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BEFORE THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	.	
	.	Case Number 21-cr-407
Plaintiff,	.	
	.	
vs.	.	
	.	
DARYL JOHNSON and	.	
DANIEL JOHNSON,	.	June 1, 2022
	.	10:06 a.m.
Defendants.	.	

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TRANSCRIPT OF SENTENCING HEARING  
BEFORE THE HONORABLE DABNEY L. FRIEDRICH  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the United States:	SAMUEL DALKE, AUSA
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Official Court Reporter:	SARA A. WICK, RPR, CRR
	United States District Court
	for the District of Columbia
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	202-354-3284

Proceedings recorded by stenotype shorthand.  
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## P R O C E E D I N G S

(All participants present via video conference.)

COURTROOM DEPUTY: Your Honor, we are in Criminal Action 21-407, the United States of America versus Daryl Johnson and Daniel Johnson.

Representing Mr. Daryl Johnson, we have Mr. Christopher Davis. Representing Mr. Daniel Johnson, we have Mr. Allen Orenberg. Representing the United States, Mr. Samuel Dalke. And Ms. Hana Field is representing Probation, and the defendants are appearing by way of video.

THE COURT: All right. Thank you, Mr. Hopkins.

So before we can proceed by way of video conference, I need, Mr. Davis and Mr. Orenberg, I know that your clients have consented to sentencing being conducted by video conference, but consistent with the CARES Act, I do need to make a finding that this matter cannot be continued without serious harm to the interests of justice.

And I assume that the desire to proceed by way of video conference is based on the pandemic and the need to resolve this case sooner rather than later, but if I can hear from both of you. I will start with Mr. Davis.

MR. DAVIS: Certainly, Your Honor. Mr. Johnson consents to proceeding by video.

THE COURT: And give me the reasons. I need to make a finding. Is it because of the pandemic and the desire to

1 resolve the case quickly?

2 MR. DAVIS: Exactly, Your Honor, that he agrees to  
3 moving forward via video based on the circumstances attendant to  
4 the COVID pandemic and also to expeditiously resolve the matter  
5 pending before Your Honor.

6 THE COURT: Okay. Is that right, Mr. Daryl Johnson?  
7 You understand you have the right to appear before me in the  
8 courtroom for sentencing, if you desire, and I understand from  
9 your attorney that you would like to proceed today by way of  
10 video. Is that right?

11 DEFENDANT DARYL JOHNSON: Yes, ma'am. Yes, Your  
12 Honor.

13 THE COURT: All right. And Mr. Orenberg?

14 MR. ORENBERG: Yes, Your Honor. For the same reasons  
15 Mr. Davis just informed the Court, Mr. Daniel Johnson also  
16 waives his right to appear personally in court for sentencing  
17 hearing.

18 THE COURT: Thank you.

19 Mr. Daniel Johnson, you also understand you have the right  
20 to appear before me for sentencing in the courtroom?

21 DEFENDANT DANIEL JOHNSON: Yes, Your Honor.

22 THE COURT: And is it your desire to waive that right?

23 DEFENDANT DANIEL JOHNSON: Yes.

24 THE COURT: Okay. All right. Consistent with the  
25 CARES Act, we will proceed by way of video conference.

1           So I have reviewed the final presentence reports and  
2           recommendations. I've also read the parties' sentencing  
3           memoranda, including the exhibits, the many letters submitted in  
4           support of both defendants, as well as the government's  
5           sentencing chart and videos.

6           Am I missing anything? Mr. Davis?

7           MR. DAVIS: No, Your Honor.

8           THE COURT: Mr. Orenberg?

9           MR. ORENBERG: Your Honor, I would just point out that  
10          last evening, somewhat late, I filed an additional character  
11          support letter. I had inadvertently left it out of my main  
12          package a couple of --

13          THE COURT: And I read that; I read that. From the  
14          employer?

15          MR. ORENBERG: Yes, Your Honor. Thank you.

16          THE COURT: Okay. Thank you. And I do appreciate  
17          those letters very much. That was very helpful to me.

18          All right. Mister -- I don't have my reading glasses. Is  
19          it Dalke or Dalke?

20          MR. DALKE: Dalke, Your Honor.

21          THE COURT: All right. I just want to make sure that  
22          I mentioned everything that the government's provided.

23          MR. DALKE: Yes, Your Honor, and just for  
24          clarification, the three videos that were sent, I believe the  
25          second and third video exhibits have audio. Did that come

1 through for Your Honor?

2 THE COURT: It did. One was missing audio.

3 MR. DALKE: Correct. The CCV has no audio to it.

4 THE COURT: Are you prepared to play those today?

5 MR. DALKE: Since the Court has already seen them -- I  
6 have them available, but I was not preparing to play them since  
7 the Court's already had the opportunity to review them.

8 THE COURT: Well, I would like you to, because it's  
9 hard for me to spot the defendants in the videos. Can you at  
10 least play one of them so I can see -- the one that most clearly  
11 reflects where they were in that scrum?

12 MR. DALKE: Absolutely, Your Honor.

13 THE COURT: All right. We will do that in just a  
14 minute, but let me make sure that we've gone through the  
15 preliminary stuff.

16 So Mr. Davis and Mr. Orenberg, I take it you've reviewed  
17 the presentence reports with your clients?

18 MR. DAVIS: We have, Your Honor.

19 MR. ORENBURG: Yes, Your Honor.

20 THE COURT: All right. And Mr. Daryl Johnson, you've  
21 had a chance to review the PSR with your attorney, and you've  
22 had adequate time to talk to him about it and correct any errors  
23 in the report?

24 DEFENDANT DARYL JOHNSON: Yes, Your Honor.

25 THE COURT: All right. And the same for Mr. Daniel

1 Johnson?

2 DEFENDANT DANIEL JOHNSON: Yes, Your Honor.

3 THE COURT: Okay. Mr. Dalke, you have no objections  
4 to the report?

5 MR. DALKE: That is correct, Your Honor.

6 THE COURT: All right. And I know that --  
7 Mr. Orenberg, I know you're making an argument that the criminal  
8 history for Mr. Daniel Johnson is overrepresented, but aside  
9 from that, you have no objections to the PSR; is that correct?

10 MR. ORENBERG: That is correct, Your Honor.

11 THE COURT: And the same for you, Mr. Davis?

12 MR. DAVIS: That is correct, Your Honor, no material  
13 objections, although I note that paragraph 54 indicated that  
14 Daryl Johnson had a, I think it was, Missouri driver's license  
15 and a traffic ticket from Missouri, and he's indicated that he  
16 did not have that, a Missouri driver's license. But I don't  
17 think it affects these proceedings.

18 THE COURT: Okay. Ms. Field, do you have any response  
19 to that?

20 PROBATION OFFICER: Your Honor, we did note in our  
21 response to defense counsel's objections that the information  
22 about the Missouri driver's license was found an accurate  
23 record. It was associated with the defendant by matching his  
24 Social Security number, his present residence, and his birth  
25 date. We did revise the report to include the date that the

1 offense occurred, but we didn't change the report otherwise. So  
2 I have no additional information to provide.

3 THE COURT: Okay. Well, Mr. Davis, it's not a fact  
4 that in any way affects the sentence that I will impose in this  
5 case. But do you have concerns about what's stated in the  
6 report?

7 MR. DAVIS: Not concerns, just that it's not accurate.  
8 Despite the AccuReports title for the database that it came out  
9 of, there's something amiss, but I don't think it impacts the  
10 sentence here at all.

11 THE COURT: Okay. Well, Ms. Field, I assume Daryl  
12 Johnson is a very common name. I'm just wondering if this is an  
13 error that should be corrected.

14 Does the government have a position on this?

15 MR. DALKE: No position, Your Honor. And again,  
16 whether or not he had that driving infraction has no bearing on  
17 the government's position or recommendation in the sentence.

