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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,) Criminal Action
) No. 1:21-cr-00686-FYP
Plaintiff,)
) **Sentencing** (via Zoom)
vs.)
)
NATHAN WAYNE ENTREKIN,) Washington, D.C.
) **May 6, 2022**
Defendant.) Time: 11:00 a.m.

**Transcript of Sentencing (via Zoom)
Held Before
The Honorable Florence Y. Pan (via Zoom)
United States District Judge**

A P P E A R A N C E S

For the Government: **Sean P. Murphy**
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Also Present: Sherry Baker, Pretrial Services Officer

Stenographic Official Court Reporter:
(via Zoom) Nancy J. Meyer
Registered Diplomate Reporter
Certified Realtime Reporter
333 Constitution Avenue, Northwest
Washington, D.C. 20001
202-354-3118

P R O C E E D I N G S

(REPORTER'S NOTE: This hearing was held during the COVID-19 pandemic restrictions and is subject to the limitations of technology associated with the use of technology, including but not limited to telephone and video signal interference, static, signal interruptions, and other restrictions and limitations associated with remote court reporting via telephone, speakerphone, and/or videoconferencing.)

THE COURTROOM DEPUTY: This is Criminal Action 21-686, United States of America v. Nathan Wayne Entrekin.

Counsel, please identify yourselves for the record, beginning with the government.

MR. MURPHY: Good morning, Your Honor. Sean Murphy on behalf of the United States.

THE COURT: Good morning, Mr. Murphy.

MS. JAHN: Good morning, Your Honor. Dani Jahn on behalf of Mr. Entrekin, who is present.

And just for the record, in light of the CARES Act and the pandemic, the defense agrees to appear in this manner.

THE COURT: Good morning. Thank you, Ms. Jahn.

Good morning, Mr. Entrekin.

THE DEFENDANT: Good morning, Your Honor.

THE COURT: All right. And your lawyer just told me, Mr. Entrekin, that you're agreeing to appear by video for this hearing, and I just want to confirm that. Is that okay with you?

THE DEFENDANT: Yes, Your Honor.

1 THE COURT: All right. Thank you.

2 So this case is here for a sentencing after
3 Mr. Entrekin's guilty plea to Count 5 of the information, which
4 charged you with parading, demonstrating, or picketing in a
5 Capitol Building.

6 Under the plea agreement, the government agreed to
7 dismiss Counts 1 through 4 of the information at sentencing.
8 Does the government now move to do that upon imposition of the
9 sentence today?

10 MR. MURPHY: Yes, Your Honor, the government so
11 moves.

12 THE COURT: All right. Thank you.

13 And so upon imposition of sentence, Counts 1 through 4
14 will be dismissed.

15 I want to thank the parties and the probation officer
16 for their helpful submissions here in aid of sentencing. I
17 have reviewed the following: the presentence investigation
18 report; the sentencing recommendation of the probation officer;
19 the defendant's memorandum in aid of sentencing and attached
20 exhibits, which included letters from Mr. Entrekin, his mother,
21 Laura Entrekin, and his friend, Wayne Schultz.

22 I reviewed the government's memorandum in aid of
23 sentencing and its notice of filing of video exhibits, as well
24 as the six video submissions that were made. I've also
25 reviewed the defendant's reply which attached an amicus brief

1 filed by the public defender in the case of Jeremiah Caplinger
2 on the issue of whether split sentences are permissible for the
3 offense of conviction in this case. It appears that
4 Judge Friedman has yet to rule in that case.

5 But I've also reviewed a memorandum opinion by
6 Judge Lamberth in *United States v. Little*, holding that split
7 sentences are permissible when imposing a sentence for a petty
8 offense; and a memorandum opinion by Judge Kollar-Kotelly in
9 *United States v. Spencer*, which held that split sentences are
10 not permissible when imposing a sentence for a petty offense.

11 So that's everything that I've reviewed. I just want to
12 make sure I haven't missed anything.

13 Anything from you, Ms. Jahn?

14 MS. JAHN: No, Your Honor, nothing further.

15 THE COURT: Mr. Murphy, anything from you?

16 MR. MURPHY: No submissions. However, when I was
17 preparing for this hearing this morning, I did notice that
18 Judge Kollar-Kotelly, on April 29th in the case of the *United*
19 *States v. Oliver Sarko* -- that's docket -- or Case No.
20 21-cr-591 -- issued a memorandum opinion and order, the holding
21 of which -- as can be seen on page 5 of that document, says
22 "Accordingly, consistent with the analysis set forth herein and
23 the recent case law from this District Court, it is
24 accordingly," and then she imposed a split sentence, 30 days'
25 incarceration followed by 3 years of probation. So I only

1 bring that up to the Court so that insofar as it's relying on
2 judge's -- Judge Kollar-Kotelly's previous memorandum that held
3 that split sentences are not permissible, she has now issued a
4 much more recent opinion holding that they are.

5 THE COURT: Thank you. I'm just going to go pull
6 that up right now, because that's something I was not aware of.

7 MS. JAHN: Your Honor, if I could also just add
8 another piece of information that is not part of the record.
9 But there is a pending matter before Judge Sullivan on this
10 issue of the legality of split sentences, and the federal
11 defender's office has filed a reply. That criminal number is
12 21-055. The defendant's name is Dominick Madden, M-a-d-d-e-n.
13 And there is a recitation throughout speaking about
14 Judge Lamberth's decision in *Little* and, respectfully,
15 submitting information as to why that is incorrect. As you
16 know, what was already contained in the reply that I filed,
17 that Judge Lamberth's opinion in Mr. Little's case is now being
18 appealed.

19 THE COURT: Okay. Thank you. I understand that.

20 So I'm just taking a quick look at Judge Kotelly's
21 opinion. And I will note that I think this is a pretty
22 contained issue. It involved statutory interpretation of,
23 really, one statutory provision read in conjunction with
24 another. And for the record, that's 18 U.S.C. § 3561(a)(3),
25 read in conjunction with section -- 18 U.S.C. § -- I'm sorry,

1 18 U.S.C. § 3551. And so I think this is a fairly narrow
2 issue. I think this has been very thoroughly discussed and
3 briefed, both in the *Caplinger* brief that I read in preparation
4 for this hearing and as well as in the prior opinions.

5 And so I'm interested in, sort of, the new outcome in
6 Judge Kotelly's new opinion in *Sarko*.

7 But in terms of the legal issues, I don't think that we
8 need to take additional time to review any of this briefing or
9 any of the new arguments made because I feel like the briefing
10 and analysis has been very thorough already. It's something
11 that people have taken a really hard look at. I've taken a
12 really hard look at it. And so, just for the record, I don't
13 think that we need to put off this hearing or take time out to
14 read any more opinions on this issue.

15 And I'm prepared to go forward today, understanding that
16 this is a live issue that's going to continue to be considered,
17 addressed, and discussed, and resolved by various judges on
18 this court. So I thank the parties for the updates where
19 things stand on this issue.

20 I'm just taking a quick look at Judge Kotelly's opinion
21 because one of the opinions I did read in preparation for this
22 hearing was her prior opinion in *Spencer*. Yeah, it seems that
23 Judge Kotelly is relying on *Little* now and has imposed a split
24 sentence. She also applied -- relied on a Fourth Circuit case,
25 *United States v. Posley*.

1 All right. Thank you.

2 Okay. So for this sentencing, I think that we should
3 address that legal issue first. I'm just going to review where
4 we stand right now. And then I think we should talk about that
5 legal issue before we proceed to allocution.

6 For sentencing on this single count of parading,
7 demonstrating, or picketing in a Capitol Building, the maximum
8 sentence is six months' incarceration, a \$5,000 fine, five
9 years' probation. The parties dispute whether the Court may
10 lawfully impose a split sentence; that is, a sentence of
11 incarceration followed by a term of probation.

12 The probation officer recommends a sentence of 45 days'
13 incarceration, but I've consulted with Ms. Baker, and that
14 recommendation was made assuming that a split sentence is not
15 permissible. The government recommends a split sentence of
16 105 days' incarceration followed by 3 years of probation with
17 60 hours of community service and \$50 in restitution. The
18 defendant recommends a sentence of probation.

19 And so I think before we proceed to hearing allocution,
20 we need to resolve this issue of the legality of the split
21 sentence so the parties know what the Court considers an
22 appropriate menu of options before they allocute. And I've
23 reviewed the parties' arguments in their sentencing memoranda
24 and the authorities cited. And I've now taken a look at the
25 *Sarko* case that Mr. Murphy brought to my attention this

1 morning.

2 And so I think this issue is just how best to interpret
3 the language in 18 U.S.C. § 3561(a)(3). And for the record,
4 that provides, in relevant part, "In general. A defendant who
5 has been found guilty of an offense may be sentenced to a term
6 of probation unless." Subsection (3) says, "The defendant is
7 sentenced at the same time to a term of imprisonment for the
8 same or a different offense that is not a petty offense."

9 So I tend to agree, having read through the opinions and
10 the analysis here, with Judge Lamberth; that the best reading
11 of this language is a split sentence is permissible because I
12 read the phrase "that is not a petty offense" to modify the
13 whole phrase "the same or a different offense." Meaning, that
14 if a defendant is sentenced to a term of imprisonment for the
15 same offense that is not a petty offense, probation would be
16 permissible.

