVE: That's correct, Your Honor.

9 THE COURT: All right. And I see that -- okay.  
10 Well, I mean, the government raises some objection to the  
11 specific offense characteristic which the government says  
12 incorrectly suggests a two-level increase applies because  
13 the trespass occurred at a secured government facility. But  
14 I think that must have been corrected because paragraph 32  
15 of the PSR doesn't use the phrase "secured government  
16 facility," and appears to be correct to me.

17 So is the objection the government seems to impose  
18 in its amended sentencing memo docketed at ECF 80, at 13 --  
19 is that objection correct? Because the PSR appears to be  
20 correct to me.

21 MS. EVE: The PSR is correct, Your Honor.

22 THE COURT: All right. Thank you. I just wanted  
23 to clarify that for the record.

24 And, Ms. Fitzharris, have you and your client read  
25 and discussed the presentence investigation report?

1 MS. FITZHARRIS: Yes, Your Honor. We have.

2 THE COURT: And I understand that the defendant  
3 has no objections to any of the factual or other statements  
4 in the final PSR?

5 MS. FITZHARRIS: That's correct.

6 THE COURT: All right. Thank you.

7 Mr. Herendeen, can you stand just right where you  
8 are.

9 Are you fully satisfied with your attorney in this  
10 case?

11 THE DEFENDANT: Very much so, Your Honor.

12 THE COURT: And do you feel that you have had  
13 enough time to talk to Ms. Fitzharris about the probation  
14 department's presentence investigation report and all of the  
15 other papers submitted in connection with your sentencing?

16 THE DEFENDANT: Yes, Your Honor.

17 THE COURT: All right. Thank you. You may be  
18 seated.

19 All right. Let me -- I actually have a couple  
20 corrections I want to make to the presentence investigation  
21 report. Starting on paragraph 26, which states that the  
22 codefendant, Robert Schornak, was sentenced to 36 months of  
23 probation to include 30 days of intermittent confinement --  
24 that needs to be corrected to: Mr. Schornak was sentenced  
25 to 36 months of probation, with special conditions of two

1 periods of 14 days of confinement, for a total of 28 days of  
2 intermittent confinement, plus two months of home detention,  
3 and restitution of \$500.

4 Any objection to making that correction, from the  
5 government?

6 MS. EVE: No, Your Honor.

7 THE COURT: And from the defense?

8 MS. FITZHARRIS: No, Your Honor.

9 THE COURT: And then the presentence investigation  
10 report, at paragraph 67, says that the defendant's recent  
11 arrest for possession of cocaine is pending. And according  
12 to the defendant's memo docketed at ECF 78, at page 3,  
13 note 1, that case has been dismissed.

14 So does this paragraph 67 need to be updated?

15 MS. FITZHARRIS: Yes, Your Honor. I apologize.

16 At the time of this report, it had not yet been  
17 dismissed. But Mr. Herendeen successfully completed the  
18 diversionary probation period, and it has been dismissed and  
19 sealed.

20 THE COURT: Okay. And do you know the date it was  
21 dismissed?

22 MS. FITZHARRIS: I do not know, Your Honor.

23 THE COURT: Okay. But it was --

24 MS. FITZHARRIS: March 22nd of 2022.

25 THE COURT: Okay. Does the government have any

1 objection to correcting that information in paragraph 67?

2 MS. EVE: No, Your Honor.

3 THE COURT: All right. So with those two  
4 corrections -- and hearing no objection by either side --  
5 the Court will accept the factual portions of the  
6 presentence report. And with those two corrections to  
7 paragraphs 26 and 67 just noted, I will accept the PSR as my  
8 findings of fact at sentencing as supplemented by review of  
9 the video exhibits in this case.

10 Okay. We're now at step two of the sentencing  
11 hearing where I determine how the guidelines apply in this  
12 case.

13 The parties haven't objected to the guideline  
14 determination set out in the presentence investigation  
15 report. And I determine that the guidelines apply in this  
16 case as follows:

17 With respect to the criminal history, the  
18 presentence investigation found Mr. Herendeen has three  
19 prior criminal convictions; two DUI offenses, one when he  
20 was age 17 and one when he was age 34; and a disorderly  
21 person offense when he was also age -- a long time ago, when  
22 he was age 21. Of these convictions, only his more recent  
23 DUI offense in 2011 counts towards his criminal history  
24 score, and is assigned one point. And, therefore, his  
25 Criminal History Score is 1, and his Criminal History

1 Category is 1.

2 The guideline at Section 2B2.3 applies to the  
3 defendant's conviction under 18 U.S.C. Section 1752(a) (1)  
4 for entering and remaining in a restricted building or  
5 grounds. And this guideline starts with a base offense  
6 level of 4, to which two offense levels are added because  
7 the trespass in the offense conduct occurred at a restricted  
8 building or grounds under the guideline at  
9 2B2.3(b) (1) (A) (vii); and two offense levels are subtracted  
10 for Defendant's acceptance of responsibility under the  
11 guideline at 3E1.1(a), resulting in a total offense level of  
12 4 which, in combination with this Criminal History Category  
13 of 1, results in an advisory sentencing range of zero to 6  
14 months' imprisonment or up to 3 years' probation.

15 Any period of imprisonment may be followed by up  
16 to 1 year of supervised release, which is also not only the  
17 guideline limit but also the statutory maximum; a fine range  
18 of \$500 to \$9500; and a special assessment of \$25 for the  
19 single count of conviction for a Class A misdemeanor.

20 Are there any objections, for the record, to the  
21 guideline determination from the government?

22 MS. EVE: No, Your Honor.

23 THE COURT: And from the defense?

24 MS. FITZHARRIS: No, Your Honor.

25 THE COURT: All right. So now I'm going to turn

1 to the third step of the hearing where the parties are  
2 invited to address and supplement their briefing on  
3 application of the factors set out in Section 3553(a) of  
4 Title 18.

5 Here I have, again, divergent sentencing  
6 recommendations. The government recommends 28 days'  
7 incarceration within the advisory guideline range of zero to  
8 6 months, 3 years' probation, plus 60 hours of community  
9 service. The defense, on the other hand, requests  
10 18 months' probation only, plus 100 hours of community  
11 service. And the probation office recommends the same,  
12 18 months' probation.

13 So I will begin with the government.

14 MS. EVE: Thank you, Your Honor.

15 As the Court has acknowledged, there were five  
16 videos that were presented to the Court for its  
17 consideration. I would like to start with the last -- I  
18 would like to start with the last video which I think is  
19 particularly egregious.

20 The video is a self -- self-produced video  
21 recorded by Mr. Herendeen on January 6th when he was inside  
22 the Capitol. The video lasts approximately 30 seconds. And  
23 at, approximately, the 8-second mark of the video a voice is  
24 heard saying: Downstairs in the fucking basement.

25 As the video progressed, the same voice was

1 observed saying: They're in the basement, we got to go  
2 there, that's where they're all hiding. That's where  
3 they're at. They're in the fucking basement.

4 Your Honor, this was a direct reference to members  
5 of Congress who had been -- who had to evacuate from the  
6 building or barricade themselves. The fact that Defendant  
7 made this statement is probably the most aggravating factor  
8 that he engaged in on that date; and it's something that  
9 we'd ask the Court to start with in terms of determining a  
10 sentence for this defendant.

11 The other -- the other factors in this case which  
12 are of particular note is that the defendant entered into  
13 the Capitol through the Senate wing door approximately 7  
14 minutes after it was breached. The breach occurred at  
15 2:13 p.m.; the defendant entered through the broken Senate  
16 wing door at 2:20 p.m. He then headed from that Senate wing  
17 door to the Crypt. And in search of what? We don't know,  
18 unless we can take into consideration the video that the  
19 defendant made.

20 The other video that the defendant made was while  
21 he was also inside the Capitol Building. And in that video,  
22 which is Government's Exhibit No. 4, the defendant pans the  
23 crowd inside the room that he was in. And there were  
24 people -- not the defendant --

25 (Screeching sound, interruption.)

1 THE COURT: Okay. That's the public access line.

2 Okay. If it happens again, we're going to have to  
3 turn the public access line off because it's going to be  
4 interfering. It's a very weird thing. Just in the last  
5 week or two our public access line through AT&T is creating  
6 this weird buzz periodically. It had -- for two and a half  
7 years -- two years of the pandemic it hasn't happened. It's  
8 a weird thing that's happening not just in this courtroom  
9 but in other courtrooms. And if it happens one more time  
10 we're going to have to turn off the public access line  
11 because it's too disruptive.

12 MS. EVE: Okay. I had one of those Urkel moments  
13 where I'd say: Did I do that?

14 THE COURT: Yeah. I know. Okay. It was none of  
15 us; it's AT&T.

16 MS. EVE: Okay. Good.

17 In this -- in this Facebook video, as I indicated,  
18 the defendant pans the crowd, and there are individuals who  
19 are shouting at police officers. And the defendant -- he's  
20 not going to try to help the police officers; he is just  
21 taking this for his own enjoyment, and then he puts it on  
22 Facebook. It's another aggravating factor --

23 (Screeching sound, interruption.)

24 THE COURT: Let's turn it off.

25 Okay. It's now going to be off. It won't happen

1 again. Sorry about that.

2 MS. EVE: That's okay, Your Honor.

3 But the defendant is in the midst of people who  
4 are taunting police officers who are doing their job. The  
5 defendant came equipped to Washington, D.C. with a flak  
6 jacket, a tactical vest. And before he leaves Michigan,  
7 where he's from, makes the statement that -- just one  
8 moment -- you know: If I die, I'm doing this for my nation.  
9 I'm saving my country. And he came prepared with -- as I  
10 indicated, military-style attire, the jacket and the vest.  
11 He also had the bear spray.