18 THE COURT: All right. Ms. Field, given how common  
19 this name is, my preference would be, I guess, to -- I don't  
20 know. I'm concerned that this is a different Johnson.

21 MR. DAVIS: Your Honor, there's also -- in this age of  
22 identity theft, there could be many explanations for why  
23 paragraph 54 and 55 reflect what they do. But Mr. Johnson has  
24 indicated that he did not have a Missouri driver's license.

25 Correct, Mr. Johnson?

1 DEFENDANT DARYL JOHNSON: That is correct.

2 MR. DAVIS: So I would ask that it be stricken just so  
3 that it doesn't perpetuate the confusion, and since it doesn't  
4 impact anything, I think that it would be appropriate to extract  
5 it.

6 THE COURT: Ms. Field, given the circumstances, I  
7 would ask that you make that correction, all right, that this is  
8 disputed and may not be accurate.

9 PROBATION OFFICER: Understood, Your Honor. So would  
10 you like us to strike that paragraph, then? Is that what I'm  
11 understanding?

12 THE COURT: Yes, please.

13 PROBATION OFFICER: Understood.

14 MR. DAVIS: I think that would be two paragraphs. I  
15 think that would be 54 and paragraph 55. Oh, no, I'm sorry,  
16 paragraph 54. I'm sorry.

17 THE COURT: Okay. Ms. Field, do you have that? Any  
18 questions?

19 PROBATION OFFICER: No questions, Your Honor. Thank  
20 you.

21 THE COURT: All right. So with that correction, I  
22 will accept the presentence report as my findings of fact  
23 pursuant to Rule 32 of the Federal Rules of Criminal Procedure.

24 The parties agree with the presentence report that the  
25 relevant guideline is 2A2.4(a) and the base offense level is a



1 level 10. The parties further agree that the total offense  
2 level, taking into account the two-level reduction for  
3 acceptance of responsibility, is a level 8. Because Daryl  
4 Johnson has no criminal history, the parties agree that his  
5 guideline range is zero to six months' imprisonment.

6 The parties agree that based on Daniel Johnson's prior  
7 record, his criminal history category is II, which results in a  
8 guideline range of four to ten months' imprisonment, though the  
9 defense argues that a criminal history category of II  
10 overrepresents his criminal history.

11 Have I accurately summarized the parties' positions here?  
12 Mr. Davis?

13 MR. DAVIS: You have, Your Honor, although I just  
14 noticed that Missouri driver's license appears on page 3 of the  
15 presentence report under the "Alternative IDs" section. It  
16 lists an Iowa driver's license, a Minnesota driver's license,  
17 and then it lists a Missouri driver's license, and again, the  
18 Missouri driver's license is the one that is in dispute.

19 THE COURT: All right. Ms. Field, can you make that  
20 correction, please?

21 PROBATION OFFICER: Yes, Your Honor.

22 THE COURT: All right. Have I accurately summarized  
23 the parties' positions with respect to the guidelines?  
24 Mr. Davis?

25 MR. DAVIS: You have, Your Honor.

1 THE COURT: Mr. Orenberg?

2 MR. ORENBERG: Yes, Your Honor.

3 THE COURT: Mr. Dalke?

4 MR. DALKE: Yes, Your Honor.

5 THE COURT: Okay. All right. I've independently  
6 calculated the guidelines. I do agree with the calculations set  
7 forth in the plea agreement and the presentence report.

8 All right. So before moving on, Mr. Orenberg, let me hear  
9 your argument on the overrepresentation of criminal history.  
10 I'm not inclined to agree with you here, but I will give you a  
11 chance to make any additional points.

12 MR. ORENBERG: Your Honor, I have laid out my  
13 arguments on page 9 of my sentencing memorandum, which is  
14 document 56, beginning on page 9. With respect to the 2015  
15 conviction for underage drinking and driving and a related  
16 moving traffic offense, this conviction is almost nine years old  
17 and, as I've pointed out, is the result of a set of minor  
18 traffic infractions. I'm asking the Court to observe that based  
19 on the age of the conviction and the fact that it's a  
20 misdemeanor, that the assignment of one criminal history  
21 category point should be discounted. It should not be taken  
22 into account by the Court.

23 Now, with respect to the 2015 conviction for disorderly  
24 conduct, it's my understanding that the arrest was the result  
25 of, I'm going to say, a brouhaha between himself and his then

1 girlfriend and another gentleman. According to Mr. Johnson, he  
2 was very upset about, I'm going to say, the relationship or the  
3 perceived relationship between his then girlfriend and this  
4 other gentleman, and he became visibly and outwardly acted  
5 upset, and the police were called. Again, this is a  
6 misdemeanor, and we're objecting to the assignment of one  
7 criminal history category point.

8 And then the 2021 conviction for a small possession -- a  
9 small amount of possession of marijuana, open bottle, and  
10 driving after revocation and speeding, these again are all  
11 misdemeanor convictions or citations with no active jail  
12 sentence, and we again are objecting to the assignment of one  
13 criminal history category point.

14 Your Honor, all of these convictions, these three separate  
15 offenses, were, you know, misdemeanors. And it's my argument  
16 that, accordingly, the criminal history category assignment of  
17 II overrepresents the actual seriousness of his criminal  
18 history, and we're asking the Court to find that he's a criminal  
19 history category I.

20 THE COURT: All right. Mr. Dalke, any response you  
21 would like to make beyond what you've stated?

22 MR. DALKE: Briefly, Your Honor.

23 I will say, he got three criminal history category points.  
24 So even if one of these three were discounted, he would still be  
25 criminal history category II. So to drop him to criminal

1 history category I, you would really have to discount two out of  
2 these three offenses.

3 They did all happen in the past ten years. One of them, as  
4 noted, did involve disorderly conduct as well as a sentence of  
5 30 days, although it appears that 28 of those days was  
6 suspended. So effectively, he served two days in prison, likely  
7 time served, followed by a year of probation. And that one did,  
8 it appears, involve some threats and some disturbance in a  
9 public space.

10 I think where the government comes down is I don't think  
11 it's overrepresentation of criminal history II because he's been  
12 in the criminal justice system before and now has come back  
13 before this Court and committed additional -- after committing  
14 additional offenses. So we're not jumping up to III or IV or  
15 VI. It's one bump up in the guidelines. He did commit those  
16 three offenses. It is appropriately calculated. And I don't  
17 think there's an overrepresentation here.

18 THE COURT: Mr. Orenberg, I'm inclined to agree with  
19 the government. If we were talking about two criminal history  
20 points, I might agree with you, but we're talking about three  
21 here, and I am troubled about the -- his record as a whole. I  
22 know there's also some uncharged driving on suspended license  
23 and the like. I'm just concerned. I don't think that Daniel  
24 Johnson's record is reflective of criminal history category I.

25 So I will -- to be clear, you were seeking a departure or

1 just a variance?

2 MR. ORENBERG: A variance, Your Honor.

3 THE COURT: Okay. All right. I will -- I'm not going  
4 to grant that motion, if you will, to reduce the criminal  
5 history category from a II to a I. So we are looking at a  
6 guideline range of four to ten months.

7 Let me go ahead and start with the government. Mr. Dalke,  
8 like I said, I would like to see -- I don't need to see all  
9 three videos, but one or two that best reflect where the  
10 defendants were in relation to the crowd.

11 MR. DALKE: Yes, Your Honor. Would you like to start  
12 with that, or would you like an allocution and I can kind of  
13 work that in?

14 THE COURT: If you can start with the video, that  
15 would be most helpful.

16 MR. DALKE: Absolutely. So bear with me while I share  
17 my screen.

18 Your Honor, do you see a video up on the screen?

19 THE COURT: Yes.

20 MR. DALKE: Okay. And this is Government's Exhibit 1,  
21 which is a video that is approximately 3:56 in length. It was  
22 taken from the Capitol's CCV system. So it doesn't have sound.  
23 I provided the other videos to provide a context of the sounds  
24 and what was going on that day. But this is the video that, in  
25 the government's view, kind of best shows, you know, the actions

1 of both Johnsons at approximately 2:37 and 2:38 p.m. on  
2 January 6. So I'm going to play, and then I will pause it when  
3 the Johnsons enter the screen.