17 So I would like to give Ms. Jahn an opportunity to
18 persuade me otherwise and ask her a few questions about her
19 interpretation. But just from my reading, that seems to be the
20 most logical and grammatical way of reading this statute. So,
21 Ms. Jahn, are you prepared to sort of talk through the
22 arguments that were made in *Caplinger*, which are the ones that
23 you adopted?

24 MS. JAHN: Yes, Your Honor. So we rely -- just for
25 the record, we rely on the amicus that was filed by A.J. Kramer

1 in that matter. I understand that was filed before the
2 decision in *Little*. I referenced another pleading and another
3 case a few moments ago. I just want to do so for the record.
4 *United States v. Dominick Madden*, 21-055, where, again, the
5 federal defender's office discusses the applicability of
6 whether a split sentence is lawful and makes an argument,
7 respectfully, that Judge Lamberth's decision is not correct;
8 and -- and I'm happy to cite to you the -- the actual ECF
9 filing itself. It's --

10 THE COURT: Ms. Jahn, I think it's a little late for
11 that because we're at sentencing.

12 MS. JAHN: I understand.

13 THE COURT: Right. So I will not consider that. But
14 if you want to make any arguments about that, related to that,
15 I will allow you to do so.

16 MS. JAHN: Your Honor, I will just stand by saying,
17 respectfully, we believe the *Little* decision is incorrectly
18 decided. Judge Lamberth is the only judge -- with the
19 exception of what I've now just learned this morning,
20 Judge Kollar-Kotelly, in this other *Sarko* matter -- that has
21 ruled in the way the government has been seeking; separate from
22 you, Your Honor. I don't know what you have done in a -- in a
23 prior case. I don't know if you've ruled on it.

24 THE COURT: I have not.

25 MS. JAHN: I tried to find that answer this morning.

1 No other judge, other than Judge Lamberth, has been giving
2 split sentences. And, in fact, this has been vetted out and
3 discussed with all of your colleagues. And so, respectfully,
4 we believe Judge Lamberth's decision is an outlier. There is
5 no notice and --

6 THE COURT: But -- I'm sorry, Ms. Jahn. Has anybody
7 else ruled that -- ruled on this issue to the contrary?
8 Because it's different to say nobody else has done it versus
9 anybody has confronted the issue and ruled in conflict with
10 what Judge Lamberth ruled.

11 Because the only holding I was aware of that ruled in
12 conflict with the *Little* analysis was Judge Kotelly's written
13 opinion in *Spencer*. And that, apparently, has been repudiated
14 in *Sarko*. So are you aware of any other actual ruling on this
15 issue? Are you just saying nobody yet has adopted that
16 reasoning?

17 MS. JAHN: So I'm not aware of a written opinion to
18 reflect what we're discussing. However, I personally have been
19 a part of many sentencing hearings, as have my colleagues from
20 the federal defender's office, where this issue has been fully
21 vetted and discussed, and the outcome and ultimate sentences
22 imposed at least appear to be consistent with saying they are
23 not -- they do not read the statute that way.

24 I know I had a matter before Judge Nichols. The matter
25 involved Dalton Crase. He did not issue an opinion ruling. He

1 just disagreed. And my categorization of it is that perhaps
2 the Court thought a safer course was to impose a different way
3 of a sanction rather than dealing with this legal issue. In
4 all candor, I think my assessment of perhaps -- some other of
5 your colleagues have ruled in the same way. They haven't said
6 it that way, but they have made a choice about either
7 imprisonment or probation with other conditions.

8 And so I agree there has not been another opinion, but
9 there has been a lot of discussion on the record at all of
10 these sentencing hearings about these issues, Your Honor.

11 THE COURT: Yes. Thank you.

12 So my understanding, just anecdotally, from talking with
13 some of my colleagues and based on my own experience, is that
14 judges don't want to reach this issue unless they have to. And
15 so, for example, in a sentencing that I recently did, this
16 issue was raised and teed up, but I made the determination to
17 give a sentence in a halfway house, which was a condition of
18 probation, and I did not need to resolve this legal issue given
19 the sentence that I determined was the appropriate one.

20 And in talking to some of my colleagues, it -- many of
21 them have told them they just haven't reached the issue. And I
22 think people -- which I think is the right way to approach
23 this. If you don't need to resolve it, you don't. And it
24 seems that there have been many cases in which judges have
25 found there were appropriate sentences that they could impose

1 without needing to actually reach this issue.

2 And so you're telling me, however, that you believe that
3 Judge Nichols verbally reached this issue and ruled the other
4 way?

5 MS. JAHN: Yes, Your Honor. In that matter, it was a
6 much shorter time period. It was a 14-day request by the
7 government. And, again, the same arguments were -- were
8 presented in this particular case. I don't have the transcript
9 so I want to be very careful, but we did then reappear. You
10 should know there was questions about intermittent confinement,
11 weekends, and the like.

12 Ultimately, what I can tell you is that the sentence was
13 modified because there was not a facility available to one of
14 the co-defendants, and Judge Nichols wanted each of the
15 defendants in that case to be treated the same. So he modified
16 the condition of probation to home confinement, which was the
17 request of the defense from the beginning. And so that went --
18 that case is a little bit, obviously, different than this one,
19 but --

20 THE COURT: Yes.

21 MS. JAHN: And there is a longer history there, and
22 some issues that were unforeseen. So it is not virtually the
23 same.

24 THE COURT: Okay. Thank you. I appreciate that.
25 And I do think that that's a feature of all of these sentences

1 that -- involving January 6th misdemeanants, that none of them
2 are exactly the same. Everything is so fact-dependent.

3 So if we could just talk for a moment about the legal
4 issue, Ms. Jahn. I think what this boils down to is reading --
5 I'm just going to pull this up -- the statutory language that I
6 just indicated. And so the operative language is "Unless the
7 defendant is sentenced at the same time to a term of
8 imprisonment for the same or a different offense that is not a
9 petty offense." And my understanding of the argument against
10 the *Little* analysis is that the phrase "that is not a petty
11 offense" modifies only a different offense. It does not modify
12 the same offense.

13 Do you have the language in front of you, Ms. Jahn?
14 Because I just want to talk to you about this for a moment.

15 MS. JAHN: I was trying to pull it up quickly, Your
16 Honor. So are you referencing the *Little* case? Are you
17 referencing -- just so I can get the right language you're
18 referring to.

19 THE COURT: Sure. I'm just referencing the statutory
20 language.

21 MS. JAHN: Understood.

22 THE COURT: And so that is in the *Caplinger* brief
23 that you attached --

24 MS. JAHN: Yes. Yes. I have that right here.

25 THE COURT: -- in your reply.

1 So if you look under -- it's on page 3, No. 3, where you
2 talk about probationary sentences. The relevant statute at
3 issue is section 3561(a)(3). Do you see that?

4 MS. JAHN: I do, Your Honor, yes.

5 THE COURT: Okay. So my question is: Under the
6 interpretation that you are advocating, what does -- what do
7 the words "the same" modify? Because it says, "The defendant
8 is sentenced at the same time to a term of imprisonment for the
9 same or a different offense that is not a petty offense." The
10 same what? What does "the same" modify?

11 MS. JAHN: So you're referring to the -- to the
12 second phrase of "the same"; correct?

13 THE COURT: Yes.

14 MS. JAHN: And so that would modify not a petty
15 offense.

16 THE COURT: But that's not grammatically correct.
17 He's sentenced at the same time to a term of imprisonment for
18 the same, not a petty offense.

19 MS. JAHN: For the same -- I understand how you've
20 read it. And I want to be consistent with *Caplinger*,
21 Your Honor.

22 THE COURT: *Caplinger* says that -- doesn't address
23 what "the same" modifies. They just say that "that is not a
24 petty offense" only modifies a different offense.

25 And then my question is: Well, what about "the same"?

1 What does "the same" modify? Because it seems to me that the
2 same must modify "offense," which means the same offense that
3 is not a petty offense. Because "that is not a petty offense"
4 certainly modifies "offense" in that second phrase. And if
5 "the same" is modifying offense, then you can only read it as
6 the same offense that is not a petty offense.

7 MS. JAHN: Your Honor, I'm trying to read it multiple
8 ways. The way that you --

9 THE COURT: Sure. Take your time. I sprung this on
10 you, and I want to get this right.

11 So the phrase is "The defendant is sentenced at the same
12 time to a term of imprisonment for the same or a different
13 offense that is not a petty offense."

14 MS. JAHN: For the same --

15 THE COURT: Yes. "[T]he same or a different offense
16 that is not a petty offense." *Little* reads, "that is not a
17 petty offense" to modify the whole phrase "for the same or a
18 different offense." *Caplinger* amicus brief reads "that is not
19 a petty offense" to modify only a different offense.

20 MS. JAHN: Yeah.

21 THE COURT: And I -- and under the *Caplinger*
22 analysis, I'm wondering what does "the same" modify?

23 MS. JAHN: Could I have a moment to -- because this
24 is such a big issue?

25 THE COURT: Of course.

1 MS. JAHN: And Mr. Kramer wrote the *Caplinger*. I
2 don't want to make a statement that would be inconsistent with
3 that. And so could I have a moment to try to confer?

4 THE COURT: Yes, you may. You can mute us, if you'd
5 like to.

6 THE DEFENDANT: Ms. Jahn, should I -- should I be in
7 with you there?

8 MS. JAHN: No. Just hold on a second.

9 THE DEFENDANT: Okay.

10 (Off the record.)