12 THE COURT: But what is it that is particularly  
13 threatening about a flak jacket and this other jacket?

14 MS. EVE: Well, it's a preparation for violence,  
15 Your Honor. You know, if you are just coming here to  
16 support the former president, if you are here -- if you are  
17 coming to Washington to make a statement, just to stand out  
18 in front of the Capitol or to talk to Congressmen to get  
19 them to -- Congressmen or women to get them to change  
20 their -- their opinion in terms of certifying the election,  
21 you don't need a flak jacket. You don't need --

22 THE COURT: Well, what makes a "flak jacket" a  
23 flak jacket?

24 MS. EVE: I think it has certain protection. It's  
25 thick, I know -- I know that. And it's something that

1 people don't normally wear if they're just walking down the  
2 streets of Washington, D.C. It's something that is sold at,  
3 like, an Army Navy store. It doesn't have the same level of  
4 protection as the bulletproof vests or the vest that the  
5 defendant wore.

6 THE COURT: And the vest he was wearing, in  
7 addition to the flak jacket, was a bulletproof vest?

8 MS. EVE: That's my understanding, Your Honor.

9 THE COURT: All right.

10 MS. EVE: So my point --

11 THE COURT: One of the factual -- it seems like an  
12 important fact, as part of the preplanning here, the  
13 defendant bought bear spray. And the government says that  
14 he had the bear spray with him in his backpack when he came  
15 to the Capitol. The defense seems to suggest maybe he  
16 didn't.

17 Do you have any information about that?

18 MS. EVE: Your Honor, that is a -- we know that he  
19 brought bear spray to Washington, D.C.; he did not use the  
20 bear spray. I have notes that indicated to me -- these are  
21 notes from either the previous counsel who had this case or  
22 from the agents that I have spoken with; they said to me  
23 that the bear spray was in the backpack.

24 Before this Court proceeded today, I spoke to  
25 defense counsel; and she stated that she wasn't sure whether

1 it was in the backpack or not.

2 So it's a question, whether he brought that with  
3 him to the Capitol; although, it is something that he did  
4 bring with him to Washington, D.C.

5 THE COURT: Well, the government's sentencing memo  
6 says that he told the FBI in an interview that he brought it.

7 MS. EVE: Well --

8 THE COURT: Isn't that right?

9 MS. EVE: That's -- that was my understanding,  
10 Your Honor. That was something that was told to me by the  
11 agents. Ms. Fitzharris was there when there was the  
12 conversation that the defendant engaged in with the -- with  
13 the agents; and she has a different understanding.

14 THE COURT: All right. Well, that's a pretty  
15 important fact, what he brought with him to the Capitol.

16 MS. EVE: I agree, Your Honor.

17 THE COURT: So did the FBI do 302s? And do the  
18 302s reflect what he said? 302s are usually prepared pretty  
19 close to the date of the interview.

20 MS. EVE: Your Honor, one of the difficulties in  
21 this case is that --

22 THE COURT: Because it says, on page 10 of your  
23 memo --

24 MS. EVE: Yes, Your Honor.

25 THE COURT: -- Herendeen and his attorney agreed

1 to an interview on September 17, 2021.

2 And he goes on to say he initially minimized the  
3 evidence that he planned for violence. And then the last  
4 sentence is: Herendeen then admitted that he packed bear  
5 spray, flak jacket, tactical vest, and mask. He stated he  
6 did not take a gun with him to the rally. He stated he only  
7 intended to use the tactical gear and spray if he  
8 encountered members of Antifa and needed to defend  
9 himself -- which all suggests that he had the bear spray  
10 with him in his backpack when he went to the Capitol.

11 So I was quite surprised to see the defense memo  
12 raising a question about that.

13 MS. EVE: I agree, Your Honor.

14 And let me -- let me state my position and the  
15 reason why I am a little bit uncomfortable.

16 After the government submitted their sentencing  
17 memorandum, Ms. Fitzharris contacted me; and she -- she  
18 indicated that it was an off-the-record proffer. I haven't  
19 done any off-the-record proffers in any of my Capitol riot  
20 cases because what we are giving the defendant is an  
21 opportunity to plead to one count.

22 And so even though there is a 302, the government  
23 is limited in what it can -- in what it has represented.  
24 And that's the reason why the government submitted the  
25 supplement to its amended sentencing memorandum. And I

1 indicated in there, in one of the paragraphs, that certain  
2 information that was included in the government's sentencing  
3 memorandum was presented by the defense in that  
4 off-the-record proffer.

5 THE COURT: Well, it seems like it would be pretty  
6 clear what's happening at a proffer. Okay.

7 So what -- I am not sure what you are saying. Do  
8 you agree that it was an off-the-record proffer, or you  
9 don't?

10 MS. EVE: I went back, after I spoke to  
11 Ms. Fitzharris, and I found the proffer letter; and, indeed,  
12 it was an off-the-record proffer. So the defense intended  
13 for none of the information that they disclosed that day to  
14 be used against the defendant. And what I had done in the  
15 government's sentencing memorandum is bring to light what it  
16 is the defendant had said during that off-the-record  
17 proffer.

18 THE COURT: So there is nothing -- okay. I'm just  
19 looking at the government's supplement to the sentencing  
20 memorandum --

21 MS. EVE: Yes, Your Honor.

22 THE COURT: -- and I see nothing in that  
23 supplement that mentions the bear spray. So are you saying  
24 that your government's supplement to the amended sentencing  
25 memo should have also said -- like you say -- you know,

1 should also have said: Don't consider the bear spray in the  
2 backpack?

3 MS. EVE: No, Your Honor. I am not saying that to  
4 the Court.

5 There was a conversation that the defendant had  
6 with an individual prior to coming to the Capitol. And he  
7 indicated to this person that he had the -- he called it  
8 "Antifa spray"; but given the picture, it's bear spray. So  
9 there were photographs that the government had; and so the  
10 Court can consider the bear spray as evidence against the  
11 defendant.

12 THE COURT: And that he had the bear spray at the  
13 Capitol with him that day?

14 MS. EVE: Not that he had it at the Capitol with  
15 him that day. We know that it is something that he brought  
16 with him to Washington, D.C.

17 I have spoken to Ms. Fitzharris with regard to  
18 that -- the Court's specific question -- and I have been  
19 advised the defendant is unable to say whether he took it  
20 with him to the Capitol or not.

21 THE COURT: And am I supposed to disregard all of  
22 the information provided in that proffer -- in the interview  
23 that the government put in its sentencing memo then?

24 MS. EVE: That is at the request of the defense,  
25 Your Honor.

1 THE COURT: Well, the defense can make all sorts  
2 of arguments to you. If they're right, I would presume that  
3 the government would agree or disagree. And if you disagree  
4 with the argument, tell me.

5 I mean, I am getting very frustrated with the  
6 government just saying: Yeah, the defense makes that  
7 argument; take it like you want.

8 What -- I need to know the government's position.

9 MS. EVE: Your Honor, given the fact that the --

10 THE COURT: It's very significant whether --

11 MS. EVE: I'm sorry.

12 THE COURT: It's very significant in evaluating  
13 offense conduct on January 6th whether a defendant had  
14 preplanning. This defendant clearly did preplanning; that  
15 included buying bear spray, and bringing a knife and  
16 tools -- preparation for violence.

17 It is also important what the defendant actually  
18 executed in terms of the preplanning, in terms of what that  
19 defendant actually brought in preparation for violence at  
20 the Capitol on January 6th. So it is important to know  
21 whether the defendant brought bear spray to the Capitol or  
22 not.

23 And you are telling me that the government's  
24 position is the defense says: No one knows? He doesn't  
25 know? He doesn't remember.

1 MS. EVE: I can't speak for the defense, Your  
2 Honor. When I spoke with Ms. Fitzharris with regard to the  
3 bear spray, I was informed the defendant doesn't know  
4 whether he brought the bear spray to the Capitol.

5 THE COURT: And any admissions he may have made  
6 that he did bring the bear spray to the Capitol are off  
7 limits because the defense says it was made at a proffer  
8 session that nothing said can be used against him?

9 MS. EVE: That's correct, Your Honor.

10 THE COURT: And you have confirmed that --

11 MS. EVE: That it was an off-the-record proffer?

12 THE COURT: -- it was at a proffer session where --

13 MS. EVE: Yes. Yes.

14 THE COURT: -- nothing he said can be used against  
15 him?

16 MS. EVE: Yes.

17 THE COURT: And so everything in your -- page 10  
18 of your government's memo talking about this interview that  
19 Herendeen and his attorney agreed to on September 17,  
20 2021 -- are you basically saying that that whole paragraph,  
21 down to the second paragraph where he says, "Herendeen  
22 stated that he only intended to use the tactical gear and  
23 spray if he encountered members of Antifa and needed to  
24 defend himself" -- all of that I am not permitted to  
25 consider? I should just strike it out of the government's

1 memo?

2 And despite the fact that the government has three  
3 different submissions, including one amended memo, this  
4 should have been yet another amendment made to the  
5 government's memo? Is that what you are telling me?

6 MS. EVE: Yes, Your Honor.

7 THE COURT: Okay.

8 MS. EVE: Sadly.

9 THE COURT: All right. So I am -- everything  
10 about Herendeen's interview -- so everything on Herendeen's  
11 interview? So that whole section should be omitted?

12 MS. EVE: Your Honor, let me --

13 THE COURT: Everything about the interview,  
14 including where he claimed he stopped some rioters from  
15 entering a room and assisted a man who had been tear gassed  
16 before he decided to exit the Capitol -- that was all under  
17 a proffer agreement, so I can just delete everything under  
18 the caption "Herendeen's Interview"?