4 (Video played.)

5 MR. DALKE: And the Johnsons enter the screen at  
6 approximately 0:43 into the video, but in this video, you can  
7 see the east rotunda doors which are to the right, and you can  
8 see the police officers standing in front of it, including an  
9 officer with a face shield. There were three police officers  
10 standing in front of that door.

11 THE COURT: Mr. Dalke, you will make this video  
12 available on the public database?

13 MR. DALKE: Correct, Your Honor.

14 And to the left side of this video where some of the  
15 rioters are opposite the door, that's where the rotunda is.

16 And I just paused it there. Daryl Johnson just came across  
17 the screen between the pillar and the wall. You can see him  
18 right there. He's wearing a hat, and there's a backpack.

19 THE COURT: Wait. Hold on. Between the pillar and  
20 the wall? The wall closest to us?

21 MR. DALKE: The wall closest to the left, which is the  
22 rotunda side, and then there's a column. There's a woman at the  
23 top, and then there's a gentleman right beneath the woman  
24 wearing a backpack and a hat.

25 THE COURT: All right. So not the gentleman with the

1 flag, but one in between the column and the wall right now?

2 MR. DALKE: Yes. And I can back up a second, and I  
3 will just play it, and then I can rewind it 5 seconds, and you  
4 can see both Daryl and Daniel Johnson in that space, and you're  
5 also going to see them in a space yelling in the direction of  
6 the doors. That's Daryl Johnson cupping his hands and yelling,  
7 and Daniel Johnson -- I've paused it here again 0:50 into the  
8 video -- is wearing a tan hat with sunglasses on top. He was  
9 just right next to his father, Daryl Johnson, and he also yells.

10 And then they disappear behind the column, and you will see  
11 them more clearly now, 0:56 into the video, right above that  
12 blue flag that's being waved, again Daryl Johnson in the black  
13 hat with the white letters and backpack and Daniel Johnson in  
14 the tan hat with the sunglasses and has the bandana.

15 And then they move forward, Your Honor. So 1:12 into the  
16 video, Daniel Johnson opens up his arms and yells "forward"  
17 again towards the police officers' line and the door. His  
18 father is behind him.

19 THE COURT: Can you point with the cursor where they  
20 are?

21 MR. DALKE: If you can see my cursor, they're right  
22 here now.

23 THE COURT: Okay.

24 MR. DALKE: In total, by the government's estimation,  
25 I think they're about 30 or 40 seconds in this space before the

1 push starts. And again, that's where you can see Daniel Johnson  
2 yelling.

3 And there the push begins. So you can see Daniel Johnson  
4 and Daryl Johnson both pushing. This is 1:38 into the video.  
5 Daniel Johnson turns around and pushes with his back for more  
6 leverage. They move up here to the apex. They cross the  
7 threshold of the door. The doors open up.

8 THE COURT: Where are the police officers right now?  
9 Between the crowd and the doors?

10 MR. DALKE: Yes, Your Honor. And then they come over  
11 here. So then here -- and I will pause here 2:00 into the  
12 video. After they come back off the top side -- so they push.  
13 They beat the apex. They breach the doors with a group of other  
14 rioters. They come back up on the top side of the video, and  
15 then they walk down towards the bottom of the video where  
16 there's a set of stairs, and they go up those stairs. And you  
17 can see them raising their fists, pumping their fists at this  
18 point, as well as yelling and kind of motioning or pointing  
19 towards heading up the stairs.

20 THE COURT: Okay.

21 MR. DALKE: There you see them pointing, heading up.  
22 And right about 2:10 into the video, they depart this screen and  
23 head up the stairs.

24 And the last thing I will note since we have this video  
25 already up, if I move it forward towards the end of this clipped



1 section, this is just a minute and a half later, you can see the  
2 number of rioters kind of streaming through those doors once  
3 they're opened and breached. And again, these doors, these east  
4 rotunda doors directly go out to the east front of the Capitol.  
5 And I will talk about it later in my allocution, but this was a  
6 major breach point in the events of January 6.

7 Your Honor, while I have this video up, are there any  
8 particular sections you would like me to go back and play or  
9 point out?

10 THE COURT: No. That was helpful. There's no need to  
11 play another one.

12 Mr. Dalke, let me ask you, the government has done a good  
13 job of listing a number of specific cases in its sentencing  
14 memorandum that the Court should view as analogous. With the  
15 exception of the Mostofsky case, all of those were charged as  
16 misdemeanors, and initially, I think, in this case the  
17 defendants were charged with misdemeanors.

18 Can you help me understand how their conduct differs from  
19 those defendants such that the government -- I know this isn't  
20 the role of the Court. I'm just curious why these defendants  
21 and not the others were charged with the felony civil disorder  
22 offense.

23 MR. DALKE: Certainly, Your Honor. And I will say at  
24 the outset, as the Court noted, the Mostofsky case is the only  
25 other 231 case, at least with the lead charge, that I'm aware of

1 that has gone to sentencing. And so that's certainly why we  
2 believe it has some bearing on this Court's decision today.

3 The three others that I picked out and highlighted to the  
4 Court are all misdemeanor cases. And I need to be clear at the  
5 outset, that's no reflection that we view this as a misdemeanor  
6 case, and there are distinguishing points on those cases. The  
7 reason I provided those three in particular is because they all  
8 centered on that same east rotunda door.

9 THE COURT: No, understood. But why weren't those  
10 defendants charged with the felonies?

11 MR. DALKE: Sure. So Frank Scavo, which was Case  
12 Number 21-cr-254, he was outside during that push. So unlike  
13 the Johnsons, he did not engage on that interior push against  
14 that line of police officers. So the 231 charge for his case,  
15 in the government's view, at least in my view, would not be  
16 appropriate, because he didn't actively participate in that  
17 breach, actively participate in interfering with those three  
18 officers who were essentially sandwiched between the interior  
19 rioters and the exterior rioters.

20 THE COURT: Were there officers on the outside of the  
21 Capitol building as well?

22 MR. DALKE: My understanding is yes, there were, Your  
23 Honor. I'm not sure at that exact moment, but certainly, at  
24 times, there were altercations and incidents with officers in  
25 proximity to those doors on the outside.

1 THE COURT: But they weren't sandwiched between the  
2 crowd and the doors like the officers on the inside? Is that  
3 what you're saying?

4 MR. DALKE: I haven't seen all those videos. I'm not  
5 sure exactly what happened. I will say that, you know, if you  
6 sandwich an officer between the outside doors, the doors don't  
7 open inward. They open outward. And that's critical to the  
8 Johnsons' conduct and why this particular breach was so  
9 relevant, is they were again inside the Capitol, entered with  
10 the mob on the west front, and then went and allowed the mob on  
11 the east front to enter through those doors by knocking them  
12 open, by pushing them through.

13 So yes, I provided those other cases as comparables because  
14 they involved the east rotunda doors, but I don't think it's  
15 fair to say the conduct of those rioters on the outside who were  
16 not involved in the breach of the doors -- they were ready and  
17 willing and wanted to go in. There's no question. You can see  
18 those rioters streaming in after the doors are breached.

19 But it's -- the conduct that is most egregious on the  
20 Johnsons' part is the breaching of those doors from the inside,  
21 and that's what led to the 231 charge, and that's why I think  
22 it's appropriate, and that's what, frankly, distinguishes it  
23 from those cases, both the Mark Simon case and the Frank Scavo  
24 case.