11 MS. JAHN: Your Honor, I'm unable to reach -- as you
12 saw me, I was on my phone trying to reach a whole host of
13 folks, and no one is picking up this very moment. And so if
14 you would just allow, perhaps, maybe just tabling this issue
15 for a moment, and I can email and try to see if I can get more
16 clarity, since I was unable to reach someone. Would you allow
17 for that?

18 THE COURT: Yes.

19 MS. JAHN: I just didn't expect that you would be
20 focusing on this language here, and I just don't want to be
21 inconsistent for the record.

22 THE COURT: No, I understand. That's fine, Ms. Jahn.

23 MS. JAHN: Okay.

24 THE COURT: I had another question that you might
25 want to add to your email. Maybe we should discuss that before

1 you send it.

2 MS. JAHN: Okay. All right.

3 THE COURT: And so I'm interested in whether your
4 interpretation in *Caplinger* makes sense. And so the government
5 is saying that what this language does -- and, admittedly, this
6 language is not the model of clarity that we would hope for --
7 is it says that you can have split sentences for petty
8 offenses, whether it's the -- for the same offense or for a
9 different offense, but you can have split sentences for petty
10 offenses.

11 That's kind of the bottom line of their position. And
12 they say that that makes sense because you can't get supervised
13 release for petty offenses. So for all the other types of --
14 of crimes where you can't have probation, you can have
15 supervised release. So that's the reason why this
16 interpretation makes sense.

17 The interpretation that is advocated in *Caplinger* -- or
18 the amicus brief in *Caplinger* is that that is not a petty
19 offense; that last phrase only modifies a different offense,
20 which means that if it's the same offense, you can't have a
21 split sentence. In fact, split sentences are never allowed.
22 But there is a situation where it appears -- this amicus brief
23 is advocating -- there are two petty offenses, then one of them
24 can have a probationary sentence. That's kind of what the
25 bottom line is. Because you're saying "that is not a petty

1 offense" only modifies a different offense. So if it's the
2 same offense, probation is not allowed, but it would be if it's
3 a different offense that is not a petty offense.

4 So I want to, kind of, provide a concrete example of how
5 that would work under your view of *Caplinger*, which is: Say
6 there were two petty offenses, two counts of parading, that
7 means then I can have a probationary sentence for one of them
8 just because there are two counts that are misdemeanor
9 offenses? It just doesn't make sense to me. So I want to
10 understand why the interpretation that is advocated in
11 *Caplinger* makes any sense just on a big-picture level.

12 Why would we want a situation where any time there are
13 two petty offenses, you can impose probation for one of them?
14 It just doesn't make sense. That seems to be the implication
15 of the interpretation that is advocated in *Caplinger*.

16 MS. JAHN: I think that's the argument, Your Honor;
17 is that if there are two, a Court could impose probation for
18 one and then a term of incarceration for the other. That
19 doesn't seem inconsistent because --

20 THE COURT: But why would we want that?

21 MS. JAHN: Well, I don't think we would want that,
22 respectfully, but I think that is consistent with the statutory
23 language as written. So that --

24 THE COURT: So I -- maybe I phrased that wrong. I --
25 not why would we want that but why does it make sense? Why

1 would Congress have written it so that we could do that, is
2 kind of my question?

3 Whereas, the government's interpretation makes sense.
4 It's saying, if it's a petty offense, you can also have
5 probation because you can't supervise them with supervised
6 release. So any petty offense, you can have a split sentence,
7 whether it's in the same offense or a different offense. But
8 if it's petty, you can have a split sentence. That's kind of
9 their bottom-line.

10 Whereas, the *Caplinger* interpretation is if you have one
11 petty offense, you're out of luck. There can be no supervision
12 for this person. It's either incarceration or probation, but
13 you can't have a split sentence. Like, with -- even though for
14 all felony offenses you could have incarceration with
15 supervised release. But for misdemeanors, we just have this
16 sort of different situation, unless you have two petty
17 offenses. Then you could have all probation for one; and, I
18 guess, for the other, maybe all probation for both; right?

19 You could have all probation for both but no split
20 sentence, or you could do something weird, like have
21 incarceration for one, run them consecutive, and have probation
22 for the other. But why should a court have to do that if it
23 wants to impose a split sentence? And how come you can only do
24 it if there are two charges? Doesn't that invite the
25 government to try to charge two counts that are pettys so they

1 can -- it just doesn't -- the whole thing doesn't make sense.

2 MS. JAHN: Well, there's -- as you've just
3 articulated, there's so many different combinations that could
4 be had. But if the Court wanted to impose probation under the
5 probation statutory authority, there is an opportunity for a
6 court to give intermittent confinement, one, or other
7 conditions. You mentioned earlier that you impose halfway
8 house placement as a condition. So there are other mechanisms
9 within the other statutory authority, not 3561, that allow for
10 these different opportunity sentences that you've just
11 articulated, if that makes sense.

12 THE COURT: But then the question is why would
13 Congress want to preclude a sentence that's not intermittent?
14 Like, there's a way of getting to confinement if it's
15 intermittent with probation, but your reading of *Caplinger*
16 seems to indicate that there are some reasons -- some good
17 reason why we would want to preclude a sentencing court from
18 imposing a split sentence of, say, 30 days and then 3 years of
19 probation.

20 MS. JAHN: Because there's no notice to a -- the way
21 that we are reading and interpreting these statutory
22 authority and go back to the plea agreement even of itself,
23 there is no notice that someone could be imprisoned up to
24 six months and an additional term of probation, and the
25 probationary terms can -- can be different. But --

1 THE COURT: Can I ask you about that, Ms. Jahn,
2 because I did see that in your reply brief.

3 In a normal felony case, it'll say whatever -- the
4 maximum is 15 years' imprisonment, a \$10,000 fine, but you
5 can -- you can do both. Like, you don't have to say in your
6 plea agreement that both of these are applicable. Like, why is
7 this different?

8 MS. JAHN: So, Your Honor, in -- in this plea, it
9 spells out what all the maximum penalties are. It specifically
10 states there's a fine. It says a term of probation not more
11 than five years. It also started with a six-month maximum of
12 imprisonment. And so it's -- the way the statutory reliance on
13 probationary offenses is, it's giving notice to defendants. It
14 is either/or. So you are either going to prison for up to
15 six months, or you are getting probation up to five years. And
16 then there are conditions of probation that can, frankly,
17 include intermittent confinement. So it's not like it's
18 precluding it outright, but it's either one.

19 THE COURT: I'm looking at the plea agreement now.
20 It seems to say "and."

21 MS. JAHN: Well, it says all of these, yes, and so it
22 says --

23 THE COURT: But doesn't say "or." It says "and."
24 "Your client understands that a violation" --

25 MS. JAHN: Well, it --

1 THE COURT: -- "carries a maximum sentence of
2 six months of imprisonment . . . a fine of not more than
3 \$5,000 . . . a term of probation of not more than 5 years; and
4 an obligation to pay any applicable interest or penalties."

5 MS. JAHN: Your Honor, there's semicolons between
6 each one of those. And so whether or not it's used as a comma
7 or a semicolon, frankly, I just think it's including every
8 scenario of what could happen, but it does not say combined in
9 that way.

10 THE COURT: It implies combined because it says
11 "and."

12 MS. JAHN: Respectfully, I don't think it applies
13 that way because you have to go back to, then, what does
14 probation entail and what is the statutory authority for
15 probation. And that's where *Caplinger* comes into play and how
16 it's spelled out.

17 THE COURT: So I think that's a different argument,
18 Ms. Jahn. Like, I appreciate you bringing us back to the plea
19 agreement. I think that's important, but this plea agreement
20 does not, from my reading of it, indicate that it's an "and" --
21 it's an "or" proposition; that it's either imprisonment or
22 probation. It's not spelled out here in any way.

23 And the only indicator is "and," not "or," and I -- and
24 I'm kind of back to my first sentence, which is almost all
25 federal criminal statutes have alternative maximums, such as

1 15 years of incarceration and a \$5,000 fine or -- and it's
2 never interpreted as "or." It's always you could give both;
3 right? And I'm just wondering why this should be any
4 different.

5 MS. JAHN: Right. But that affects liberty and then
6 finances. So I see them as completely different. Versus we're
7 talking about liberty outright. So you're talking about
8 incarceration and then --

9 THE COURT: No, I understand that. I'm just saying
10 why -- the normal way of looking at criminal statutes is that
11 you can give any combination of this list of things that are
12 listed, and you're saying that that's not true in this
13 instance. And I understand the arguments that are -- that are
14 made in *Caplinger*, et cetera, as to why. But it just seems not
15 the norm in terms of this plea agreement and just the general
16 way we look at criminal maximums, that this is an "or"
17 situation. It's usually -- the default is an "and" situation.

18 MS. JAHN: I -- I hear you in terms of the felony
19 matters, and so I'm not trying to dispute you on that. I think
20 this is --

21 I'm sorry, Your Honor. I didn't hear you.

22 THE COURT: You're just saying there's a reason as to
23 treat this differently?

24 MS. JAHN: Correct, Your Honor. This is -- as you
25 well know, but for the events of January 6th, we have not seen

1 the volume of misdemeanor type of offense conduct that now we
2 are seeing. And this issue, frankly, has only come up in this
3 context because then it was realized that there -- one, there's
4 this issue, and if courts wanted to impose some sanction
5 involving incarceration, how could they do that? And you're
6 right. And some of your colleagues have said, well, I don't
7 want to reach that legal decision. I'm just going to impose
8 incarceration outright for whatever reason.