19 MS. EVE: No, Your Honor. I wouldn't go that far.

20 Well, the easiest thing for the Court to do is to  
21 ignore everything under "Herendeen's Interview"; I don't  
22 want to parse anything.

23 THE COURT: That's what I'm asking.

24 MS. EVE: Yes, Your Honor.

25 THE COURT: Okay. Fine; it can all be out.

1 MS. EVE: Yes.

2 THE COURT: All right. Okay. And when you  
3 were making -- you said something about having -- the  
4 government had photographs of the bear spray so you could  
5 tell that what he called "Antifa spray" was bear spray.

6 MS. EVE: Yes, Your Honor.

7 THE COURT: What photographs are those? And what  
8 are you talking about?

9 MS. EVE: Those were not submitted to the Court,  
10 Your Honor, because they -- we weren't -- I was going to.  
11 But given my conversation with Ms. Fitzharris, we did not  
12 include that because we couldn't prove to the Court that he  
13 actually had that with him at the Capitol. It goes to him  
14 planning, but not to his conduct on January 6th at the  
15 Capitol.

16 THE COURT: And the photographs are subject to the  
17 proffer agreement, too, and can't be used against him?

18 MS. EVE: Oh. No, no. No. Absolutely not, Your  
19 Honor. They could be.

20 But I guess the problem is, it's like -- okay.  
21 I'm juggling with: What did he have with him on  
22 January 6th? I know he planned on bringing the bear spray.  
23 Can I -- can I submit to the Court --

24 THE COURT: Let's start with the beginning of the  
25 story.

1           Where did you get the photographs? Where did the  
2 government get the photographs?

3           MS. EVE: There is a source who provided that,  
4 those photographs.

5           THE COURT: Okay. So a source provided  
6 photographs of this defendant. On the days preceding  
7 January 6th or after January 6th?

8           MS. EVE: Preceding January 6th. These are the  
9 items that Herendeen planned -- that Herendeen showed me  
10 that he plans to take to the Capitol, and included amongst  
11 them was the bear spray.

12          THE COURT: I see. Okay.

13          And those photographs have never been shared with  
14 the Court for me to rely on for review --

15          MS. EVE: That's correct, Your Honor.

16          THE COURT: Okay. And does it make a difference  
17 in the government's recommendation?

18          MS. EVE: It does not.

19          THE COURT: And why doesn't it? Because bringing  
20 bear spray to the Capitol is a pretty significant factor in  
21 determining whether or not a defendant should be given a  
22 period of incarceration. And if you are telling me that I  
23 can't rely on it, then the government shouldn't be able to  
24 rely on it either.

25          So if all I've got is a defendant who came with a

1 backpack and a flak jacket, why -- and no bear spray -- and  
2 everybody agrees he didn't use the bear spray -- why doesn't  
3 that change the government's sentencing recommendation in  
4 this case --

5 MS. EVE: Our sentencing recommendation is --

6 THE COURT: -- since your sentencing  
7 recommendation was clearly based on the Herendeen interview?

8 It was in the government's memo where he said he  
9 had it in his backpack prepared to use on January 6. But  
10 you are saying you can't rely on it anymore than I can rely  
11 on it, so how can that not affect the government's  
12 sentencing recommendation in this case.

13 MS. EVE: Your Honor, that was just one factor  
14 that we were relying on. And one of the things that I  
15 pointed out when I began this sentencing argument was the  
16 video that the defendant recorded where he is telling a  
17 crowd that has stormed into the United States Capitol  
18 Building, made reference to the fact that members of  
19 Congress -- he doesn't say, "Members of Congress," but he  
20 clearly says, "They're in the basement."

21 This mob that is in the Capitol is in earshot of  
22 this defendant making that statement. And even though he  
23 doesn't direct anybody: Hey, this is the way to the  
24 basement or anything -- but he does make that statement, and  
25 that statement was recorded.

1           And that's the reason why I began my sentencing  
2           argument raising that as the most important factor in this  
3           case, and one of the reasons -- the primary reason why the  
4           government made the recommendation that he [sic] did.

5           If we were relying on the bear spray, we don't  
6           have -- the defendant didn't use the bear spray; didn't show  
7           it. There are no images of the defendant inside the Capitol  
8           Building holding a can of bear spray, let alone using it.  
9           So while --

10           THE COURT: Okay. Let me go back to the footage.

11           In all of the CCTV footage -- videos, the  
12           defendant appears to be holding his phone out in front of  
13           him. It looks like he was recording as many minutes as he  
14           could when he was inside of the Capitol -- it was such an  
15           exciting event; and, yet, the only videos taken by the  
16           defendant provided to the Court are a short Facebook post  
17           and the video talking about the basement, Exhibits 4 and 5.

18           Is there more video from the defendant's phone  
19           that was turned over to the FBI, or is that it?

20           MS. EVE: Your Honor, in terms of going -- I went  
21           through the entire evidence in this case; and the only  
22           videos that I was able to locate are the Facebook video,  
23           that's Government Exhibit No. 4, and the cellphone video  
24           which is Government Exhibit No. 5.

25           THE COURT: And so was the defendant's phone

1 examined in connection with this case?

2 MS. EVE: I can't answer that, Your Honor.

3 I know that some of these -- some of the phones  
4 that have been seized during the course of this  
5 investigation -- just in terms of a large number of them --  
6 the cellphone extractions still haven't been caught up with.

7 I know in another case that's --

8 THE COURT: But you don't even know if the  
9 defendant's phone was turned over in connection with this  
10 case -- or do you know?

11 MS. EVE: I don't know.

12 THE COURT: And is there even a limited  
13 cooperation term in the plea agreement in this case? And is  
14 that -- was he required to produce his recordings in his  
15 phone in connection with the plea agreement in this case?

16 MS. EVE: That was not made a requirement, Your  
17 Honor.

18 THE COURT: So when I see in the CCTV footage of  
19 him holding -- recording everything that was going on, he  
20 was given a plea in this case and didn't even -- might not  
21 have even turned it all over.

22 MS. EVE: That's -- that's a fair statement, Your  
23 Honor.

24 MS. FITZHARRIS: Your Honor, I don't know if you  
25 need to hear from me at this point --

1 THE COURT: Well, if you have --

2 MS. FITZHARRIS: -- I do have things --

3 THE COURT: Can you shed light on that?

4 MS. FITZHARRIS: Yes. Yes, Your Honor.

5 Mr. Herendeen's cell phone was seized and  
6 analyzed. And I have reviewed the Cellebrite report and all  
7 of the videos that were produced to me. And so -- and in  
8 terms of access to his social media accounts, that was a  
9 provision of the plea agreement.

10 THE COURT: Okay. Thank you.

11 MS. FITZHARRIS: And he has -- and he has provided  
12 the FBI with all information about -- his social media  
13 account that he had.

14 THE COURT: Okay. Thank you.

15 All right. All right. Proceed.

16 MS. EVE: Your Honor, I -- I would like to answer  
17 more questions that the Court has, but I feel like I have  
18 created more questions than I have been able to --

19 THE COURT: Well, when I see CCTV footage of a  
20 defendant who seems to be recording the whole time and I  
21 only get two very short videos, I wonder: What happened to  
22 the rest of it? And so it was just -- you know, it was just  
23 sort of an obvious question based on the evidence that I  
24 have reviewed.

25 And, to me, bringing bear spray to the Capitol is

1 a very significant fact. And the fact that I am learning at  
2 the sentencing hearing that all of that information provided  
3 in the government's sentencing memo is not something I  
4 should rely on is not appreciated, to put it bluntly.

5 MS. EVE: I accept that.

6 THE COURT: So let me just review a couple other  
7 things here.

8 So the government provided this helpful chart --  
9 that grows by the day -- about other sentences imposed on  
10 January 6th cases. And the chart, as of the time I got it  
11 from the government, showed 12 cases involving a conviction  
12 under 1752(a)(1), the same statute of conviction here. And  
13 out of those 12 cases on the chart, it appeared that eight  
14 of the defendants were given some period of incarceration;  
15 three had only probation, and one defendant had received a  
16 fine.

17 So given that 8 defendants out of 12 or --  
18 including a defendant I just sentenced this morning -- 9 out  
19 of 13 as of today, even in my court, have received some term  
20 of imprisonment, is it the government's position that some  
21 period of incarceration would not be an unwarranted  
22 sentencing disparity for a defendant whose offense of  
23 conviction is 1752(a)(1)?

24 MS. EVE: Yes, Your Honor.

25 THE COURT: So the defense memo -- recognizing

1 that the majority of defendants convicted of this Class A  
2 misdemeanor have received a term of imprisonment -- has  
3 compared Mr. Herendeen's case not to the Class A misdemeanor  
4 defendants, but to the Class B defendants -- those  
5 defendants who have been extended plea offers by the  
6 government to plead to the parading, demonstrating,  
7 picketing petty offense under 40 U.S.C. 5104(e)(2)(G). And  
8 the defendant points out that: It is difficult to discern  
9 the difference between the conduct of those cases -- petty  
10 offense cases -- and Mr. Herendeen's.

11 And so what is the government's response to that  
12 criticism, that it's hard to tell the difference in conduct  
13 that the government finds -- warrants a Class A misdemeanor  
14 plea offer versus a petty offense plea offer, which does  
15 make a difference in the 3553(a)(6) analysis of avoiding  
16 unwarranted sentencing disparities?

17 So, of course, the defendant's position is: Don't  
18 look to the other Class A misdemeanor convictions; look to  
19 the petty offense convictions where a lot more probationary  
20 sentences have been awarded or given -- imposed -- because  
21 that's where my guy sits.