25 THE COURT: Okay. Simon was outside as well?

1 MR. DALKE: Yes, Your Honor.

2 THE COURT: And Smith?

3 MR. DALKE: So Smith was inside. Smith was inside,  
4 and he was more -- I will say he was more similarly situated to  
5 the Johnsons than Scavo or Simon. He can be seen on that video  
6 that I just showed Your Honor. I can bring it back up, and I  
7 can point him out if you would like.

8 He was there before them in that area outside the east  
9 rotunda doors. There were some iron benches that law  
10 enforcement had put in front of those doors. I think there's  
11 two or three of them. And he went and moved them. Officers saw  
12 this, and they took him away and put the benches back.

13 He later then returned with a group of rioters and -- as  
14 depicted on the screen with Government's Exhibit 1 that Your  
15 Honor just watched, and he did join in the push at that door.  
16 However, he was late to the push. So he was several individuals  
17 back behind the Johnsons.

18 Essentially, they again made it to the apex, they made it  
19 really to that threshold, if not past that threshold. I don't  
20 have a video showing that they, meaning the Johnsons, put their  
21 hands on an officer, but they were close. They were close. And  
22 if you take it in proximity to Jeffrey Smith who was multiple  
23 people back, he had a much bigger physical distance between  
24 himself and the doors. He then was -- followed the Johnsons,  
25 meaning he was after them when they kind of raised their fists

1 and pointed upstairs and yelled to go upstairs. He was  
2 following them, trailing them up those stairs.

3 But I do candidly admit, there are some similarities in his  
4 case, and he received 90 days. He received 90 days'  
5 incarceration, which again is what the government asked for for  
6 Daryl Johnson.

7 THE COURT: But why wasn't he charged with a felony?

8 MR. DALKE: Your Honor, I --

9 THE COURT: As we look at these cases, we want to be  
10 consistent, and that's a big discrepancy here that isn't clear  
11 to me, why the charging decisions are so disparate.

12 Is there an effort to review these at a higher level to  
13 make sure similarly situated defendants are treated similarly?

14 MR. DALKE: Certainly, Your Honor. As the Court is  
15 aware, there's over 800 cases charged. We're doing the best we  
16 can to keep similarly situated defendants with similar charges  
17 and with similar guilty pleas. Certainly, there is evidence  
18 that we continue to uncover as to additional defendants.

19 I'm not intimately familiar with the Jeffrey Smith case. I  
20 did not handle it. I have read all the briefs. I'm familiar in  
21 that sense. But as far as the charging and plea decisions in  
22 that case, again, I'm not sure how they got to where they got.  
23 But I will say we are being consistent, Your Honor, in that we  
24 are asking for sentences substantially similar to that case.

25 I do think, as already outlined by the Court, that the

1 conduct of Daryl and Daniel Johnson is more egregious than that  
2 of Jeffrey Smith.

3 THE COURT: Smith moved these iron benches. That's at  
4 another location?

5 MR. DALKE: No, that's these doors, Your Honor.

6 THE COURT: Arguably, that's more egregious than what  
7 these defendants did.

8 MR. DALKE: No, Your Honor, I don't think moving iron  
9 benches which are unguarded at the time is more egregious, and  
10 then the police officers confronted him, and then he moved away.

11 THE COURT: He did that, and then according to the  
12 government, he helped the other rioters overwhelming the police  
13 officers by sandwiching them between the rotunda doors. You're  
14 saying he was farther behind them, but he was involved in that  
15 conduct as well.

16 MR. DALKE: Correct, Your Honor, he was. He was  
17 farther behind, but he was involved in that push.

18 THE COURT: Am I correct that these defendants  
19 initially were not charged with a felony but there was a  
20 superseding information?

21 MR. DALKE: That is correct, Your Honor.

22 THE COURT: And why is that? Is that based on the  
23 government's review of the video? What changed? I don't quite  
24 follow how we got where we are.

25 MR. DALKE: Yes, Your Honor. I think -- and again,

1 having not been the attorney from the start, my understanding in  
2 this case is they were initially charged with misdemeanor  
3 trespass offenses because that's what the evidence showed. That  
4 was the evidence that we had at the time. As the case went on,  
5 as we searched the phones, as we recovered additional video, we  
6 uncovered this push and their statements that they made after  
7 January 6. And in the government's view, the best charge for  
8 their conduct bumped up to the 231.

9 And there is no question in the government's mind in this  
10 case. This is not a misdemeanor case. This is not misdemeanor  
11 conduct. This is felony conduct. And I think as can be shown  
12 in Exhibits 2 and 3 of the video exhibits that the government  
13 showed, I mean, the chants going on, the sounds, the sirens, the  
14 sandwiching of those officers, I mean, this was violent conduct.

15 THE COURT: No, I can understand the charge. I just  
16 don't understand the disparate treatment. Are you telling me  
17 that the government in other cases -- there's a large mob there.  
18 Other cases involving other defendants who are in that mob are  
19 also being re-evaluated in the way these defendants were? Is  
20 that what you're telling me?

21 MR. DALKE: Your Honor, I'm not sure if I follow. I  
22 mean, these defendants were re-evaluated when the government  
23 found additional evidence against them that showed they were  
24 involved more than the government previously knew. And so  
25 that's why we moved from the misdemeanor to the felony charge.

1           And certainly, I think in any case where the government  
2 finds additional evidence, there's going to be that discussion.

3           THE COURT: Is the additional evidence the statements  
4 made after the fact or the degree to which they were involved in  
5 pushing the mob towards the officers?

6           MR. DALKE: Both, Your Honor. My understanding is  
7 when these defendants were initially charged, we weren't aware  
8 of their involvement in that push. As we just showed this video  
9 to Your Honor, it's not abundantly clear from watching the video  
10 that it's Daryl and Daniel Johnson. You have to spend some time  
11 and take some time, and this video was discovered after further  
12 review of the videos and the evidence, and that's why we brought  
13 the 231 charge later as opposed to initially at the outset when  
14 we weren't aware of all the evidence. We weren't aware of all  
15 the actions of Daryl and Daniel Johnson at the time of the  
16 initial misdemeanor complaint.

17           THE COURT: So is it fair to say to the extent the  
18 government identifies other individuals who are in that scrum  
19 pushing against the doors where the officers are sandwiched,  
20 that those defendants also would be charged with felonies?

21           MR. DALKE: Certainly, Your Honor, yes, that would be  
22 my recommendation.

23           THE COURT: But not just your cases. Your  
24 understanding is the government re-evaluates as a whole these  
25 cases as they get additional evidence?



1 MR. DALKE: That is my understanding, yes, Your Honor,  
2 that if additional evidence is being uncovered -- and it is. I  
3 mean, I have certainly over a dozen of these cases, and every  
4 week, every month, I'm finding new videos. My agents are  
5 finding new videos. We conduct a new search warrant, and we  
6 find a new phone from a different defendant, and that phone from  
7 additional rioters shows new conduct not just of that rioter but  
8 of other rioters around them. So we do uncover new evidence of  
9 assaults. We do uncover new evidence of bad conduct. And  
10 certainly, we are taking that into account. We're doing the  
11 best that we can, given the large number of defendants and  
12 trying to be, to the best that we can, you know, fair and  
13 evenhanded with all of the defendants.

14 THE COURT: Okay. All right, Mr. Dalke. I will go  
15 ahead and let you allocute. Thank you for clearing all that up.

16 MR. DALKE: Your Honor, the government is asking for a  
17 term of imprisonment in the cases of Daryl and Daniel Johnson,  
18 and we're asking for a term of imprisonment because it's  
19 warranted in this case.

20 On January 6, the Johnsons took part in an unprecedented  
21 attack on the United States Capitol, an attack on law  
22 enforcement officers, and an attack on democracy itself. To  
23 paraphrase a colleague, on that day, thousands of people were  
24 brought together by the lie of a stolen election, and they  
25 marched on the United States Capitol. They pushed over

1 barricades. They assaulted police officers. And they breached  
2 the Capitol building. And this hostile takeover was timed. It  
3 was timed to force an interruption of the certification of the  
4 2020 Electoral College vote count. There's simply no question  
5 that this conduct is a direct, serious assault on both the rule  
6 of law and on the peaceful transfer of power.