9 I think for those that wanted some incarceration and
10 supervision, they have then now reached the -- the issue and
11 have found an alternative means that is appropriate given the
12 3553(a) factors for that particular individual that could
13 warrant house arrest or a weekend in jail or some sort of other
14 intermittent confinement. And so I just -- I just want to
15 ensure -- I'm just relying on what has been put forward in
16 *Caplinger* and want to maintain consistency there, Your Honor.

17 THE COURT: Okay. That's fine with me. And so those
18 are my two outstanding questions, if you want to confer with
19 Mr. Kramer.

20 MS. JAHN: Can you restate the exact second question?
21 It seemed we had a lot of exchange there, and I just want to
22 make sure I'm understanding.

23 THE COURT: Oh, sure. The question is: If we were
24 to adopt the analysis and reasoning of the amicus brief in
25 *Caplinger*, it seems that -- it seems that the way this would

1 work in practice is that if there were two petty offenses, then
2 you could impose a probationary sentence; but if there's only
3 one, you never can. And why does that make sense?

4 Because my bottom-line is why is it that if there were
5 two offenses of conviction of parading, then I could try to
6 fashion a split sentence by saying incarceration on one,
7 probation on the other, consecutive. But, otherwise, there are
8 no split sentences. And what would be the policy rationale to
9 support such a regime?

10 MS. JAHN: Thank you. I will try to find an answer.

11 THE COURT: Okay. Do you want me to give you a
12 minute to --

13 MS. JAHN: That would be helpful. Thank you.

14 THE COURT: Take a moment, Ms. Jahn.

15 Ms. Jahn, it occurs to me -- do you think we need to
16 just take a break? Because I really can't move on to the
17 sentencing until we resolve this legal issue, and I don't know
18 that we can resolve it until you've had a chance to make the
19 record and talk to your people.

20 MS. JAHN: If you would allow just a few moments of
21 indulgence and I can step away from the connection and try to
22 get the answers to your questions, that would be helpful,
23 Your Honor.

24 THE COURT: Okay. Should we take 15 minutes?

25 MS. JAHN: That would be great. Thank you.

1 THE COURT: All right. Let's take 15 minutes. Thank
2 you.

3 MS. JAHN: Thank you.

4 (Recess taken.)

5 MS. JAHN: Your Honor, I tried during the break --
6 thank you -- to get answers to the two questions. This is a
7 very involved issue that is going to affect many other persons.
8 So just for the record, I -- if the Court would be so inclined
9 to allow a brief continuance so I can brief it more fulsome in
10 response to your questions. Because I recognize there is a
11 grammatical issue that we've talked about and excised certain
12 language out; but, frankly, it -- if we did that, it would
13 ignore the context of the entire Sentencing Reform Act and the
14 statutory authority.

15 I think the argument is that if we read it in the way
16 that you're suggesting -- or, frankly, that I might be
17 suggesting -- there is a grammatical issue, which I recognize.

18 THE COURT: I just don't want more briefing on this.
19 I think this is fully briefed.

20 MS. JAHN: All right. Well --

21 THE COURT: I mean, I just want to have oral
22 argument.

23 MS. JAHN: I hear you, Your Honor.

24 THE COURT: And, frankly, Ms. Jahn, I feel like you
25 should have been prepared to --

1 MS. JAHN: I understand. It's just a nuance here
2 with where the language is. So I just think for the record,
3 Your Honor, that you can't look at this divorced from the
4 context of the Sentencing Reform Act.

5 And -- and your second question was about the policy
6 rationale for when there are two cases involving petty
7 offenses. And you gave the example of you could impose jail in
8 one of those petty offenses and then probation in another. And
9 I think that's absolutely correct because it's two offenses
10 that someone has either been found guilty or admitted guilt to.
11 And, of course, you could give them a much harsher sentence for
12 two offenses. So I think the policy rationale there is
13 supported by their two separate offenses in and of themselves
14 and someone --

15 THE COURT: Could I give -- let me just ask you this:
16 Could I give probation for a felony offense if there's a
17 different offense that's not a petty offense in addition,
18 because it seems like your interpretation would allow that,
19 within -- within that -- within the language of subsection (3),
20 putting aside the other subsections. It just seems like --

21 MS. JAHN: But a felony didn't preclude -- I know
22 there are classes of felonies that preclude probation. So if
23 it was not precluded, you could then give -- you're asking
24 could you give probation for a felony offense or -- in
25 addition to another felony term of imprisonment; is that your

1 question?

2 THE COURT: So, yeah, my question is: If we're just
3 looking at the language of subsection (3), it seems to plainly
4 apply to petty offenses because there's explicit carve-out for
5 felony offenses in subsection (a); right?

6 MS. JAHN: So, Your Honor, I think the argument --
7 just to make sure I'm saying it correctly, if we go back under
8 (a) and if you're reading, "A defendant who has been found
9 guilty of an offense," that is the same --

10 THE COURT: No, but (a)(1) says, "The offense is a
11 Class A or Class B felony."

12 MS. JAHN: Oh, I'm sorry. We're back to the felony.

13 THE COURT: (a)(1). Right. So (a)(3), clearly, is
14 dealing with petty offenses because felony offenses have been
15 carved out.

16 So the defendant's sentenced at the same time to a term
17 of imprisonment for the same or -- the same or a different
18 offense. Because my point is "same" must be modifying
19 "offense." Same or different offense that is not a petty
20 offense. So --

21 MS. JAHN: So, Your Honor -- but before --

22 THE COURT: Anyway --

23 MS. JAHN: I -- I'm so sorry. But I think the
24 argument, though, is the phrase "the same" from subsection (3)
25 modifies the word "offense" in subsection (a).

1 THE COURT: And not the "offense" that's three words
2 away from the same?

3 MS. JAHN: Yes. So I understand how you're -- how
4 you're reading it, consistent with Judge Lamberth. I think
5 *Caplinger's* argument is that "the same" from section (3)
6 modifies under the provision of (a) "of an offense" that begins
7 this analysis.

8 THE COURT: Okay. So you're saying it is the same
9 offense, but the offense that's the same is modifying -- is
10 from the language under subsection (a) where it says, "A
11 defendant who has been found guilty of an offense." That
12 offense?

13 MS. JAHN: Yes.

14 THE COURT: Which is three lines above where the word
15 "the same" appears. And if you're saying it modifies that
16 instead of the word "offense" that is three words away under
17 subsection (3)?

18 MS. JAHN: Yes.

19 THE COURT: Okay. All right. I don't find that very
20 persuasive, but I understand the argument now. Thank you.

21 Okay. And then do you have an answer to my second
22 question, which was why this -- why would the bottom-line, sort
23 of big-picture, outcome make sense under your proposed
24 interpretation?

25 MS. JAHN: Your Honor, in terms of what is the policy

1 rationale for why it should be done in the context of two
2 separate offenses?

3 THE COURT: You would have to have two offenses to
4 have probation -- two petty offenses in order to have
5 probation. Why is that -- why does that make sense? Why would
6 Congress write it that way and want it that way?

7 MS. JAHN: Because they didn't expressly state
8 otherwise.

9 THE COURT: Well, if you interpret it the way the
10 government is advocating and the way *Little* did, they did.

11 MS. JAHN: We just, respectfully, disagree with the
12 *Little* analysis.

13 THE COURT: Okay. All right. Thank you.

14 And I just want to just note, for the record, I don't
15 think it's appropriate to continue this sentencing for
16 additional briefing. And I started this hearing saying I think
17 this issue is a pretty contained one, and I think it's been
18 fully briefed and analyzed and discussed. And so I am not
19 inclined to continue this for more briefing.

20 And I did want to give Ms. Jahn an opportunity to
21 consult with people in her office in order to make sure that
22 she's adhering to their position with respect to this
23 interpretation, but I don't want to put off the sentencing;
24 because I feel like that is preparation that should have been
25 done in advance of the hearing given that these issues were

1 squarely raised, and it was entirely foreseeable that I would
2 need to reach this issue if I were to consider the government's
3 sentencing recommendation in this case. So I'm not inclined to
4 put this off anymore for those reasons.

5 Is there anything you want to add for the record,
6 Ms. Jahn?

7 MS. JAHN: No, Your Honor. Just in sum, we believe
8 *Little* was wrongly decided. We believe that the Court cannot
9 divorce this particular language from the context of the
10 Sentencing Reform Act and rely on the previously submitted
11 materials in *Caplinger*.

12 THE COURT: Okay. Thank you, Ms. Jahn.

13 Mr. Murphy, did you want to be heard on any of these
14 issues?

15 MR. MURPHY: Yes, Your Honor. And I'll keep it --
16 famous last words, but I'll try to keep it brief.

17 I just wanted to round out a bit the analysis of what
18 judges have -- have fallen where. And, again, my -- my only
19 ability to do so is anecdotal. I do know that Judge Walton in
20 a case that I believe is against Defendant Smith -- and I'm
21 sorry I don't have the exact cite, but I -- he relied on the
22 *Little* decision in imposing a split sentence in that case.