22 So what is the articulable principle the  
23 government is using to look at conduct and say: This  
24 warrants a petty offense plea offer versus a Class A plea  
25 offer, like in this case?

1 MS. EVE: Your Honor, we begin with the negotiated  
2 plea, which was to 1752(a)(1), as opposed to one of the 5104  
3 Class B misdemeanors that the Court has referenced. And we  
4 start with the statute that the defendant pled guilty to,  
5 and then look to how this Court and other courts have  
6 treated similarly situated defendants; and that's what you  
7 saw in the table that you have referenced.

8 But the Court asked: Well, what distinguishes the  
9 1752 defendant from the 5104 defendant; am I correct?

10 THE COURT: Yes. I mean, based on the defendant's  
11 memo, at page 3, which says that: It's difficult to discern  
12 the difference between the conduct of those cases and  
13 Mr. Herendeen's. And I want to hear the government's  
14 response to that.

15 MS. EVE: Your Honor, I -- I come back to the fact  
16 that there was a plea that was negotiated. It wasn't --  
17 he -- he didn't plead guilty to the 5104; he pled guilty to  
18 the 1752. And at the time of the --

19 THE COURT: Well, I think the government decides  
20 what plea offer is warranted in a case.

21 So it's the government's decision whether to offer  
22 a plea offer or just go to trial, whether it's the  
23 government's -- or to require the defendant, if the  
24 defendant wants a disposition short of trial just to eat the  
25 indictment, so to speak, or the information. So it's the

1 government that is making the initial decision: We think --  
2 based on what we have seen of this offense conduct -- it  
3 warrants a petty offense plea or this conduct warrants a  
4 Class A misdemeanor plea.

5 And the defense is raising a legitimate issue of  
6 an observation that it's difficult to discern the difference  
7 between the conduct where the government says: Give this  
8 person a petty offense plea offer or give this person a  
9 Class A misdemeanor plea offer.

10 And my question is pretty simple, which is: What  
11 is the articulable principle, if there is one, for how the  
12 government is saying: This conduct yields a petty offense  
13 plea offer versus this conduct yields a Class A plea offer?

14 MS. EVE: Your Honor --

15 THE COURT: Because it does make a difference in  
16 terms of the 3553(a)(6) analysis of avoiding unwarranted  
17 sentence disparities. And the ultimate argument by the  
18 defense is: We don't care what the 1752(a)(1) Class A  
19 misdemeanor defendants have been getting because this  
20 defendant should have been -- should be considered in the  
21 context of the petty offense defendants who have mostly  
22 gotten probation.

23 MS. EVE: Well, Your Honor, there was an  
24 evaluation done of this defendant, and it was -- and the  
25 plea came after the off-the-record proffer. It was done

1 based on the evidence, including the videos that I've  
2 highlighted to the Court. And the determination was made --  
3 based on all of that information -- that 1752 was the  
4 appropriate offer for the plea that was made to this  
5 defendant.

6 THE COURT: Based on the fact that he brought bear  
7 spray also to the Capitol?

8 MS. EVE: Well -- yes.

9 THE COURT: And now, that fact -- based on the  
10 government's position asserted here -- that can't be relied  
11 on.

12 MS. EVE: Not from the government, Your Honor.  
13 And, of course, the Court can ask the defendant: Did you  
14 bring bear spray to the -- to the Capitol?

15 I am saying that the government is precluded from  
16 presenting that evidence to the Court. We know that he made  
17 plans to bring the bear spray.

18 And what the government is precluded from doing --  
19 and the defense is making an argument here that: Well, he  
20 doesn't know whether he brought it to the Capitol. He  
21 brought the backpack. He brought the jacket. He brought  
22 the vest. But we don't know whether he brought the bear  
23 spray.

24 It's a quandary. But I'm presenting the -- all of  
25 this information was considered by the prosecutor.

1 THE COURT: It's actually not a quandary. I think  
2 it's -- it's based on the government's position that I have  
3 to admit all of that Herendeen interview from the  
4 government's memo -- I can't rely on that.

5 MS. EVE: No, we cannot, Your Honor.

6 THE COURT: Can you answer the original question?

7 MS. EVE: Your Honor, there was an eval- --

8 THE COURT: It's difficult to discern the  
9 difference between the conduct of those cases -- meaning,  
10 petty offense cases -- and Mr. Herendeen's, i.e., Class A  
11 misdemeanor cases.

12 So I ask again. Can you articulate a principle  
13 for why the government is deciding on petty offense plea  
14 offers versus Class A misdemeanor plea offers?

15 MS. EVE: Your Honor, there is an evaluation of  
16 the evidence done by supervisors and recommendations that  
17 are given to the prosecutors to present to the Court.

18 And in this particular case, the video about  
19 making reference to the location of the Congressmen seemed  
20 to be one of the -- what's the overwhelming factor in their  
21 determination as to why this Class A misdemeanor case should  
22 be treated differently than the Class B misdemeanor cases.

23 THE COURT: Okay. All right.

24 And just for purposes of the record, by my review  
25 of the difference between the original sentencing memo and

1 the amended sentencing memo, the only difference is some  
2 typographical corrections; is that correct?

3 MS. EVE: That is correct.

4 THE COURT: Okay. So for purposes of this, I am  
5 not citing or relying at all on the original sentencing memo  
6 in this case, only the government's amended sentencing memo  
7 with its additional redactions of the Herendeen interview on  
8 those pages -- pages 10 to 11 -- as a result of the  
9 revelations at the hearing today. So I am only relying on  
10 that and the government's corrections.

11 And the government, in its amended sentencing  
12 memo, stated that the defendant, "Has not expressed more  
13 than a minimal amount of remorse." And the government did  
14 correct that statement in its supplemental filing; that he  
15 has, indeed, shown remorse.

16 And what was the basis of that change?

17 MS. EVE: My -- a conversation with  
18 Ms. Fitzharris; she spoke to the former prosecutor.  
19 Whereas, I was -- made that representation based on my  
20 conversation with the agents.

21 THE COURT: I see.

22 And so the reason I asked that question is because  
23 the defendant has met with the House Select Committee  
24 investigating the Capitol attack.

25 And as I have expressed before, I think trying to

1 cooperate with the congressional committee trying to  
2 understand why what occurred on January 6th did -- is a  
3 factor that demonstrates remorse, acceptance of  
4 responsibility, and actually taking an affirmative step to  
5 help remedy what occurred that day.

6 So was the fact that the defendant has met with  
7 the House Select Committee investigating the Capitol attack  
8 one of the reasons that the government corrected its  
9 statement that he -- and stated, in its supplemental filing,  
10 that he has indeed shown remorse?

11 MS. EVE: No, Your Honor, that was not -- not at  
12 all. We don't have -- the prosecution team does not have  
13 access to any information the defendant would have testified  
14 to before -- or given to the January 6th committee.

15 THE COURT: So it's hard for -- it's difficult for  
16 the government to make an evaluation of whether he lied to  
17 them or whether he told the truth to them or whether he said  
18 much of anything to them; is that right?

19 MS. EVE: Rather than it being "difficult," I  
20 just -- I am incapable.

21 THE COURT: Okay. So one of the things I look at  
22 in these cases, in terms of evaluating acceptance of  
23 responsibility, is how promptly a defendant enters a plea in  
24 the case.

25 And in this case, the government first extended a

1 plea offer on May 21, 2021, according to one of the  
2 government's status reports docketed at ECF 27; and the plea  
3 offer was accepted on December 16, 2021. So the plea offer  
4 was outstanding about seven months.

5 Is it the view of the government that this  
6 defendant entered a prompt plea?

7 MS. EVE: No, Your Honor.

8 THE COURT: And is that -- how does the government  
9 believe that should be taken into account in evaluating  
10 remorse or acceptance of responsibility?

11 MS. EVE: Your Honor, I -- what I do know is that,  
12 as the Court has indicated, a plea offer was made.

13 A significant amount -- a lot of time passed  
14 between the time that the plea offer was made and the time  
15 that it was accepted. And I know that the government met  
16 with the defendant -- I think it was in September -- late  
17 September or October, for the -- for purposes of the  
18 interview and cannot explain what took the defendant to the  
19 point of late December before the plea was accepted.

20 THE COURT: All right. Anything further?

21 MS. EVE: No, Your Honor.

22 THE COURT: All right. I'll hear from  
23 Ms. Fitzharris. Just give me a second to read this  
24 supplemental letter.

25 All right. Please proceed.

1 MS. FITZHARRIS: Thank you, Your Honor.

2 Mr. Herendeen would prefer to be -- for people to  
3 remember him as a good dad. He's joined today by his three  
4 children; he cares for them very deeply. He'd prefer to be  
5 remembered as a kind neighbor -- somebody who looks out for  
6 their well-being, tries to lend a helping hand. And he'd  
7 prefer to be remembered as somebody who really does care for  
8 his family and his country.

9 He is, unfortunately, forever -- because of  
10 decisions he made -- tied to a moment in history that he  
11 calls a "black mark" on our nation's history; he is deeply  
12 ashamed of it.

13 And I would say that -- I think one of the things  
14 that we talk about often at sentencing are consequences.  
15 And I know there is a significant concern in these cases for  
16 making sure that people who participated in this  
17 once-in-our-nation's-history event --

18 THE COURT: One hopes.

19 MS. FITZHARRIS: One hopes.

20 -- suffer consequences. And Mr. Herendeen has  
21 already suffered very significant consequences.