7 So while the events of January 6 are incomparable, it's --  
8 the conduct of the rioters, however, does cover a broad  
9 spectrum. As already outlined by this Court and as I want to  
10 delve into today, the issue is where do the Johnsons' conduct  
11 fall in comparison with some of the other rioters.

12 And so there's three significant points that the government  
13 wants this Court to be aware of when comparing the Johnsons'  
14 conduct. First is their time, their place, and their method of  
15 entry. The second is the actions that the Johnsons took once  
16 they were inside; once they breached into the Capitol, what did  
17 they do. And third is the statements that they made on social  
18 media after January 6.

19 In the government's view, it's these three points, taken  
20 together with the rest of their conduct, that makes clear that  
21 again this is not a misdemeanor case, this is not misdemeanor  
22 conduct, and that the Johnsons each committed a serious felony  
23 offense and should be incarcerated.

24 So first is the time, the place, and method of entry. The  
25 Johnsons entered at 2:20 p.m., which was only seven to eight

1 minutes after the initial breach of the Capitol. Their entry  
2 can be shown on images 1 and 2 of the government's sentencing  
3 memorandum. And they didn't walk through a door. They didn't  
4 walk through an open door. They jumped through a smashed-out  
5 window on the west front of the Capitol.

6 And as this Court is uniquely aware, the west front of the  
7 Capitol and those northwest scaffolding is where a significant  
8 amount of violence and confrontation occurred. In fact, it was  
9 the focal point of the Guy Reffitt trial. And it's impossible  
10 for the Johnsons to have entered when they did and where they  
11 did without seeing active police resistance, without witnessing  
12 violent clashes, without hearing chants, without watching  
13 rioters overrun the police and smelling the pepper spray.

14 And in fact, on the CC video -- and this is image 3 in the  
15 government's sentencing memorandum -- you can see the Johnsons  
16 pouring water onto another rioter's eye once inside the Capitol  
17 like we do the OC spray.

18 Daniel Johnson, later that day after leaving the Capitol,  
19 bragged that "I was one of the first ones inside." So they  
20 weren't the first individuals inside. That happened at around  
21 2:13 p.m. But at 2:20 p.m., they were still a part of that  
22 first wave, that violent wave up the west front. And again,  
23 it's impossible for them to have gotten from the Peace Monument  
24 and outside the bottom of the steps, through all those rioters  
25 and up and through the Senate window without being a part of

1 that initial push up those steps and through those doors.

2 They could have turned back at any point, but they didn't.  
3 They chose to advance. And they chose to be on the front line  
4 of the hostile takeover at the Capitol.

5 And the last thing I will note on the timing of their  
6 entry, which was 2:20 p.m., it was the exact same time that  
7 members of both the House and Senate were instructed and did  
8 evacuate their chambers and the Joint Session of Congress was  
9 suspended.

10 So second, I want to talk about the actions of Daryl and  
11 Daniel Johnson once inside the Capitol. So as already shown to  
12 the Court in Government's Exhibit -- video Exhibit 1, at  
13 2:37 p.m., so approximately 17 minutes after entering the  
14 Capitol, the Johnsons encountered three police officers who were  
15 guarding the east rotunda doors. And those images can also be  
16 shown in images 5 through 13 in the government's memorandum.  
17 Initially as shown on Exhibit 1 video, the Johnsons are yelling,  
18 and they join in yelling at the officers. And you can also see  
19 in those videos, and you can see from the Johnsons' actions,  
20 that they're looking directly out those windows where additional  
21 rioters were amassed outside the Capitol.

22 I'm not going to play for the Court since the Court has  
23 already seen it, but I do want to talk about Exhibits 2 and 3  
24 which were submitted by the government. These were videos taken  
25 by nearby rioters that match up with the timing of Exhibit 1,

1 which was the CCV video which shows the overall. Exhibits 2 and  
2 3 kind of show the chaos, the mayhem, and they show the rioters  
3 trying to get in from the east side of the Capitol. They show  
4 the officers protecting the door. And they provide a sense of  
5 the scene that was initially encountered by the Johnsons at  
6 2:37 p.m. You can hear the alarm ringing in the background, and  
7 you can hear rioters yelling.

8 Now, remember, the Johnsons were yelling. I don't know  
9 what they said. I don't know what they yelled. But you can  
10 hear others yelling. And it may have been them, or it may have  
11 been other rioters at the same time. You can hear them yelling,  
12 "Open the door." You can hear them yelling, "Let them in." You  
13 can hear them yelling, "Get out of the way. Your life is not  
14 worth it. Push. Push. Push."

15 At that moment, the Johnsons didn't leave, but they joined  
16 in. They advanced on the officers. They pressed forward, and  
17 led by Daniel, they forcibly pushed and shoved forward in the  
18 group, sandwiching the officers and forcing the doors open.

19 Again, in the government's memorandum, it's depicted in  
20 images 10 through 17, as well as video Exhibits 1 and 3. It's  
21 important that both of the Johnsons, both Daryl and Daniel,  
22 pressed forward. Daniel turned his back at one point and  
23 presses for more leverage against the other rioters and against  
24 those doors and officers. And those doors were forced open, and  
25 those officers were shoved aside and they were discarded. In

1 particular, in Exhibit 3, you can see the officer being  
2 sandwiched on that door. You can see his helmet being knocked  
3 askew. You can also see a different officer limping away down  
4 besides the doors, discarded, shoved out to the side.

5 But there wasn't remorse after that attack. What you see  
6 is you see celebratory fist pumps, victory pumps, shouts, points  
7 to go upstairs. With their work done, they headed upstairs.

8 And it's important for the Court to understand the context  
9 of this push against the doors, the east rotunda doors, because  
10 the effects of the Johnsons' actions and the other actions  
11 involved in that push was felt in the Capitol that day well  
12 after they left both the scene and even after they left the  
13 building. The crowd, as shown in Exhibit 1, I showed the Court  
14 just a minute, minute and a half after the Johnsons joined in  
15 that push. You can see the crowd streaming in two or three  
16 abreast through those doors on the east side of the Capitol.  
17 And that continues for about 30 minutes. Not until about  
18 3:10 p.m. that officers were finally able to get those doors  
19 shut again. And you will see people with tactical helmets, riot  
20 gear, gas masks going up through those doors.

21 And over the next 45 minutes, there's a series of  
22 conflicts, assaults, disorders that occurred in that rotunda  
23 space, at 3:00 p.m., at 3:10 p.m., at 3:25 p.m. So again, the  
24 Johnsons weren't a part of that. In fact, they had already left  
25 the Capitol at that time. But their work had been done. They

1 had essentially joined the Capitol breach from the west front  
2 and then helped the east front mob breach as well. Essentially,  
3 at that point, after 2:38 p.m., after that second, you know --  
4 it wasn't the second breach point, but after that east front was  
5 opened up to rioters, you have law enforcement officers dealing  
6 with two major breaches on both sides of the Capitol that didn't  
7 exist before Daryl and Daniel Johnson's conduct.

8 A mob can only succeed because of its numbers, and that's  
9 one of the most alarming things in this case, is that the  
10 Johnsons were not just a part of the mob. They actually enabled  
11 the mob, enabled the east front mob to get in the Capitol in  
12 large numbers.

13 And third, I want to talk about the statements the Johnsons  
14 made on social media after the riots. There are post-riot  
15 statements that show both Daniel and Daryl Johnson were proud of  
16 their actions. Daniel Johnson, on January 6 after leaving the  
17 Capitol, engages in a Snapchat conversation saying, "I was one  
18 of the first ones inside. It was fucking wild. I was trying to  
19 find a way into the chamber." Daryl Johnson makes similar  
20 comments, public comments on Facebook the following day, saying,  
21 "Yesterday will be the beginning of a revolution. There will be  
22 hangings on the front lawn of the Capitol. That crowd was not  
23 messing around," meaning the crowd that he was just a part of.  
24 A week later, Daryl Johnson said, "It's going to get very ugly  
25 and turn into some version of a civil war."