23 And I did have a sentencing hearing before Judge Moss
24 where he referenced but didn't rely upon the *Little* decision,
25 much as Your Honor has done here. He engaged in his own

1 statutory construction and analysis and decided that it was
2 within his authority to impose a split sentence. However, at
3 the time -- and it was a case against Micajah Jackson, and the
4 cite on that one is 21-cr-484. And, again, that was
5 Judge Moss.

6 He said that he would -- he agreed with Judge
7 Little's [sic] ultimate conclusion that they were authorized
8 but -- but didn't end up imposing one, much like Your Honor did
9 with *Conover*. He imposed a halfway house sentence in that case
10 for various other factual reasons that were present in that
11 case.

12 So just to add Judge Walton and Judge Moss to the -- to
13 the world of judges that have agreed that -- that split
14 sentences are authorized.

15 THE COURT: Okay. Thank you.

16 All right. And so the Court has considered the briefing
17 in this matter and everything that's been submitted by the
18 parties and their arguments. And I interpret the relevant
19 statute to permit the imposition of a split sentence for a
20 crime of conviction that is a petty offense.

21 I adopt the reasoning and the ruling in *United States v.*
22 *Little*, 21-cr-315, where Judge Lamberth issued a memorandum of
23 opinion that squarely addressed this issue.

24 Independently, I think the best reading of
25 18 U.S.C. § 3561(a)(3) is that the phrase, quote, that is not a

1 petty offense, unquote, modifies the full phrase, quote, the
2 same or a different offense, unquote. That's the most
3 grammatically correct reading, as well as the reading that
4 makes the most sense substantively.

5 The defense has argued that the words "the same" in the
6 second phrase under section (a)(3) modifies the word "offense"
7 that is three sections above, under the -- I think they call it
8 the prefatory phrase -- under subsection (a). And to me that
9 really makes no sense grammatically when the word "offense"
10 appears three words later within the same subsection of the
11 statute. I think the word "the same" -- the second word "the
12 same" in subsection (3) modifies the word "offense," which is
13 three words -- or, I guess, four words later; meaning, it's the
14 same or a different offense that is not a petty offense. That
15 it makes the most sense. And I just think, substantively, it
16 also makes the most sense.

17 Because what this interpretation does, the
18 interpretation adopted in *Little*, is it allows split sentences
19 for petty offenses. And the reason for that -- and there's
20 legislative history to support this -- is that -- that
21 supervised release is not available for petty offenses. It is
22 available for other types of offenses. And so to allow
23 probation in split sentences for petty offenses allows
24 supervision after a term of incarceration, which otherwise
25 would not be available, even though that is available for

1 felony offenses where you can have a term of imprisonment
2 followed by supervised release. And so I think that makes
3 sense.

4 In trying to play out the implications of the defense's
5 proposed interpretation in *Caplinger*, I'm not able to figure
6 out a way in which that makes any sense substantively; that one
7 would require two petty offenses in order to give a
8 probationary offense -- I'm sorry, probation sentence or a
9 split sentence in the petty offense context. It just doesn't
10 make sense to me. And I was trying to reason it out with
11 Ms. Jahn. And I still don't know how that makes any sense.

12 And so, therefore, I think both grammatically and
13 substantively, the best reading is that adopted in *United*
14 *States v. Little*. And I'll note too that this interpretation
15 is reconcilable with 18 U.S.C. § 3551(b), which does explicitly
16 state that, in general, a sentence of probation and a sentence
17 of imprisonment are mutually exclusive. And it's reconcilable
18 because § 3561(a)(3) is a more specific statute that creates an
19 exception to the general rule that is expressed under section
20 3551(b). And so I rule that it is permissible to impose a
21 split sentence for a crime of conviction that is a petty
22 offense.

23 Okay. So in light of that ruling, I'll hear allocution
24 from the parties, and I'll hear first from the government. And
25 I'll note I have read all your papers, but I'm interested in

1 hearing anything you wanted to highlight.

2 MR. MURPHY: I'll start off the recommendation by
3 repeating the -- the government's specific recommendation
4 that -- specifically, that the -- that the defendant be
5 sentenced to a split sentence of 105 days' incarceration or
6 approximately 3 and a half months, followed by 3 years of
7 probation, 60 hours of community service, and \$500 in
8 restitution.

9 The key reasons for this recommendation are, as listed
10 in the government's sentencing memorandum, first, that he
11 entered the Capitol twice, despite being forced out the first
12 time by police officers, and videotaping rioters who were at
13 the time looting the Senate parliamentarian's office.

14 Second, he entered into two private office spaces, also
15 known as -- and referred to across this memorandum and other
16 memoranda as sensitive spaces. Specifically, the Senate
17 parliamentarian's office and Oregon Senator Jeff Merkley's
18 office during the two breaches of the Capitol. And, notably,
19 he entered one sensitive space the first time and another
20 sensitive space the second entry, which was via the Senate wing
21 door.

22 Third, he filmed the video of himself in the northwest
23 plaza. Again, notably, after he had already entered and been
24 forced out of the Capitol, entered a sensitive space, and
25 seeing the destruction and looting and misbehavior that was

1 going on in there. And in that video, he yelled to -- to the
2 world, "Why can't you people just do what we want? Why do you
3 got to make it so hard? Why do you take our money and use it
4 for nefarious purposes?" He goes on beyond that, and the full
5 quote is included in the various government filings.

6 The fourth reason is that while he was in the Capitol,
7 again, he provided narration to his videos, most of which was
8 directed at his mother who -- I want to be clear -- was not at
9 the riot, and it's my understanding also that it was not a
10 livestream situation. It was him recording a video that he
11 then anticipated later showing to his mother -- or sending to
12 his mother.

13 But in one specific video, he stated, "We can't let
14 Biden be our President. We can't. There's no way." And he
15 said that while he was in the Capitol, specifically, the crypt,
16 which is right below -- it's the -- literally, the center of
17 Washington, D.C., and also the Capitol.

18 Fifth and finally, Entrekin, the defendant in this case,
19 has a criminal history which includes a nonviolent conviction
20 from 2000 where he served a 3-year term of probation, and a
21 conviction for threatening and intimidating from 2015 for which
22 he also -- well, for which he was notably sentenced to a split
23 sentence of 105 days' incarceration split with a 3-year term of
24 unsupervised probation.

25 THE DEFENDANT: Excuse me.

1 THE COURT: Can I ask, where do you get 105? Because
2 I think the PSI says it was 180 days, execution suspended as to
3 all but 60.

4 MR. MURPHY: You're correct, Your Honor. What --
5 what happened -- and I apologize for not catching this sooner.
6 As -- it was an error made when I used the control-F function
7 to change the number of days as to the recommendation in this
8 case, and it inadvertently changed that as well, but the Court
9 and Mr. Entrekin are absolutely right; that it was 60 days.
10 And I apologize for the -- for the error in that paragraph.

11 THE COURT: And so why did you -- why are you
12 recommending 105? That's kind of a different number.

13 MR. MURPHY: It is a bit unusual. And it's crafted
14 with the idea of consistency and balancing other sentences of
15 other defendants in these cases; specifically, the cases that
16 are cited by the -- in the sentencing memorandum. I apologize.
17 Just one moment.

18 So with regards to specific cases that seem to be
19 generally applicable or similar to Mr. Entrekin's, Derek
20 Jancart and Erik Rau, 21-cr-148 --

21 THE COURT: I'm sorry. Where are you looking,
22 Mr. Murphy? You're looking at the chart in your memo?

23 MR. MURPHY: In my memo on page 38.

24 THE COURT: All right.

25 MR. MURPHY: In the case of Jancart and Rau, the

1 defendants pled guilty to misdemeanor charges, like this
2 defendant, and they both received sentences of 45 days'
3 incarceration. The sensitive space that they entered into
4 was -- was Speaker Pelosi's conference room.

5 Another defendant, Gracyn Courtright, whose case is
6 under 21-cr-72, actually reached the Senate floor. She appears
7 to not have known where she was, however, and received a
8 sentence of 30 days' incarceration with 1 year of supervised
9 release.

10 THE COURT: So, Mr. Murphy, am I missing something?
11 Like, how does this support your recommendation of 105?

12 MR. MURPHY: The -- so that is due to a balancing of
13 the individual aggravating factors. Some other defendants who
14 have just pled to -- or I'm sorry, who -- whose aggravating
15 factors include entering a sensitive space, the recommendation
16 may be lower. For others who -- who stayed within the Capitol
17 but may have had a previous criminal record, the sentence may
18 be another thing.

19 It's -- and Judge Cooper used this phrase previously in
20 a sentencing that I had before him, but it's -- these
21 sentencings are more of an art than a science.

22 But in -- it's Mr. Entrekin's specific and unique
23 combination of aggravating factors. Specifically, that he does
24 have prior criminal offenses for which he has already served
25 probationary sentences. It's the fact that he -- as can be

1 shown by the government, Video Exhibit 2, when he was on the
2 west lawn. And contrary to the claims that he -- he makes in
3 his letter to Your Honor, that they had no idea what they were
4 doing and he was just kind of going with the flow. I think he
5 compared it to a -- a collegiate sporting event where people
6 are trying to rush the field.