22 The notoriety of the case has caused a lot of  
23 personal stress for him. There's been local reporting in  
24 the news about his participation, including some incorrect  
25 suggestions of involvement or association with white

1       supremacists groups. He has been incred- -- has felt such  
2       stress over the past year. And I have now represented  
3       Mr. Herendeen for almost -- for over a year; and he has  
4       really struggled.

5               And one of the things that I think is rather  
6       remarkable about Mr. Herendeen is that it took some time for  
7       him to recognize how stressed -- stressful he [sic] was, and  
8       the -- the stress of this pending case and the impact it was  
9       having on him, and the impact it was having on his  
10      children -- to try to seek help; and he did.

11             In the fall he asked me for referrals to  
12      therapists. He asked his pretrial officer for referrals to  
13      a therapist. And he has, since then, been going to therapy  
14      to work through how to manage the stress -- the shame of  
15      being associated with this event, with January 6th, how to  
16      manage the difficulty of parenting high school children; and  
17      a lot of the challenges that I have disclosed to the Court  
18      but I don't want to talk very publicly about. But it's  
19      something that I think -- if there is a silver lining for  
20      him -- a positive in this -- in this sense.

21             But the shame and the stress and the -- and the  
22      turmoil that it caused him to be -- to know that he was  
23      involved in this black mark on our nation's history is a  
24      significant consequence.

25             He has also suffered financial loss as a result of

1 his involvement. His small business is down about --

2 THE COURT: Well, let me ask. Because -- you  
3 know, every criminal defendant has stress from a criminal  
4 case and being involved in the criminal justice system; that  
5 doesn't move me, I'm sorry.

6 This is a defendant who has been on pretrial  
7 release as opposed to sitting in pretrial detention. This  
8 is a defendant who, even under the best of circumstances, is  
9 not facing a lifetime in prison; he is facing one year. I  
10 see defendants with far more serious penalties confronting  
11 them who are entitled to feel a lot more stress than this  
12 defendant. So stress doesn't move me.

13 What I am concerned about for defendants who came  
14 on January 6 -- not only went to a rally; perfectly  
15 appropriate, First Amendment protected, fine -- but then  
16 followed a crowd, broke into the Capitol Building because of  
17 belief in conspiracy theories and the big lie that there was  
18 a stolen election. What I am concerned about is: Do they  
19 still believe that?

20 Because I have to assess the risk that this man  
21 might still believe that -- might still be susceptible to  
22 conspiracy theories spouted by all sorts of people,  
23 including politicians who have been elected to office. But  
24 every American has a duty to separate truth from fiction  
25 when it comes to the actions they're taking. So let's get

1 down to brass tacks.

2 MS. FITZHARRIS: All right.

3 THE COURT: This defendant believed that there was  
4 a stolen election. He told another person, "If I die, I die  
5 saving the nation." He thought this was such a serious  
6 problem, he believed these lies. He thought this was so  
7 serious, he said he was willing to die to save the nation.

8 So has that changed? What's his belief system  
9 now?

10 MS. FITZHARRIS: Yes, Your Honor; it has changed.

11 At the time that -- in January of 2021, and before  
12 that -- the years before it -- probably from 2016 until the  
13 election, Mr. Herendeen had been following the President in  
14 a lot of -- President Trump, and a lot of supporters on  
15 Facebook.

16 When we met with the House Select Committee, he  
17 talked about how he was getting a lot of news from Facebook.  
18 It was -- it was constant in his feed; stories about people  
19 planning to steal the election, people -- a lot of -- you  
20 know, it seemed to him -- because that was the news he was  
21 consuming -- credible stories about attempted -- you know,  
22 attempts to rig the votes. And when he went to bed on the  
23 night of the election, Donald Trump was leading in the  
24 polls; and when he woke up, that changed. And when he  
25 logged into Facebook and read through the feed, it -- there

1 were all of these conspiracies that -- to him, it seemed  
2 potentially credible.

3 And what he has done since then I think is  
4 important to remember, a couple -- very important: He's  
5 completely disengaged from social media entirely. He does  
6 not have a Facebook account anymore. He does not have any  
7 social media accounts at all. He has no interest in hearing  
8 what Donald Trump has to say -- or any of the politicians  
9 have to say about it. He was -- he is disgusted by it.

10 He told the House Select Committee that he felt  
11 abandoned, frustrated, misled by all the people who were  
12 promoting on Facebook that there would be a big reveal that  
13 would, once and for all, prove that the election was stolen  
14 and it would change things. There would be some big  
15 unveiling, that is why he went.

16 The comment he made about, "If I die, I die saving  
17 the nation" -- even the person who reported it to the FBI  
18 believed he said it as a joke. But there was at the time --  
19 based on what he was seeing on Facebook -- a lot of concern  
20 about Antifa violence; and lots and lots of posts about  
21 Antifa being involved in -- you know, in violence in  
22 Portland, Oregon during the Black Lives Matter protest.

23 And, listen, I -- my personal views, I thought --  
24 I think that's kind of -- it's farfetched. It's crazy; but  
25 that was the media world he was living in.

1           And I think it's very important when you ask: Why  
2 isn't this going to happen again? Why has -- is  
3 Mr. Herendeen in a different position now?

4           He's recognized that all of that social media,  
5 conspiracy theories -- it's toxic. It was -- it didn't make  
6 him happy. And he chooses now not to engage with it.

7           He still has friends who -- who support Donald  
8 Trump; and they want to talk to him about it, and he doesn't  
9 want to. It -- it's not of interest to him at all.

10           When the House Select Committee asked if he, you  
11 know, cares what Donald Trump has to say, he said: No, I  
12 don't. And I think that's very important because -- and he  
13 sees this, and he -- what happened on January 6th and the --  
14 the violence against the police, it's -- he's disgusted by  
15 it.

16           I mean, one of the things that I think is notable  
17 in what he said to the Court is that he -- he can't imagine,  
18 given the -- I understand what the Court is saying about  
19 "stress" -- the stress he feels about this case. But  
20 the trauma of the police officers having to experience that  
21 degree of violence -- I think Mr. Herendeen's ability to  
22 recognize how this impacted the people who were trying to  
23 protect the Capitol is very significant.

24           I think Mr. Herendeen's decision to meet with the  
25 House Select Committee is also very important, and it's --

1 as well as the FBI. And we can talk -- there are a few  
2 things I want to talk about that I want to clarify. But I  
3 think Mr. Herendeen has actually said from the beginning  
4 he's happy to talk about it because he is not -- it's not  
5 something he wants to have happen again at all.

6 And one of the things -- and I put this in the  
7 memorandum, but it kind of stuck with me when the House  
8 Select Committee asked him again about how he feels about  
9 Donald Trump. He said, you know: It was a ride that I  
10 didn't realize I didn't like until I got off of it. He's  
11 off it, and he doesn't want to get back on. And that is  
12 very important when we think about whether he has already  
13 been deterred, whether he is someone who the Court needs to  
14 protect the public from, you know, engaging in this behavior  
15 again. All of that is very critical.

16 And with respect to, you know, the Antifa stuff --  
17 it is very easy for me to raise my eyebrows and be  
18 concerned; you know, kind of brush it off. And I listened  
19 to Mr. Ohm at Mr. Schornak's sentencing talk about it. And  
20 I know Mr. Ohm is representing significantly more people  
21 charged in these cases than I am; but it is apparent that  
22 there was a very strong belief that there was going to be  
23 violence.

24 And Mr. Herendeen thought -- I mean, he was  
25 concerned about -- you know, he had heard -- he had never

1       been to Washington, D.C. before. He heard about the D.C.  
2       sniper. He was in -- totally involved in this kind of toxic  
3       Facebook world; and that's why he brought the vest. That's  
4       why he brought the bear spray, which he called "Antifa  
5       spray"; the knives, which he ultimately decided --

6               THE COURT: And this flak vest is a bulletproof  
7       vest?

8               MS. FITZHARRIS: No. He did not bring a  
9       bulletproof vest. It is like a -- it's a soft vest that he  
10      had on, not like a -- it doesn't have the armor -- the,  
11      like, plates in it that some bulletproof vests would. But  
12      he did -- he did wear it because of concern about violence  
13      against Trump supporters.

14              With respect to the bear spray, I think there is a  
15      lot of confusion because Mr. Herendeen packed two backpacks  
16      when he came to D.C. And before going to the rally he left  
17      one backpack in his car; and he had one on his back, which  
18      you can see in his videos. He does not remember if he put  
19      the bear spray in the one he took with him. And the fact  
20      that he was able to take off his coat at one point and put  
21      it inside the backpack suggests maybe he didn't. But he --  
22      he can't say with certainty -- and he has never said with  
23      certainty on one day versus another -- that he brought the  
24      bear spray to the Capitol; he just doesn't know. He is not  
25      trying to be evasive, he just doesn't know.

1 THE COURT: So the redacted part of the  
2 government's memo under the subtitle "Herendeen Interview,"  
3 where it says expressly he admitted he brought the bear  
4 spray to the Capitol was incorrect?

5 MS. FITZHARRIS: That's correct.

6 I was at that interview, Your Honor; Ms. Eve was  
7 not.

8 I think it's -- and sometimes, you know, I  
9 think -- in terms of being precise about the questions --  
10 you know, I went -- I actually brought my notes from that  
11 interview just to double-check today and make sure. And,  
12 you know, I think there can be confusion about what you  
13 brought to Washington versus what you brought to the  
14 Capital; and sometimes there can be imprecision in -- in  
15 answering and questioning.

16 So I think -- I don't want the Court to think  
17 Mr. Herendeen is being intentionally evasive or not  
18 accepting responsibility. He accepts responsibility for  
19 bringing the bear spray to Washington, D.C.; that was wrong,  
20 he knows that.