1           The government openly admits that Daryl and Daniel Johnson,  
2 after being arrested, after being charged, expressed remorse,  
3 expressed regret, but it's these comments that they made in the  
4 days and the weeks after January 6 that show their actual  
5 intent, that they were trying to find a way into the Senate  
6 chamber, that they wanted to start a revolution, that they were  
7 a part of a violent crowd that wasn't messing around.

8           So with those three points highlighted to the Court, it  
9 becomes clear that a period of probation or a period of home  
10 confinement is simply inadequate in this case. It wouldn't  
11 account for the seriousness of the offense. It wouldn't account  
12 for the aggravating factors. It wouldn't provide adequate  
13 deterrence, and it would result, in the government's view, in a  
14 sentencing disparity from similar cases, certainly from the only  
15 other 231 case, Mostofsky.

16           And as highlighted in the memo and already discussed with  
17 this Court, the government does believe the conduct of the  
18 Johnsons is more egregious than the other misdemeanor cases that  
19 have been before other judges involving the east rotunda doors.  
20 They weren't minor participants, and they were not among the  
21 least culpable on January 6. Their conduct and their words show  
22 otherwise. They were both willing and active participants that  
23 joined a very violent mob on the west front and then helped a  
24 second mob on the east front also gain access to the United  
25 States Capitol. And they didn't just push aside a metal



1 barricade or open an unguarded door. They helped to rush a line  
2 of police officers and enabled hundreds of rioters to enter and  
3 further the insurrection. Then they celebrated their conduct on  
4 social media. There's no doubt they committed serious felonies  
5 and should receive prison terms.

6 Thank you, Your Honor.

7 THE COURT: Thank you, Mr. Dalke. In terms of the  
8 relative culpability of Daryl Johnson and Daniel Johnson, how,  
9 if at all, would you distinguish the two?

10 I think Daniel was the first to enter. He was the first to  
11 step forward towards the doors. He was the one who tried to  
12 unlock the door -- or open the door, rather, upstairs.

13 How does the government view the respective evidence for  
14 each?

15 MR. DALKE: Yes, Your Honor. And there's no doubt  
16 they are similar. They were both in for 26 minutes, and from  
17 what the government can tell -- I don't want to say they were  
18 inseparable, but they were together for that whole duration. I  
19 do think there are the small differences already pointed out by  
20 the Court, Daniel being in a couple instances the first, you  
21 know, ahead of his father, the first one kind of to step  
22 forward, the first one to yell, the first one to -- at least  
23 between the two of them, to join the push, the first to go  
24 through the window. I do think he has a statement about  
25 attempting to find a way into the chamber. He did use his back

1 for additional leverage.

2 And it's already been discussed at the outset, but I don't  
3 think his criminal history is significant, but it is something  
4 that is factored in, and it was factored in both to the  
5 sentencing guidelines as well as the government's recommendation  
6 that Daniel Johnson, unlike his father, who has a clean record,  
7 Daniel Johnson does have a couple of offenses, including a  
8 disorderly conduct offense. He has been sentenced by judges  
9 before. He knows what can come of bad acts, and he went for it  
10 anyway.

11 So I think those, although very similar, I do think there  
12 are some differences that warrant a slightly higher sentence for  
13 Daniel Johnson as opposed to Daryl Johnson.

14 THE COURT: All right. Thank you.

15 Mr. Davis?

16 MR. DAVIS: Thank you, Your Honor. And I would like  
17 to emphasize what Your Honor just inquired about, how do you  
18 distinguish the two, because although they're father and son and  
19 I'm certain the father loves his son very much, I don't think  
20 you're sentencing a pair. I think you're sentencing an  
21 individual here, and you have to look at individual actions.

22 During the government's allocution, I heard repeated  
23 references to violence. However, I have not seen photographs of  
24 violence engaged in by Daryl Johnson, and I don' really think  
25 the videos demonstrate violence on behalf of Daryl Johnson. And

1 he didn't plead guilty to violence. He pled guilty to  
2 interfering with law enforcement. He pled guilty to basically  
3 interfering with them performing their job, in other words  
4 keeping others out.

5 THE COURT: Mr. Davis, let me stop you there. How can  
6 you watch that video and not say that that is attempted assault  
7 if not assault?

8 MR. DAVIS: Well, I mean, I can distinguish it very  
9 easily. As I look at it -- first of all, there were references  
10 about a crowd was yelling. There's nothing to indicate --

11 THE COURT: Well, stop on the yelling. I'm talking  
12 about the physical actions of the two defendants. How can you  
13 say it's not an actual assault and attempted assault there with  
14 the officers sandwiched between the doors and the crowd?

15 MR. DAVIS: Well, I mean, first of all, Mr. Johnson is  
16 in the back initially, and if you notice when you watched that  
17 video, when the actual push takes place, a man comes up behind  
18 Daryl Johnson and Daryl Johnson's son, puts his hands on their  
19 back, and pushes them forward. Within those few seconds  
20 afterwards, the crowd surges forward and quickly dissipates.

21 THE COURT: And then they pump their fists afterwards.

22 MR. DAVIS: Is it a pump of fist, or is it a point in  
23 direction, we're going that way, because they went that way  
24 shortly thereafter. They couldn't go out the doors that opened.  
25 They went up the stairs. Mr. Johnson went up the stairs, and he

1 exited the building.

2 I think there's a difference. I mean, I look at one of the  
3 cases we were talking about a little bit earlier, Jeffrey Smith.  
4 I mean, Jeffrey Smith -- no, it isn't Smith. Yes, Jeffrey  
5 Smith. I mean, he got right up in the face of the officers that  
6 were blocking the door. He got inches from them and screamed,  
7 "Stand down. We're getting in there one way or another." And  
8 it was unclear whether he actually physically assaulted anyone.  
9 During the course of his presence in the Capitol, he was sending  
10 out electronic messages pointing out how he was a patriot who  
11 stormed the Capitol.

12 There's nothing like that on Mister --

13 THE COURT: Mr. Davis, I want to make sure I  
14 understand your position. Let's just focus solely on Daryl  
15 Johnson. Is it your position absent the individuals behind him  
16 pushing him forward, that he would not have been a part of that  
17 scrum? Is that what you want me to take away from the evidence  
18 that I've seen, that he was pushed against his will towards the  
19 officers who were defending --

20 MR. DAVIS: I don't know if you can say it's against  
21 his will, but I don't think it was his idea to push. I mean, he  
22 got pushed, and then --

23 THE COURT: He walked forward before anyone --

24 MR. DAVIS: He walked forward, but he didn't push. He  
25 walked forward, and that man came up, put his hands on their

1 back, pushed them forward, and the whole crowd surged forward.

2 And we're talking a matter of seconds. It's very easy to  
3 be a next morning quarterback and decide what should have been  
4 done during the game the night before. You have to take into  
5 consideration, these were split-second things that happened, and  
6 they happened for seconds.

7 I don't think that Mr. Johnson approached those doors with  
8 the intent to attack the officers there. I just don't think  
9 that's the case. And even when you look at that --

10 THE COURT: But to open the doors, you don't think  
11 that that's the intent?

12 MR. DAVIS: I don't know. I wasn't there. I imagine  
13 that when people approached the doors they were thinking about  
14 letting the others in, but I don't think that the idea was to  
15 push officers out of the way when the approach was done. I  
16 don't think that was. I mean, it wasn't like everyone turned  
17 around and charged the doors immediately. People walk up  
18 towards the doors, and then you have Mr. Smith up in the front  
19 yelling at the officers that they might as well get out of the  
20 way, and then there's a push.