7 I mean, Government's Exhibit 2 makes it pretty clear, as
8 well as the defendant's own video, that -- like what they were
9 there for, the kind of people they were looking out for to
10 support them in their cause, and you can hear the flash-bangs
11 going off. You can see the -- the plumes of smoke from either
12 smoke devices or chemical irritants that are being deployed by
13 some party in -- in -- on the west lawn to try and push the
14 rioters back, and yet he continued onward.

15 The fact that he went inside the Capitol once and almost
16 immediately was met by -- you know, luckily the law enforcement
17 officers, the police officers, had blocked the
18 parliamentarian's hallway and were able to get most of them
19 back before they were able to penetrate further into the
20 Capitol; with what the defendant recorded himself and in his
21 video can be heard and he describes as machine gun Tasers.

22 He pokes his head into the parliamentarian's office. He
23 sees the looting, and he expresses what seems to be sincere
24 shock and -- and terror at -- at what he sees, which is good,
25 because the state of destruction of the parliamentarian's

1 office was -- was, indeed, very shocking; with the papers
2 strewn about, people seated at desks with their feet up on the
3 desks, broken windows.

4 But once he gets out, he doesn't leave. He stays there
5 on the northwest plaza and waits for the next -- for the
6 ability to enter the next breach point that was available to
7 him, which is the Senate wing door. He goes in there --

8 THE COURT: Mr. Murphy --

9 MR. MURPHY: Yes, Your Honor.

10 THE COURT: -- has anybody gotten 105 days for
11 conduct similar to what Mr. Entrekin has done?

12 MR. MURPHY: I'm unsure of anybody receiving that
13 exact number, but I'm also unsure of anyone who has this exact
14 combination of -- of aggravating factors and -- and behavior.

15 THE COURT: Okay. All right. Because I started this
16 by asking you how did you come up with 105, which is an odd
17 number, and doesn't seem like anybody else got that much. And
18 what you point to, they've gotten less than half that much.

19 MR. MURPHY: Yes, Your Honor. If I could have just a
20 moment to pull up my notes on -- in this case.

21 THE COURT: I wanted to ask you too, Mr. Murphy, the
22 video clips you submitted, none of them are from the
23 closed-circuit cameras from within the Capitol. It's almost --
24 it's exclusively from other sources, including Mr. Entrekin's
25 own phone. And I was wondering why that is.

1 MR. MURPHY: That's correct, Your Honor. And that
2 was a decision that -- that I made because of the use of clips
3 from the -- the closed-circuit video throughout the
4 government's filings and -- including the sentencing
5 memoranda -- there are large portions of that dedicated to the
6 screenshots. And I realized that videos are -- provide more --
7 more than a screenshot. But what I wanted to emphasize through
8 the -- through the use of -- specifically, the defendant's own
9 videos, which is the -- Government's Exhibit 1, was the -- not
10 just the sight but the sound and his own narration of the
11 events as they were occurring.

12 THE COURT: Well, I infer, though, from the lack of
13 any video from the CCTV that there isn't any video of him, I
14 guess, confronting police officers, doing any -- being along
15 the front lines, anything of that nature. So I just want you
16 to confirm that's true.

17 MR. MURPHY: Yes, Your Honor. There is no evidence
18 that I'm aware of in which the defendant in this case
19 specifically confronted police officers, law enforcement,
20 engaged in any direct destruction of property or vandalism
21 or -- or theft.

22 THE COURT: Or even pushed along with the crowd past
23 law enforcement? It doesn't seem like there's anything like
24 that.

25 MR. MURPHY: The only thing that -- that tends to

1 support an inferral of pushing is in his first cell phone video
2 from Government's Exhibit 1 when he takes a moment to --
3 towards the latter half of that clip and says, "Okay. We're
4 pushing now. We're pushing."

5 THE COURT: That's outside, though?

6 MR. MURPHY: That was outside, yes.

7 When he was in the parliamentarian's door and the crowd
8 was moving in, he did appear to be moving with the flow of the
9 crowd. And when he was moving out, there was a logjam of folks
10 trying to get out of the Capitol, but -- but, no, I -- I don't
11 know of any instance where he's directly confronting or
12 pushing -- kind of engaged in the heave-ho of protesters
13 against a line of law enforcement.

14 THE COURT: The other thing I wanted to ask you,
15 Mr. Murphy, is you didn't reference mental health treatment in
16 your recommended conditions of probation. What's your position
17 on that? Because I -- I think this was an oversight on my
18 part. But I saw in a prior pretrial services report that the
19 defendant was evaluated for mental health services and it was
20 recommended for him. And I just -- I only had one hearing with
21 him, his plea hearing, since that report, and I have must
22 overlooked that, because I didn't order it. And I think that
23 might be appropriate as a condition of probation.

24 MR. MURPHY: And if -- if my memory serves me, we --
25 we actually did address that, I think, at the hearing. I had

1 conferred with Mr. Vanegas, who was the counselor at the time,
2 and Your Honor did ask us if we were recommending it. And
3 based on the representations that Mr. Vanegas had made to me
4 and my understanding it, that mental health treatment was not
5 something that -- that either party was requesting at the time.
6 And I believe Your Honor said something to the effect of --
7 that we can reevaluate at -- at sentencing if it comes to that.

8 So as to the government's specific recommendation as to
9 sentencing, no, I didn't include that in the sentencing
10 memoranda -- sentencing memorandum. However, given that
11 pretrial has evaluated him for it and does seem to think it
12 would be appropriate and we are now at the sentencing stage, if
13 anything, I would recommend that he -- if that recommendation
14 still stands, that be -- that be made a condition of his
15 probation.

16 THE COURT: Okay. Thank you. Thank you for
17 reminding me of what happened at that hearing because I didn't
18 recall the contours of that. I'm glad that we at least
19 discussed it. It seems like we have more information now based
20 on the presentence report that weighs in favor of imposing
21 that, but I want to hear from Ms. Jahn on that as well.

22 So I guess the only other -- the final thing is just if
23 you have anything else to add about why 105; otherwise, I'm
24 going to move on to Ms. Jahn.

25 MR. MURPHY: Yes, Your Honor. As to why the 105, I

1 would -- I know it wasn't included in the sentencing
2 memorandum, but I do want to draw the Court's attention to the
3 fact that many of the video exhibits, which I found after the
4 sentencing memorandum was filed and are open-source videos,
5 show that even after being pushed out of the Capitol -- or --

6 I do want to make note of this because the defendant in
7 his letter does say that immediately he felt the need to exit.
8 He doesn't necessarily say which -- and that's on his letter,
9 which is 27-2 on page 2 of 3. That doesn't take into
10 consent -- into consideration the fact that he entered the
11 Capitol twice, and that in his own video, specifically
12 Video No. 8 of the government's exhibits, right towards the end
13 of that video, he states -- well, another protester says,
14 "Antifa never did this shit." To which the defendant replies,
15 "Nope, nope. That's true. That's true. Nope. You're right.
16 All right. I guess with respect to the people that are coming
17 in, I got to get out. We got more people who want to come in.
18 We got to respect that too, you know."

19 Then he goes on to say that he's glad they're not doing
20 rubber bullets anymore and he should have brought that --
21 bought that centurion helmet after all. So that -- that sits
22 in contrast to his statement that he was sorrowful and felt the
23 need to go.

24 If anything, the -- his own stated reason for needing to
25 go the second time was to let other people in and his only

1 regret was he hadn't brought more personal armor or protection.

2 Then after he left the Capitol that second time, again,
3 he didn't go home. He went around to the east side of the
4 Capitol. And this is -- and I'm sorry for the incongruous
5 nature of my comments, but he -- this is when he got to the
6 media staging. And as the videos show, he stood there smiling,
7 holding his -- his title of liberty over the destruction of the
8 media equipment that was there.

9 But even after he left that, he didn't go home or leave
10 the restricted grounds. Still, he walked around and can be
11 seen in the background of other videographers. He gives
12 another interview on the east front of the Capitol where he
13 continues to double down on his claims to be representing
14 Captain Moroni and comparing the leaders of the government to
15 the king-men, individuals who Captain Moroni killed if -- if
16 they didn't agree with him. And he continued that up until the
17 end of the time that he was on restricted grounds.

18 And then there's another picture in the sentencing
19 memorandum where he can be seen in front of another court
20 building in D.C. And from the lights -- I know it's
21 monochrome. I think it's Image 4 in the government's filing.
22 But it's nighttime, and he's still there, still dressed as
23 Captain Moroni, still in his complete costume, walking around,
24 just looking for opportunities to be photographed.

25 So that -- the only reason I point that out -- of

1 course, he has every right to wear whatever he wants on
2 whatever street in Washington, D.C., but the only reason I
3 point that out is because it sits in contrast to his claims of
4 sorrow and -- and shock that he presents in his letter to the
5 Court. And -- and the government asks the Court to consider
6 those claims appropriately in light of that evidence.

7 THE COURT: Okay. Thank you, Mr. Murphy.

8 Ms. Jahn.

9 MS. JAHN: Yes, Your Honor, and I'll be brief.

10 This is a situation where Mr. Entrekin was inside the
11 building for approximately 13 minutes. As the government just
12 told you, there's no evidence that he engaged in any violence,
13 that he engaged in any contact with law enforcement, that he
14 did anything nefarious once inside the building compared to
15 many, many others. The government has just indicated and
16 highlighted to you that Mr. Entrekin expressed shock and dismay
17 when observing the destruction of -- of particular offices. He
18 was in no way, shape, or form a part of that destruction.