21 I also want to address, you know, the plea offer,  
22 in terms of quick acceptance of responsibility. The offer  
23 that the government extended to Mr. Herendeen in May of 2021  
24 was a plea to the felony. And it had a number of  
25 guidelines -- stipulations that, frankly, I had -- I don't

1 think apply; but, at the end of the day, it was a felony  
2 plea. The --

3 THE COURT: So the plea offer changed?

4 MS. FITZHARRIS: The plea offer changed.

5 And with respect to -- you know, there was a bit  
6 of time between the offer to the misdemeanor plea and his  
7 acceptance; and a lot of that had to do with stuff in his  
8 personal life that I was alluding to earlier -- the stress  
9 he was feeling; and just feeling like -- I mean, like he was  
10 on the verge of a mental breakdown. And so making a  
11 consequential decision like that was just very difficult.  
12 And that -- that explains the gap at least there. And I --  
13 I think it's important for the Court to recognize that.

14 In terms of what Mr. Herendeen did, the video -- I  
15 know that the Court talked about his phone being out. The  
16 video of him -- "They're in the basement" -- it was an  
17 incredibly terrible thing to say, a poor choice.  
18 Mr. Herendeen will tell you that himself -- to say "They're  
19 in the basement." In the moment it did remind him of *White*  
20 *House Down*. The stairs that he was walking by don't  
21 actually have stairs to a basement. He wasn't sure if there  
22 was a basement. It was one of these -- it was -- there is  
23 not really a great excuse for it, and I am not going to make  
24 one.

25 THE COURT: Well, it is a chilling video --

1 MS. FITZHARRIS: It is chilling.

2 THE COURT: -- because everybody in that crowd is  
3 looking for the members of Congress. And whether he got the  
4 idea from a movie I am not familiar with, to say "They're in  
5 the basement" -- I think he says the word "basement" seven  
6 times in different phrasings -- talking about where they're  
7 all hiding -- "In the fucking basement"; and it was an  
8 aggressive, angry mob looking for elected members of  
9 Congress.

10 And that -- when the government says that that was  
11 part of the factors for why they decided that this was not a  
12 mere petty offense -- parading, demonstrating, and picketing  
13 of people who wander around, look around, and then leave --  
14 that this was a much more intentional action within the  
15 Capitol, it's hard for me to say the government has somehow  
16 misevaluated that video. It is a chilling video.

17 MS. FITZHARRIS: If -- if Mr. Herendeen were  
18 trying to present himself as a -- as a hero by that, I mean,  
19 it's a poor choice because the villains in *White House Down*  
20 are the ones saying it. It's not -- it's not something --  
21 it's not necessarily conduct he would emulate or want to  
22 emulate.

23 I think Mr. Herendeen, like a lot of people -- and  
24 I am sure a lot of lawyers have talked about getting swept  
25 up in the moment, you know. And at least his comments --

1 you know, there weren't stairs to the basement. I think,  
2 you know, in some ways it kind of meant nothing, right? And  
3 there are a lot of people who posture, right? -- who make it  
4 seem like they're doing more than they were.

5 But I think what is significant about  
6 Mr. Herendeen is that the only video that was -- came from  
7 Facebook. So the -- "They're in the basement," came from  
8 his phone, not Facebook. He did not post that on Facebook;  
9 and I think that's something the Court should consider.

10 He did post one video on Facebook very -- you  
11 know, very soon after he left the Capitol. Other people  
12 commented positive things on the post; he didn't say  
13 anything, and he took it down. And he hasn't been on  
14 Facebook in over a year, and I think he's better for it.

15 I understand that there is a strong sense -- you  
16 know, this case -- it's interesting. It's caused me to  
17 think back to my criminal law class -- first year in law  
18 school -- and some of the highly theoretical things that we  
19 think about in sentencing; and I remember when we talked  
20 about deterrence.

21 There was a judge who sentenced a man to stand on  
22 the corner outside a sandwich shop wearing a sign on him  
23 that said, "I stole a sandwich from this store." And it  
24 was, you know, this kind of idea that there are other ways  
25 to deter, and there are other -- other than time in custody.

1 And there is a reason why I think the notoriety of the case  
2 and the public shame of this case, the swift detection and  
3 prosecution is -- goes a very long way to deterring people  
4 from engaging in this behavior again.

5 I know that the FBI and the Department of Justice  
6 have acted very quickly, and they have charged hundreds of  
7 people -- everyone they could find -- who entered the  
8 Capitol. And that in itself -- and I think research into  
9 deterrence theory shows that goes a very long way to  
10 deterring people more than time in prison.

11 And, you know, I understand my friends and family,  
12 frankly, who say to me: You know, I want everybody  
13 punished -- and I do get that. But I think punishment is  
14 not just time in jail or prison, and it comes with knowing  
15 that you were part of a horrible event and being put out in  
16 front of the public square, basically, and have to admit  
17 that -- that goes a long way.

18 THE COURT: So let me just ask you a couple of  
19 questions --

20 MS. FITZHARRIS: Sure.

21 THE COURT: -- about your sealed filing.

22 The defendant -- based on what the PSR says --  
23 where the defendant lives in Michigan, he's sort of  
24 surrounded, also, in Michigan with his extended family; is  
25 that right?

1 MS. FITZHARRIS: That's correct.

2 THE COURT: Including the mother of his minor  
3 children?

4 MS. FITZHARRIS: Yes.

5 THE COURT: And you do focus in your briefing on  
6 the fact that he is the custodian -- the legal custodian of  
7 his minor teenagers, and make a very strong plea about him  
8 being able to stay home for their care.

9 But in this case, for this offense conduct, this  
10 is not offense conduct that took place when the defendant  
11 took a mere walk around the block and committed some  
12 criminal offense conduct; he traveled all the way here. So  
13 it's hard for me to reconcile this need for him to be with  
14 his minor children when he actually traveled all the way to  
15 the nation's capital to engage in the offense conduct. So  
16 how am I supposed to reconcile that?

17 MS. FITZHARRIS: Yes, Your Honor.

18 He left on January 5th, and he returned to  
19 Michigan on January 6th. He does have a relationship with  
20 his children's mother; she is not -- she is in their lives,  
21 but not the most -- you know, the most reliable parent. So  
22 she watched them for that period of time and -- you know, it  
23 was relatively short.

24 Before then -- you know, he does have to do work  
25 sometimes out of state; so just before January 6th he was in

1 Alabama for a month. He said he brought his son down there,  
2 actually, to -- he is a proud union worker -- and to show  
3 his son, you know, what it was like to work in the plants.  
4 And he had been just working really hard and was hoping --  
5 hoping to take a trip; and that would be, frankly, more fun  
6 than it was because I think it ended up being -- he would  
7 say not -- not fun at all.

8 THE COURT: All right.

9 MS. FITZHARRIS: Does the Court have any -- have  
10 any other questions?

11 THE COURT: No, I don't.

12 MS. FITZHARRIS: Thank you, Your Honor.

13 THE COURT: I will hear from Mr. Herendeen now if  
14 you wish to supplement your letter to me, Mr. Herendeen.

15 THE DEFENDANT: Good morning -- or afternoon,  
16 Your Honor.

17 You have my letter. It's basically the same.

18 I feel for everyone that was on the wrong side --  
19 the opposite side of the people attacking the Congress  
20 members, the police that were protecting the Capitol, what  
21 they are still going through, what their families are going  
22 through, what I have put my children through and my family  
23 through. It's something that I just won't absolutely ever  
24 be involved in again. And it's a sad day for the nation,  
25 really. And I -- I didn't want to see that happen.

1           It was a black mark on the nation, like I've been  
2 saying. It's a sad, sad day. I didn't intend to go there  
3 for that; and I won't be involved in any politics like that  
4 ever again. I just ask for the forgiveness from the Court  
5 and Congress, and everyone involved.

6           THE COURT: All right. Thank you, Mr. Herendeen.

7           THE DEFENDANT: Thank you, Your Honor.

8           THE COURT: All right. Actually, Mr. Herendeen  
9 and Ms. Fitzharris, why don't you come stand...

10           I am going to explain the sentence I am about to  
11 impose, and impose sentence.

12           So after considering the parties' sentencing  
13 memoranda, the probation department's presentence  
14 investigation report and recommendation, hearing argument,  
15 reviewing all of the briefing, supplemental briefing, sealed  
16 filings, I must consider the relevant factors that Congress  
17 has required me to consider and are set out in 18 U.S.C.  
18 Section 3553(a) to ensure I impose a sentence that is  
19 sufficient but not greater than necessary to comply with the  
20 purposes of sentencing.

21           The purposes of sentencing include: The need for  
22 the sentence imposed to reflect the seriousness of the  
23 offense -- and this was a very serious offense; promote  
24 respect for the law -- because what happened on January 6th  
25 showed complete disrespect for our fundamental

1 constitutional law; to provide just punishment for the  
2 offense; deter criminal conduct; protect the public from  
3 future crimes by you, Mr. Herendeen; and promote  
4 rehabilitation.

5 So I must -- pursuant to 18 U.S.C. Section  
6 3553(a), in addition to the guidelines and policy statements  
7 I have already considered, I have to consider the nature and  
8 circumstances of the offense; your history and  
9 characteristics, Mr. Herendeen; the types of sentences  
10 available; the need to avoid unwarranted sentence  
11 disparities among defendants with similar records found  
12 guilty of similar conduct, and the need to provide  
13 restitution to any victims of the offense.