21 I mean, it just happens so fast; it just happens so fast.  
22 I don't think it's fair to say that he engaged in violence. I  
23 just -- I think that he was in the wrong place at the wrong time  
24 and probably should not have even approached with the crowd.  
25 And I think a few split seconds afterwards shouldn't be

1 characterized as something he planned to do and something  
2 extremely egregiously plotted out and done. There was no --

3 THE COURT: Clearly, there's no planning. I'm just  
4 having a hard time accepting your characterization of  
5 culpability, that this was all a result of people around him.

6 MR. DAVIS: I'm not saying that. I'm not saying  
7 that's all a result of it. I think it's a factor you have to  
8 take into consideration.

9 What would have happened if the crowd hadn't surged forward  
10 and someone hadn't put their hands on their backs? Do you think  
11 they would have initiated that push? You don't know, and the  
12 evidence doesn't demonstrate otherwise.

13 THE COURT: I don't think you have to initiate that  
14 sort of assault to be held accountable for being a part of it.

15 MR. DAVIS: He didn't get charged with assault,  
16 though, Your Honor.

17 THE COURT: I can consider the conduct in deciding  
18 where to sentence, whether he's charged or not.

19 MR. DAVIS: Initially, he was charged with  
20 misdemeanors. And I credit Mr. Dalke's comment, because he is  
21 in a position to know how these cases were evaluated. But if  
22 this was such a -- if this was the highlight of the offense in  
23 the Capitol, which seems to be the case now, one would think  
24 that they would have known about it beforehand. If there were  
25 only two entry points to the Capitol, it seems like people would

1 have looked at that.

2 THE COURT: It's hard to see the defendants. It's  
3 very hard to see them. I had a hard time seeing them watching  
4 the videos multiple times.

5 MR. DAVIS: I guess the best I can say, Your Honor, is  
6 that we don't know if it would have happened had the whole crowd  
7 not surged forward and had someone not put his hands on both of  
8 their backs and pushed them forward.

9 We don't know what Mr. Johnson was saying. There is  
10 nothing that conclusively establishes that he was yelling at the  
11 officers. There's nothing.

12 In terms of the fist pump, I disagree. Mr. Johnson was  
13 pointing where he was going. I don't think that's a fist pump.  
14 Actually, I don't even know if Mr. Dalke was saying it was  
15 Mr. Johnson. He was speaking in terms of senior and junior at  
16 the same time. But in any event, if Mr. Johnson, Daryl Johnson  
17 raised his hand, I would submit that it was to point where they  
18 were going.

19 And they did leave. He did leave right after that. If  
20 anything -- I mean, it may not be a written expression of  
21 remorse, but he did leave right afterwards, and I think that's  
22 an indication that he recognized that something was amiss.

23 THE COURT: He left and went upstairs. He didn't  
24 leave the Capitol.

25 MR. DAVIS: Because he couldn't get out those doors.

1 He went upstairs and left the Capitol from that level. I mean,  
2 I -- there's not much else I can say to that, Your Honor. It's  
3 easy to -- again, I will switch back to the next morning  
4 quarterback argument. It's very easy to take this apart, but  
5 you have to realize, these were split-second events, and the  
6 most egregious event that the United States is arguing about  
7 lasted mere seconds. And you just don't know.

8 I mean, again, this wasn't planned. And we all know that.  
9 Mr. Johnson did not bring any weapons to the Capitol. He didn't  
10 bring any protective gear. He didn't break anything. He didn't  
11 move anything. He didn't take anything. And he didn't assault  
12 anyone. He moved with the flow of the crowd. Should he have  
13 done that? Probably not. Should he have pulled himself out of  
14 it? Probably so. He didn't do it. And he's taking a felony  
15 for that conduct.

16 You look at some of the other individuals, again, Jeffrey  
17 Smith, removing the benches, goes away, comes back. He assists  
18 the crowd in forcing the doors open. I'm reading from the  
19 government's sentencing memorandum in his case. He's screaming  
20 with his face inches apart of the officers, "Stand down. We're  
21 getting in there one way or another." And it was unclear  
22 whether he actually physically assaulted the officers. He  
23 cheered and encouraged rioters on while he was videotaping as he  
24 walked through the Capitol. He sent a message out that "America  
25 is not going to take a fraudulent election." I mean, these



1 statements were comments of what he was doing, not what he was  
2 observing. And finally, I think the most important thing is, he  
3 lied to law enforcement when he interviewed with them. And  
4 that's not the case with Mr. Johnson. Now, he did get 90 days,  
5 but he isn't going to carry the pain and life-altering  
6 consequences of a felony conviction.

7 And that last fellow that ended up pleading to a  
8 misdemeanor and got 35 days, his conduct was very similar to  
9 Mr. Johnson's, but look at his criminal history. It was  
10 ridiculously long. I mean, he had convictions for possession of  
11 a controlled substance. He had a long-standing addiction. He  
12 had convictions for assault with a deadly weapon, another  
13 conviction for carrying an unregistered firearm. He was allowed  
14 to plead to a misdemeanor and pretty much the same conduct.

15 And you take Frank Scavo, he got 60 days. He was allowed  
16 to plead to a misdemeanor. Now, he wasn't standing there with  
17 the Johnsons, but he posted statements, a blow-by-blow reporting  
18 to the public about how they were storming the Capitol and  
19 taking it over and they weren't going to take this, they're  
20 going to take the Capitol back. And he went as far as setting  
21 up on his social media a picture of him driving a bus where he's  
22 labeled it "the sedition express." And he was allowed to plead  
23 to a misdemeanor, and he got 35 days.

24 Mostofsky has his own issues. We all know the case. He's  
25 all over the media, and he was the poster boy. In my

1 experience, if you're the poster boy of January 6, you pay a  
2 price, and he paid a price. But even looking at what he did, he  
3 pled to a number of offenses in addition to the 231(a)(3). He  
4 stole a bulletproof vest and a shield. He chased Goodman up the  
5 steps. He entered the same way the Johnsons did the building.  
6 And I think perhaps most importantly, the sentencing guidelines  
7 were 12 to 18 months, and Judge Boasberg varied from the  
8 guidelines and imposed a sentence of four months less than the  
9 12 months that he should have been sentenced to. But he's very  
10 different. It's apples and oranges.

11 Again, I think the social media comment that Mr. Johnson  
12 posted, I mean, honestly, some of them I honestly believe  
13 they're First Amendment protected speech. He can comment on  
14 what he observed.

15 THE COURT: All of that is First Amendment protected.

16 MR. DAVIS: He's not encouraging anyone to do  
17 anything. He's commenting. It's bravado maybe, but he's not  
18 encouraging anyone to do anything. He's not telling them we're  
19 going to start a revolution. He's commenting on what his  
20 observations of that crowd were.

21 In terms of general deterrence for him, I think a man with  
22 his background, he's 51 years old. He's been married for 30  
23 years. He has no substance abuse problems. And but for this  
24 offense, his background is clean enough to run for political  
25 office. I mean, it's just -- for him to be left with a felony

1 is more than -- more severe than anything the other individuals  
2 we talked about had levied against them. I mean, for someone  
3 like him, this has life-altering consequences. I mean, he's  
4 from a small town.

5 As Your Honor knows from the many letters that were sent on  
6 his behalf, for one thing, you don't get that many letters  
7 unless you really are a person of strong character and have  
8 conducted yourself as a model citizen all those years. You just  
9 don't get letters like that.

10 The presentence report recommended 30 days. I think that's  
11 unreasonable given these circumstances. I think given the fact  
12 that he is now a convicted felon for the rest of his life, I  
13 think a low-end guideline sentence is more than reasonable and  
14 appropriate here. I just feel anything else would be excessive  
15 and out of line with the other sentences that have been imposed  
16 in this case.