19 Being outside, standing on a street corner, hours after
20 the events, as depicted in Image 4, respectfully, have nothing
21 to do with the criminal conduct in this case. The fact that he
22 was still there does not indicate that he is not remorseful or
23 that he is not sorry for his participation in unlawfully
24 entering the Capitol Building earlier that day. As we know, he
25 arrived from Arizona. So, surely, it wasn't going to be a

1 situation where he immediately left.

2 But what the situation was is that when he did get back
3 to Arizona, he met with the FBI at his home. He admitted to
4 his conduct. He turned over his telephone. And as I think you
5 pointed out, Your Honor, the majority of the evidence in this
6 case against Mr. Entrekin is from his own telephone, compared
7 with many other individuals who did not agree to turn over
8 their telephones, did not provide admissions with regard to
9 their conduct. Mr. Entrekin did that.

10 Once the case was officially filed, which there was some
11 months in between his admissions to the FBI and filing,
12 Mr. Entrekin has done everything in his power to resolve the
13 case quickly, admit his conduct, and ultimately asks for
14 forgiveness and is remorseful in his letter. How someone acts
15 on a particular event or engaging in conduct does not mean they
16 can't be remorseful in the future upon reflection and thinking
17 about the gravity of the situation; which, clearly, I think
18 Mr. Entrekin tried to describe why he dressed in the manner
19 that he did, what his intent for going was.

20 And in all candor, I think he got caught up. I'm not
21 excusing behavior. I am not trying to say -- or negate his
22 criminality, but it should be looked at in the context of his
23 involvement on that particular day. And I think he tries his
24 best to explain that in his letter to you, Your Honor. And so
25 I think the level of remorse and sincerity is true and valid in

1 this particular instance.

2 And, notably, as you've inquired on a couple occasions
3 as to why the government is asking for 105 days, the defense,
4 respectfully, submits that that request would result in an
5 unwarranted sentencing disparity for similarly situated
6 defendants. The government's own cases in which they rely upon
7 that I cite in my reply, the maximum period of jail was
8 45 days.

9 And the facts of those cases are dramatically different,
10 so much more so that -- the matter in front of Judge Cooper,
11 Ms. Courtright, she was on the Senate floor carrying property
12 of the United States. And for reasons that I don't understand,
13 she was afforded a misdemeanor plea offer -- not this parading
14 offense -- another misdemeanor plea offer and was given a
15 sentence of 30 days. Frankly, I think one could glean that
16 that conduct is in stark contrast to the conduct of
17 Mr. Entrekin, as he did not enter the Senate gallery, he did
18 not attempt to take any items that were in the possession of
19 the U.S. Capitol or any government official.

20 And he has been nothing but cooperative and providing
21 information about his own wrongdoing at every stage of the
22 case. And so for all of these reasons, Your Honor, we believe
23 a probationary sentence is appropriate.

24 If the Court is inclined to impose additional sanctions
25 other than the restrictions afforded to someone who is on

1 probation, we are asking that the Court consider a period of
2 home detention or home incarceration. As you know from the
3 letters, he cares for his mother who has her own medical
4 issues.

5 Mr. Entrekin has been compliant and very communicative
6 with his pretrial services officer, as articulated in the
7 report that was submitted to you yesterday, Your Honor. And so
8 he's an excellent candidate and has demonstrated that he
9 communicates well with an officer of the court. In this
10 instance, his pretrial officer. And so we submit that any
11 confinement, if the Court is so inclined, should be done in his
12 home so that he can provide for himself and his mother,
13 Your Honor.

14 THE COURT: Ms. Jahn, what is your position on mental
15 health services?

16 MS. JAHN: Your Honor, I understand there was an
17 assessment done. That was completed. I recognized there --
18 there is an issue in terms of family background. Mr. Entrekin
19 is not opposed to an additional assessment. I think the
20 request would be if the Court's so inclined as a condition of
21 probation to request an assessment and if that provider then
22 deems appropriate treatment necessary, that would be
23 appropriate. But, frankly, I don't know if the treatment
24 provider will say it's necessary for further treatment.

25 THE COURT: Seems like the last evaluation did

1 recommend further treatment, and I think that there's evidence
2 in this record related to his last conviction that suggests
3 that it would be appropriate.

4 MS. JAHN: It did, Your Honor. I inquired about that
5 with his pretrial services officer. And it was startling to me
6 that a 40-minute interview was done and there was an indication
7 of future treatment as necessary. And the record seems
8 somewhat void, frankly, of the reasons why, because I know that
9 additional information wasn't even ascertained for Mr. Entrekin
10 about family history and the like.

11 And so that's why, respectfully -- every jurisdiction
12 does things differently, but if the Court is so inclined, I
13 would just ask there be an assessment and then if it's deemed
14 appropriate, follow-up treatment and evaluation.

15 THE COURT: All right. Thank you.

16 Mr. Entrekin, is there anything that you would like to
17 say before I sentence you?

18 I think you're still muted, Mr. Entrekin.

19 THE DEFENDANT: Sorry.

20 I just -- I'm very deeply regretful for entering the
21 Capitol Building. I was there, of course, as I have written
22 and expressed, that I was there to, with the others, protest
23 the election results, which I still believe were tampered,
24 which -- I am regretful for entering the Capitol Building and
25 very regretful that I saw the destruction that I saw.

1 After leaving the Capitol, I -- despite what it
2 appeared, I was very -- it was -- it was very solemn for me,
3 despite my towing around that -- that big flag and, you know,
4 putting up a smile or two. Inside, I -- I knew at a
5 fundamental level that the people that had broken in and
6 allowed for us to come in, that was wrong. And my coming in
7 afterwards, hence, was also wrong.

8 And I'm -- I am very sorry to have -- very sorry to have
9 entered into the Capitol. By the time I moved forward -- at
10 any time, it would seem that whatever barricades there were,
11 they were removed, and I had no -- really, I had not much
12 thought of -- of -- of barricades and things because I was
13 caught up in -- in the -- in -- in that moment. And in
14 retrospect, I am sorry because I realize it was restricted
15 and -- it was a restricted area and that proceedings of
16 Congress were going forth -- attempting to anyway.

17 And I -- I should have just stayed out on the lawn and
18 did what I came there to do, which was to -- to portray the
19 character in -- in the book of my belief, my -- my church, and
20 the -- some of the analogy that was there, which, clearly, I do
21 not condone any killing of any sort or any -- any type of
22 violence.

23 The domestic violence case that I had in 2015 was a
24 culmination of a neighbor that was -- what I believe was
25 participating in -- what I was researching on the internet is

1 called directed energy weaponry and electronic harassment. And
2 this is the stuff for the three-letter -- the three-letter
3 agencies. But I -- I've just -- I've seen a lot of things
4 where there have been goings-on with NSA, CIA, and so forth.
5 You could easily, you know, kept that as, you know, this guy
6 is -- is mental or not. But there -- there were situations
7 where -- basically, it just came to a head. And -- and I said
8 things completely that I would never have said. And that's the
9 record that stains, obviously, my past, and I'm regretful for
10 that also.

11 But today I am saying that I regret ever entering the
12 Capitol Building. There -- there were much better things that
13 I could have participated in than that. And that's all --

14 THE COURT: Okay. Thank you.

15 THE DEFENDANT: -- I have to say.

16 THE COURT: All right. Thank you.

17 The gravity of the crimes committed on January 6th,
18 2021, cannot be overstated. An uncontrollable mob assaulted
19 our democracy and violently disrupted the peaceful transfer of
20 power after a free and fair election. They swarmed the
21 United States Capitol and overwhelmed law enforcement officers
22 who tried to maintain order. And they did so with the intent
23 to subvert the will of the American people and to, essentially,
24 overthrow the democratically elected government.

25 Mr. Entrekin was not one of the leaders of the mob, and

1 he did not engage in acts of violence or destruction of
2 property, but he unquestionably shared the goal of stopping the
3 peaceful transfer of power, of blocking the certification of
4 the election results. He stated on that day, quote, We can't
5 have Joe Biden as President, unquote.

6 He stands before the Court convicted of a Class B
7 misdemeanor, a petty offense, with a maximum penalty of six
8 months' imprisonment, a \$5,000 fine, and five years of
9 probation. Mr. Entrekin is entitled to be sentenced based on
10 his individual conduct, but it must be viewed in the context of
11 that dark day. And it must take into consideration the
12 relevant sentencing factors under 18 U.S.C. § 3553(a).

13 I have considered all of those factors, but I focus on
14 the following: First, the nature and circumstances of the
15 offense. Mr. Entrekin drove to Washington from Cottonwood,
16 Arizona, to protest Congress's certification of the results of
17 the 2020 presidential election.

18 He was part of that mob that swarmed the Capitol. He
19 entered the building not once but twice, and he spent a total
20 of about 13 minutes inside. I think it is significant that he
21 entered twice because there can be no doubt that after he
22 entered the first time, he was aware of what was going on
23 inside the building, which was that the unruly mob was
24 overwhelming the building and engaging in acts of destruction
25 and some acts of violence. Yet, he chose to go back inside.

1 He also made his way to private areas of the building,
2 including the parliamentarian's office and Senator Jeff
3 Merkley's office. And while he was at the Capitol, he filmed
4 the events and expressed his desire to overturn the election.
5 He explicitly stated, "We can't let Biden be our President. We
6 can't. There's no way."