14 And I am going to start here with restitution.

15 The plea agreement provides for a restitution  
16 payment of \$500, which this Court finds is the best  
17 available estimate of damage done to identifiable victims --  
18 here, the Architect of the Capitol -- on the limited record  
19 presented in this case. Since the only record I have in  
20 this case is an estimate of damages to the Capitol of -- a  
21 little bit -- like \$1.5 million that was created over a year  
22 ago, and the government hasn't supplemented that amount in  
23 any way -- so I will order that amount pursuant to 18 U.S.C.  
24 Section 3663(a)(1)(A).

25 I also find that: Determining complex issues of

1 fact related to the cause or amount of the victim's losses  
2 would complicate or prolong the sentencing process to a  
3 degree that the need to provide restitution to any victim is  
4 outweighed by the burden of the sentencing process -- which  
5 is a finding required under the Mandatory Victims  
6 Restitution Act, at 18 U.S.C. Section 3663A(c) (3) (B) -- so  
7 that the mandatory restitution provisions of that statute do  
8 not apply, and the Court need not endeavor to fix the  
9 restitution amount more precisely than the \$500 amount  
10 agreed upon by the parties.

11           Regarding the nature and circumstances of the  
12 offense, Mr. Herendeen's been convicted of entering and  
13 remaining in a restricted building or grounds in violation  
14 of 18 U.S.C. Section 1752(a) (1), which is a Class A  
15 misdemeanor.

16           And as I said at the sentencing hearing for  
17 Mr. Schornak -- this defendant's codefendant -- conviction  
18 of a trespass offense does not fully capture the  
19 significance of what happened on January 6th because the  
20 events of that day, even for participants like Mr. Herendeen  
21 who did not engage in overt direct violence against police  
22 officers or other people, were not a garden-variety episode  
23 of unlawful entry or even merely being unlawfully present in  
24 a sensitive place -- like the Capitol where the Vice  
25 President was present and members of Congress were meeting

1 to perform their constitutionally mandated task.

2 Mr. Herendeen's criminal conduct helped facilitate  
3 a riot that overwhelmed law enforcement and succeeded in  
4 disrupting the proceedings of Congress. He traveled all the  
5 way from Michigan -- leaving his two teenage kids there --  
6 and came equipped with bear spray, goggles, flak jacket, and  
7 a tactical vest, and possibly contemplated bringing a knife.  
8 He then joined the mob, and knew that following them inside  
9 the Capitol was unlawful.

10 This was not a spur-of-the-moment decision. A  
11 week beforehand, on December 30, 2020, Mr. Herendeen and his  
12 codefendant, Mr. Schornak, exchanged Facebook messages where  
13 this defendant mentioned that -- even though he had heard it  
14 might be hard to get to D.C., "I go regardless." He also  
15 asked, "Wanna make a plan?" I have next two weeks off of work.

16 And make a plan, they did.

17 When the defendant entered the Capitol, after the  
18 former President's exhortation to take the fight to  
19 Congress, he did so with most of the equipment he brought to  
20 D.C. He brought the goggles, wore the jacket and the  
21 tactical vest. He had brought to D.C. the bear spray,  
22 apparently, that -- it's unclear whether he actually brought  
23 it to the Capitol; but having brought it here, he was  
24 prepared for violence.

25 There is a short video on Facebook showing a very

1 large crowd inside the Capitol, and general chaos. And this  
2 defendant took off his hat, tipped it to the crowd in a  
3 gesture of support -- so, clearly, certainly at the moment  
4 he took pride in participating in this breach of the Capitol.

5 Now, in another video that the defendant  
6 recorded -- and there is no evidence that he posted this or  
7 sent it to anyone -- he is heard saying, in a few different  
8 phrasings, the need to get to the basement, saying, "That's  
9 where they are all hiding." The defendant says this was  
10 lifted from some movie reference. But in the context, as I  
11 have already said in my interchange with defense counsel,  
12 this was a very chilling video. It's a crowd of people  
13 chanting in the background, "Stop the steal." Some asking,  
14 Where are they at? -- seemingly referring to finding the  
15 members of Congress. And in this context, the threatening  
16 character of the defendant's suggestion to look in the  
17 basement is unmistakable -- to find the members of Congress.

18 In assessing this defendant's overall role in the  
19 mob attack on the Capitol on January 6th, I look at some of  
20 these factors: That he did engage in preplanning, and he --  
21 not only for the trip, but for potential violence to be  
22 encountered during that trip. He secured gear, including  
23 this tactical vest and bear spray. And whether or not he  
24 took the bear spray into the Capitol with him, he brought it  
25 to Washington, D.C. to be prepared for violence when he was

1 here.

2 Timingwise, he was in the Capitol Building one  
3 time for about 16 minutes; but he was among the first wave  
4 of the rioters to force their way into the Capitol Building.

5 As the government has said, the first breach of  
6 the west front of the Capitol occurred at about 2:13 p.m.,  
7 and the defendant marched into the building about seven  
8 minutes later, at 2:20 p.m. -- at almost the very moment  
9 when the Senate Chamber was being evacuated; that's very  
10 close in time. So this defendant was sort of -- in order to  
11 be -- get into the Capitol so quickly after it was breached,  
12 had to have been somewhat of an aggressive participant to be  
13 there.

14 And then, when he was inside the Capitol, there is  
15 a brief appearance of the defendant in the Crypt. There is  
16 no evidence he entered any private offices or spaces, or the  
17 Senate or House Chambers; and he didn't physically attack  
18 any police officer or any other person. He also doesn't  
19 appear to have damaged or stolen any property inside the  
20 Capitol. He didn't carry posters or anything else to try  
21 and incite people while he was inside the Capitol. Although  
22 he did post one video from inside the Capitol, that was a  
23 limited -- limited video, without much other social media  
24 postings after January 6th.

25 He did then, close -- just before sentencing, very

1 close to the sentencing, he did sit down with investigators  
2 for the House Select Committee. He also did sit down with  
3 law enforcement in connection with his plea; and he did  
4 provide his phone -- according to the defense counsel -- for  
5 forensic examination.

6 So it does appear that, after some long months  
7 after his arrest, he has turned a corner in terms of  
8 understanding the significance of his activity on  
9 January 6th, and sought to figure out what to do to remedy  
10 that in a concrete way by talking to the House Select  
11 Committee which is trying to understand the full scope of  
12 what happened that day and how it happened.

13 So, in sum, the nature and circumstances of the  
14 offense and the need for the sentence to reflect the  
15 seriousness of the offense and promote respect for the law  
16 would generally favor a custodial sentence.

17 The particular circumstances of the defendant's  
18 conduct of not physically engaging in violence, stealing, or  
19 destroying items inside the Capitol Building put him in a  
20 less-troublesome category than some other rioters that day.  
21 But the Court does find that coming equipped with --  
22 preplanning with gear to engage in violence at the Capitol,  
23 and compounded by the disturbing video taken while he was  
24 inside the Capitol referencing "the basement," with a clear  
25 allusion to the likely hiding places of members of Congress,

1 is one that requires a significant penalty in this case.

2           Regarding his history and characteristics, he has  
3 a few adult criminal convictions, but all of which are over  
4 20 years -- 20 years ago. He did have a DUI that's more  
5 recent for which he received a day in jail, in addition to  
6 12 months' probation. And since that time he has crossed  
7 paths with the criminal justice system twice. In 2019 he  
8 was arrested, though ultimately not prosecuted. He was  
9 arrested while on pretrial release in this matter for a drug  
10 possession offense which has now been dismissed.

11           He has three children; and it is a sign of support  
12 that all three of his children came here today. The  
13 defendant has been employed regularly, and fairly  
14 consistently.

15           And I am -- have taken account of the very  
16 thoughtful letter where the defendant apologized to everyone  
17 who was working in the Capitol representing the American  
18 people, the heroes protecting the Capitol, and the American  
19 people watching -- and I quote from the defendant's letter.  
20 I appreciate that he recognizes that the events of that day  
21 are a black spot on the nation's history.

22           I have looked at all of the letters submitted on  
23 his behalf, including the one that I have read while on the  
24 bench from Mr. Koslofsky talking about his work ethic, his  
25 devotion to his children, and his general helpful demeanor

1 toward his family and neighbors. And it is quite  
2 unfortunate that those were traits and behaviors that seemed  
3 absent on January 6.

4 The need for the sentence imposed to deter  
5 criminal behavior, protect the public from further crimes of  
6 the defendant are critical considerations for every  
7 sentencing judge. And the seriousness of the conduct we  
8 witnessed on January 6th highlights the need for deterrence  
9 and the form of sentence sufficient to deter this defendant  
10 and others from engaging in this kind of conduct in the  
11 future.

12 I appreciate that the defendant says that he was  
13 caught up in the social media echo chamber of conspiracy  
14 theories leading up to the 2020 election where other  
15 Americans are demonized as enemies somehow and people who  
16 are protesting against police brutality are somehow less  
17 than Americans, and other misinformation about the stealing  
18 of the presidential election in 2020.

19 And it is -- the biggest surprise to me in all of  
20 these January 6th cases is the fact that there are so many  
21 uncritical thinkers who just believe what they see or hear  
22 from politicians. But as a sentencing judge, being a crowd  
23 follower doesn't immunize you from criminal liability; it  
24 just doesn't. There are consequences to going along with  
25 the crowd. You know, mothers saying to children across for

1       ages, you know: Don't follow somebody over the cliff just  
2       because they're going over the cliff. It applies here.  
3       Unfortunately, people like Mr. Herendeen who are following  
4       people over a cliff are going to pay the consequences.

5               What concerns me in this case that, I think,  
6       warrants a sentence of more than just simply probation is  
7       the preplanning -- and the preplanning that involved  
8       bringing bear spray to the Capitol, and then compounded by  
9       the action in the Capitol -- unlike others I have seen who  
10      just wandered around and looked -- of actually talking about  
11      trying to find members of Congress.

12             Regarding the types of sentences available, he was  
13      convicted of a Class A misdemeanor, which provides a maximum  
14      term of imprisonment of one year, which -- if a term of  
15      imprisonment is applied, needs to be followed by only a  
16      maximum of one year of supervised release or up to five  
17      years' probation, with the guideline range of only up to  
18      three years out of the five.

19             Regarding the need to avoid unwarranted disparity,  
20      the Court recognizes that both probationary and custodial  
21      sentences have been imposed on January 6th defendants  
22      convicted of the same Class A misdemeanor as this defendant.  
23      And most of those defendants -- the majority of the  
24      January 6th defendants convicted of a Class A misdemeanor  
25      are sentenced to some period of incarceration. Some of it

1 is straight periods of incarceration and some of it is  
2 intermittent confinement in connection with -- as a special  
3 condition of probation.

4 The defendant's codefendant, Mr. Schornak, does  
5 serve as a useful comparator here. And defense counsel's  
6 analysis of the differences between that case and this one,  
7 I thought, was very helpful and was a careful and probative  
8 analysis. The Court did sentence Mr. Schornak to 36 months'  
9 probation, including two 14-day periods of intermittent  
10 incarceration, totaling a total of 28 days, and 2 months of  
11 home detention.

12 The two defendants' conduct is similar in some  
13 respects since both were in the Capitol a relatively short  
14 time: 16 minutes for this defendant, 12 minutes for  
15 Mr. Schornak. Both came equipped with some measure of  
16 tactical gear. Neither engaged in violence, although they  
17 said they were prepared to do so if the circumstances  
18 warranted.

19 In my view, Mr. Schornak did engage in more  
20 egregious conduct while he was unlawfully inside the  
21 Capitol. He not only went deeper into the building,  
22 including Emancipation Hall; he also stole an American flag,  
23 took it outside, hoisted it up to incite and invigorate  
24 other rioters on scaffolding to be displayed from above --  
25 in essence, turning this symbol -- the flag -- a symbol of

1 this country -- against itself as a rallying cry for all of  
2 these other people amassed there.

3 The defendant, by comparison, didn't steal  
4 anything, didn't engage in conduct to rally or prolong the  
5 riot. He entered the Crypt. He posted the short Facebook  
6 video; he recorded at least one other cell phone video; and  
7 he exited through a window to which the police were  
8 directing rioters as a means to leave.

9 His preplanning and bringing bear spray to  
10 Washington, D.C. -- whether he actually took it into the  
11 Capitol -- this was preplanning that was serious and  
12 alarming. And also alarming was the interest he took in  
13 finding members of Congress in the basement of the Capitol.

14 It is an important mitigating factor for this  
15 defendant, as I found for Mr. Schornak, that he is trying to  
16 remedy his conduct on that day by being interviewed by the  
17 January 6 committee on the House. And I do think that  
18 this -- sitting down for interviews with the House Select  
19 Committee -- deserves some recognition at sentencing in  
20 assessing the defendant's remorse, his acceptance of  
21 responsibility, and taking steps to help that investigating  
22 committee.

23 So based on my consideration of these and other  
24 factors, I will now state the sentence to be imposed.

25 Pursuant to the Sentencing Reform Act of 1984 and

1 in consideration of the provisions of 18 U.S.C. Section  
2 3553, it is the judgment of the Court that you, Daniel  
3 Herendeen, are hereby sentenced to a term of 36 months,  
4 which is 3 years of probation, on Count 2 of the indictment,  
5 with special conditions of a total of 14 days of  
6 intermittent confinement to be served in two increments of 7  
7 days each, and 2 months of home detention.

8 You are ordered to pay a special assessment of \$25  
9 in accordance with 18 U.S.C. Section 3013.

10 You are also ordered to make restitution to the  
11 Architect of the Capitol in the amount of \$500. Restitution  
12 payments shall be made to: The Clerk of the Court for the  
13 U.S. District Court, District of Columbia, for disbursement  
14 to the following victim: The Architect of the Capitol,  
15 Office of the Chief Financial Officer, the attention of  
16 Kathy Sherrill, CPA, Ford House Office Building, Room  
17 H2-205B, Washington, D.C. 20515, in the amount of the loss:  
18 \$500.

19 While on supervision, you shall abide by the  
20 following mandatory conditions as well as the standard  
21 conditions of supervision which are imposed to establish the  
22 basic expectations for your conduct while on supervision.

23 The mandatory conditions include:

24 One, you must not commit another federal, state,  
25 or local crime.

1           Two, you must not unlawfully possess a controlled  
2 substance -- that includes marijuana.

3           You must refrain from any unlawful use of a  
4 controlled substance. You must submit to one drug test  
5 within 15 days of placement on supervision, and at least two  
6 periodic drug tests thereafter as determined by the Court.

7           You must make restitution in accordance with your  
8 plea agreement and 18 U.S.C. Section 3663.

9           You shall comply with the following special  
10 conditions:

11           Pursuant to 18 U.S.C. Section 3563(b)(10), you  
12 must serve a total of 14 days of intermittent confinement.  
13 The intermittent confinement shall be served in two periods  
14 of 7 days each within your first year of probation at a  
15 facility designated by the Bureau of Prisons. You must  
16 follow the rules and regulations of the facility in which  
17 you are designated.

18           You must submit to home detention for a period of  
19 two months as soon as practical and comply with the location  
20 monitoring program requirement as directed by the U.S.  
21 Probation Office. You will be restricted to your residence  
22 at all times except for employment, education, religious  
23 services, medical, substance abuse and mental health  
24 treatment, court-ordered obligations, and any other such  
25 times specifically authorized by the U.S. Probation Office.

1           The location-monitoring technology is at the  
2           discretion of the U.S. Probation Office, and you must pay  
3           the cost of monitoring.

4           You must provide the probation officer access to  
5           any requested financial information and authorize the  
6           release of any financial information. The probation office  
7           may share financial information with the U.S. Attorney's  
8           Office.

9           Having assessed the defendant's ability to pay,  
10          payment of the total criminal monetary penalties is due as  
11          follows: Payment in equal monthly installments of \$100 to  
12          commence 30 days after the date of this judgment.

13          The Court has determined that you do not have the  
14          ability to pay interest and therefore waives any interest or  
15          penalties that may accrue on the balance.

16          Financial obligations are immediately payable to:  
17          The Clerk of the Court for the U.S. District Court, 333  
18          Constitution Avenue Northwest, Washington, D.C. 20001.  
19          Within 30 days of any change of address, you shall notify  
20          the Clerk of the Court of the change until such time as the  
21          financial obligation is paid in full.

22          The probation office shall release the presentence  
23          investigation report to all appropriate agencies, which  
24          includes the U.S. Probation Office in the approved district  
25          of residence, in order to execute the sentence of the Court.

1 Pursuant to 18 U.S.C. Section 3742, you have a  
2 right to appeal the sentence imposed by this Court if the  
3 period of imprisonment is longer than the statutory maximum.  
4 If you choose to appeal, you must file any appeal within 14  
5 days after the Court enters judgment.

6 As defined in 28 U.S.C. Section 2255, you also  
7 have the right to challenge the conviction entered or  
8 sentence imposed if new and currently unavailable  
9 information becomes available to you or on a claim that you  
10 received ineffective assistance of counsel in entering a  
11 plea of guilty to the offense of conviction or in connection  
12 with sentencing. If you are unable to afford the cost of an  
13 appeal, you may request permission from the Court to file an  
14 appeal without cost to you.

15 Are there any objections to the sentence imposed  
16 that are not already noted on the record from the government?

17 MS. EVE: No, Your Honor.

18 THE COURT: And from defense?

19 MS. FITZHARRIS: Your Honor, the only issue I  
20 would like to address is the standard condition about  
21 possession of controlled substances. As a condition of  
22 Mr. Herendeen's pretrial release, there is a similar  
23 condition. The Court amended the conditions to allow him to  
24 use medical marijuana in accordance with Michigan law; he  
25 has a medical marijuana card. And so I would ask that the

1 Court --

2 THE COURT: I will make that amendment. Thank you  
3 for the reminder about that.

4 MS. FITZHARRIS: Thank you.

5 THE COURT: Okay. You may be seated.

6 Does the government have a motion to dismiss the  
7 open counts, 1, 3, 4, and 5?

8 MS. EVE: Yes, Your Honor.

9 The government moves to dismiss those counts.

10 THE COURT: And that motion is granted.

11 Is there anything else to address today from the  
12 government?

13 MS. EVE: Your Honor, I just want to make sure  
14 that I wrote things down properly.

15 The Court did not impose a fine?

16 THE COURT: I did not.

17 MS. EVE: And the Court also did not impose the  
18 hours of community service?

19 THE COURT: I did not.

20 MS. EVE: Thank you.

21 THE COURT: Anything further from the defense?

22 MS. FITZHARRIS: No. Thank you very much,  
23 Your Honor.

24 THE COURT: All right. You are all excused.

25 You are all excused. I have got another case.

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(Whereupon, the proceeding concludes, 1:19 p.m.)

**CERTIFICATE**

I, ELIZABETH SAINT-LOTH, RPR, FCRR, do hereby certify that the foregoing constitutes a true and accurate transcript of my stenographic notes, and is a full, true, and complete transcript of the proceedings to the best of my ability.

This certificate shall be considered null and void if the transcript is disassembled and/or photocopied in any manner by any party without authorization of the signatory below.

Dated this 9th day of June, 2022

/s/ Elizabeth Saint-Loth, RPR, FCRR  
Official Court Reporter

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