7 His actions were not violent, and he did not directly
8 confront law enforcement officers. He did seem to want to
9 avoid that, but he lent his presence and his support to the
10 group effort to swarm the building. The aggregate goal of
11 breaching the Capitol could not have been achieved without the
12 individual participation of people like Mr. Entrekin.

13 His attitude that day betrayed no realization or
14 understanding of how serious and dangerous the situation was
15 that day. He cheerfully narrates events to his mother despite
16 his awareness that violence and destruction were taking place
17 all around him. He discusses riot police, rubber bullets,
18 machine gun Tasers. He filmed the destruction of media
19 equipment. Yet, he laughs when he says things like, "Where's
20 my ice cream, Nancy? I want my ice cream," referring to the
21 Speaker of the House.

22 I'm also to consider the history and characteristics of
23 the defendant. The defendant is 49 years old, and he's well
24 educated. He received a college degree in fine art studies
25 from the University of Arizona and a master's of education in

1 educational technology with distinction from Northern Arizona
2 University in 2013. He's also an Eagle Scout. He lives with
3 his mother and enjoys a close relationship with her, and she
4 wrote a letter about how much she relies on him to take care of
5 her. He's been employed in a variety of positions, including
6 as a substitute teacher, in ride-sharing, in freelance graphic
7 arts, and as a notary public.

8 He wrote a letter to the Court and addressed the Court
9 today expressing his remorse, which I think is sincere,
10 although I note that what he has said is somewhat contradicted
11 by some of the evidence in this case. Mr. Entrekin, for
12 example, said this was a solemn event for him, but that does
13 not square with him laughing and shouting, "Where's my ice
14 cream, Nancy," inside of the Capitol Building. But I do
15 believe that he's now remorseful.

16 Mr. Entrekin has been evaluated for mental health
17 services by pretrial services, and those services have been
18 recommended for him. And I think this is an important
19 consideration which weighs in favor of the somewhat lower
20 sentence, and I have taken that into account.

21 Finally, he does have two prior convictions. One is a
22 2001 misdemeanor conviction for criminal copyright infringement
23 for which he received three years' probation and paid \$2700 in
24 restitution. I note that he successfully completed probation,
25 which was terminated early in that case.

1 The other is a 2015 conviction for threatening and
2 intimidating, and it arises from an incident in which he made
3 verbal threats to kill his neighbors. He was sentenced to
4 180 days and served 60 and, again, received 3 years' probation.
5 And these are circumstances which do appear to evidence a need
6 for mental health services, as noted in the presentence
7 investigation report and comments made by his mother, among
8 others. I note also that he has a number of traffic offenses,
9 but I do not assign any weight to those.

10 Finally, I'll note the need to avoid disparity in
11 sentencing. I have reviewed the sentences imposed on other
12 defendants who have pled guilty of misdemeanor charges in
13 relation to the January 6th events. I'm confident that the
14 sentence I intend to impose is well within the range for cases
15 of this nature, and I note, in particular, that this particular
16 defendant has two prior convictions, while many other
17 misdemeanor defendants who receive probationary sentences
18 appear to have had no criminal record.

19 This sentence is particularly intended to deter
20 Mr. Entrekin and others from engaging in this type of conduct,
21 for he does not seem to have understood the seriousness of his
22 actions, and there may be others too who don't understand the
23 gravity and danger of engaging in this type of mob activity
24 with the intent to, essentially, overthrow our government.

25 So, Mr. Entrekin, I'm going to sentence you as follows:

1 Pursuant to the Sentencing Reform Act of 1984 and in
2 consideration of the provisions of 18 U.S.C. § 3553, it is the
3 judgment of the Court that you, Nathan Wayne Entrekin, are
4 hereby committed to the custody of the Bureau of Prisons for a
5 term of 45 days on Count 5. You're further sentenced to serve
6 a term of 36 months, or 3 years, of probation on Count 5. In
7 addition, you are ordered to pay a special assessment of \$10 in
8 accordance with 18 U.S.C. § 3013 and restitution in the amount
9 of \$500.

10 While on supervision, you shall abide by the following
11 mandatory conditions, as well as the standard conditions of
12 probation, which are imposed to establish the basic
13 expectations for your conduct while on supervision.

14 The mandatory conditions include: No. 1, you must not
15 commit another federal, state, or local crime; No. 2, you must
16 not unlawfully possess a controlled substance; No. 3, you must
17 refrain from any unlawful use of controlled substances. You
18 must submit to one drug test within 15 days of placement on
19 supervision and at least two periodic drug tests thereafter as
20 determined by the Court.

21 You must make restitution of \$500 in accordance with
22 18 U.S.C. §§ 3663 and 3663(a) or any other statute authorizing
23 a sentence of restitution. The Court authorizes supervision of
24 this case to be transferred to the United States District Court
25 for the District of Arizona. That is supervision only, not

1 jurisdiction.

2 You shall comply with the following special conditions:

3 Community service. You must complete 60 hours of
4 community service within 24 months. The probation officer will
5 supervise the participation of the program by approving the
6 program, and you must provide written verification of completed
7 hours to the probation officer.

8 Mental health. You must cooperate with a mental health
9 assessment or evaluation. If mental health treatment is
10 recommended, you shall participate in a mental health treatment
11 program and follow the rules and regulations of that program.
12 The probation officer, in consultation with the treatment
13 provider, will supervise your participation in the program,
14 including the provider, location, modality, duration, and
15 intensity.

16 The Court finds that you do not have the ability to pay
17 a fine and, therefore, waives imposition of a fine in this
18 case. You are ordered to make restitution to the Architect of
19 the Capitol in the amount of \$500. The Court determines that
20 you do not have the ability to pay interest and, therefore,
21 waives any interest or penalties that might accrue on the
22 balance. Restitution payments shall be made to the Clerk of
23 the Court for the United States District Court, District of
24 Columbia for disbursement to the following victim: The
25 Architect of the Capitol, Office of the Chief Financial

1 Officer, Attention: Kathy Sherrill, Ford House Office
2 Building, Room H2-205B, Washington, D.C., 20515.

3 There may be a financial payment schedule. Having
4 assessed the defendant's ability to pay, payment of the
5 restitution is due as follows: payment in equal monthly
6 installments of \$50 to commence 30 days after the date of this
7 judgment.

8 The final obligations are payable to the Clerk of the
9 Court for the -- the financial obligations are payable to the
10 Clerk of the Court for the U.S. District Court, 333
11 Constitution Avenue, Northwest, Washington, D.C. 20001. Within
12 30 days of any change of address, you shall notify the Clerk of
13 the Court of the change until such time as the financial
14 obligation is paid in full.

15 The probation office shall release the presentence
16 investigation report to all appropriate agencies, which
17 includes the United States Probation Office in the approved
18 district of residence, in order to execute the sentence of the
19 Court. Treatment agencies shall return the presentence report
20 to the probation office upon the defendant's completion or
21 termination from treatment.

22 Notice of appeal. Pursuant to 18 U.S.C. § 3742, you
23 have a right to appeal the sentence imposed by this Court if
24 the period of imprisonment is longer than the statutory
25 maximum. If you choose to appeal, you must file any appeal

1 within 14 days after the Court enters judgment.

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

10 Are there any objections to the sentence imposed that
11 are not already noted on the record?

12 Ms. Jahn?

13 MS. JAHN: No, not already noted.

14 But I do have a query with regard to the payment plan.
15 I believe you said \$30 a month to begin in 30 days. I would
16 ask for the Court to reconsider that in light of the jail
17 sentence you have imposed, to then commence upon completion of
18 his jail sentence, perhaps modifying the same language against
19 that.

20 THE COURT: Thank you.

21 I said \$50 to commence 30 days after the date of
22 judgment. I will amend that to say \$50 to commence 30 days
23 after release from incarceration.

24 MS. JAHN: Thank you, Your Honor.

25 And one other request in terms of a recommendation for

1 placement at a facility. I would ask that it be as close to
2 his home residence in Arizona as possible.

3 THE COURT: Okay. We'll make that recommendation to
4 the board -- the Bureau of Prisons. We'll recommend a facility
5 as close as possible to his home.

6 Anything from you, Mr. Murphy?

7 MR. MURPHY: No, Your Honor. Thank you.

8 THE COURT: All right. Mr. Entrekin, that is the
9 judgment of the Court.

10 I want you to know that I spent a lot of time thinking
11 about your sentence and tried to weigh all the different
12 factors that were before me. I hope that you can do better
13 going forward, and I wish you the best of luck.

14 THE DEFENDANT: I will. Thank you, Your Honor.

15 THE COURT: All right. Thank you.

16 Parties are excused.

17 (Proceedings were concluded at 12:53 p.m.)
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CERTIFICATE OF OFFICIAL COURT REPORTER

I, Nancy J. Meyer, Registered Diplomate Reporter,
Certified Realtime Reporter, do hereby certify that the above
and foregoing constitutes a true and accurate transcript of my
stenograph notes and is a full, true, and complete transcript
of the proceedings to the best of my ability.

Dated this 13th day of June, 2022.

/s/ Nancy J. Meyer
Nancy J. Meyer
Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter
333 Constitution Avenue Northwest
Washington, D.C. 20001