17 THE COURT: Okay. Mr. Dalke, any response to the  
18 characterization of the other cases?

19 MR. DALKE: Not particularly, Your Honor. The only  
20 case we haven't discussed that was mentioned was Mostofsky. I  
21 will say, he did have a higher sentencing guidelines. He was  
22 involved on the west front that we can tell. I will say the one  
23 thing, though, is once he was inside, he posed for pictures. He  
24 posed for videos. In comparison to the Johnsons, once inside,  
25 didn't go to the public media. They went to go to breach the

1 east side of the Capitol and let more rioters in, to continue  
2 the assault, to continue the breach, to continue the  
3 insurrection.

4 So I think there are a lot of overlaps in the Mostofsky  
5 case. I do think he had some enhancements, whereas the Johnsons  
6 may have been one back. And we don't have the best video, you  
7 know. Once they're in that scrum, it's hard to tell whether  
8 they laid hands on officers or not. Mostofsky, we have videos  
9 showing he did have the physical confrontation with officers.  
10 So his guidelines are higher, and that would make sense.

11 But we're not asking for eight months or twelve months  
12 here. We're asking for three to six months.

13 THE COURT: One question I had is Mr. Davis just said  
14 that the conduct of Mr. Smith, that defendant, was more severe,  
15 I believe, and that he was at the front. I understood you to  
16 say he wasn't, he didn't remove the iron benches at the front of  
17 the closed doors, but he was actually behind the defendants; is  
18 that correct?

19 MR. DALKE: That is correct, Your Honor. So there's  
20 been some -- as you would expect, there's a lot of facts. So he  
21 moved the benches. And this was I don't know how many minutes,  
22 but I would say approximately ten give or take five minutes  
23 before this push at the doors. So before the crowd had  
24 congregated, before anyone was there, he moved those benches  
25 that had been placed in front of those doors. Law enforcement

1 saw it. They stopped it.

2 He then later kind of continued to circle that area, and  
3 there were points prior to the push where he's yelling and he's  
4 in close proximity to those officers. Again, he leaves and goes  
5 into the rotunda and then comes back.

6 So at the time of the actual push, he's over by the stairs  
7 almost out of that video, sees the push happening, comes over,  
8 and joins it kind of behind the Johnsons. But when he's in  
9 close proximity to the officers, it's not during the push. It's  
10 minutes before that push occurred.

11 THE COURT: What about Mr. Davis's argument that Daryl  
12 Johnson moved forward because he was pushed from behind?

13 MR. DALKE: I don't think the video evidence supports  
14 that. And I can play it again for Your Honor. An individual  
15 does come and place a hand on the back, I think, at one point of  
16 each defendant, but you can clearly tell they are moving forward  
17 with their own volition. This isn't someone ramming into them.  
18 And they put their hands on the backs of the people in front of  
19 them. They did the same thing.

20 And again, you don't get to the front, the apex of that  
21 scrum, the threshold of those east rotunda doors and the breach  
22 without the other people behind you. I mean, it was a  
23 collective group effort.

24 But I don't think you can say -- I don't think there can be  
25 a reasonable interpretation of the video that they were

1 involuntarily shoved into that and involved in that push because  
2 someone else put them there. It was their conduct. It was  
3 their actions through and through.

4 THE COURT: Okay. I will give Mr. Orenberg a chance  
5 to allocute, and then I will give both defendants a chance to  
6 speak if they would like to do so. I know they submitted  
7 letters to the Court, which I've reviewed and I appreciate.

8 MR. ORENBERG: Yes, Your Honor. May I proceed?

9 THE COURT: Yes.

10 MR. ORENBERG: Thank you, Your Honor.

11 Your Honor, much of what I was going to say about the  
12 conduct that has been discussed today or viewed on the video has  
13 already been said by Mr. Davis. Unless the Court has any  
14 specific questions about the conduct of my client as seen in  
15 that video, I would like to move on to other areas. But I'm  
16 incorporating by reference and echoing exactly what Mr. Davis  
17 has said about Mr. Daryl Johnson with respect to being --  
18 someone from behind placing a hand or hands on their backs,  
19 pushing them forward, what happened immediately afterwards,  
20 pointing to going upstairs. They were not raising their hands  
21 in any sort of further harm, in any sort of defiant gesture.  
22 They were just getting ready to move away and to move away  
23 quickly from what was going on there.

24 Mr. Dalke talks about the social media posts that my client  
25 made later that day. I make the same arguments that Mr. Davis

1 said and that the Court observed, that these are expressions  
2 that are protected by the First Amendment. He did these social  
3 media posts in an expression of bravado, an expression of the  
4 heat of the moment or the moments or the days following what  
5 happened there on January 6.

6 As I said in my memo and what is clear and, I think, the  
7 Court understands, there was no preplanning by Mr. Daniel  
8 Johnson regarding what happened, what transpired that day within  
9 the United States Capitol.

10 And I'm just looking at my notes from what Mr. Dalke said.  
11 They may have been a part of the first group that was inside,  
12 but as the Court clearly understands, they moved through the  
13 Capitol in somewhat of a faster series of motions and found  
14 themselves in that east rotunda door area. What transpired  
15 there just happened for a few seconds. Then they moved on.  
16 They moved upstairs. And they moved outside.

17 As Mr. Davis pointed out on behalf of Daryl Johnson, taking  
18 a felony charge in this case is a life-altering event and  
19 perhaps even more so for younger Mr. Daniel Johnson. He's 30  
20 years old. He has his entire life ahead of him.

21 As I pointed out in my sentencing memorandum, he is  
22 currently working as an on-site supervisor and sales for a  
23 roofing company some 60-plus hours a week, and he is hoping to  
24 assume management control of the company and to buy the company  
25 in the foreseeable future. I say to the Court that, as

1 Mr. Johnson has told me, that any sentence of incarceration will  
2 be detrimental if not irreparable to his purchasing and managing  
3 the company.

4 As Mr. Davis pointed out, I'm going to belabor this point  
5 again, the felony moniker, the consequences of a felony on  
6 Mr. Daniel Johnson are going to be dramatic in the next 30 to  
7 40, maybe 50 years of his productive work life when he goes to  
8 apply for business lines of credit, if he's successful in  
9 purchasing the company, when he goes to engage in contracts with  
10 other vendors. I mean, all of this is going to come up, and  
11 he's going to have to explain it, and hopefully, it won't be an  
12 impediment to his hopes and dreams of owning the company in the  
13 near future.

14 Again, you know, we submitted some letters in support of  
15 Mr. Johnson. I think they demonstrate to the Court that he is  
16 well thought of. He is well respected within the community.

17 Your Honor, I mean, the fact that Daniel Johnson -- the  
18 mere fact that Daniel Johnson accepted responsibility very early  
19 on, as Mr. Dalke said, when he was arrested, he had a candid  
20 conversation interview with law enforcement authorities. He did  
21 not try to run or minimize what had happened, what he had done  
22 in the United States Capitol that day. He has been cooperative  
23 throughout the entire proceedings of this case.

24 He's had his little bumps. We've already discussed the  
25 criminal history. We understand and accept the Court's decision



1 on the criminal history category of II. As I'm sure the Court  
2 is well aware, that puts him within Zone B of the sentencing  
3 guidelines table. And I know the Court is aware of this, but  
4 when someone is in Zone B, the Court has discretion to impose a  
5 sentence of probation with a condition requiring at least four  
6 months of intermittent confinement, community confinement, or  
7 home detention, which would satisfy the minimum term of  
8 imprisonment specified in the guideline range.

9 And so I am asking for a term of probation for Mr. Daniel  
10 Johnson with the special condition of home detention with work  
11 release privileges so that he can continue to work, he can move  
12 towards his hopes and dreams of purchasing this company in the  
13 foreseeable future. He is willing to do community service  
14 hours. I think this is an excellent opportunity for the Court  
15 to impose a large number of community service hours so he can  
16 give something back to the community.

17 Unless the Court has any other questions, that is what I am  
18 asking the Court to do for Mr. Daniel Johnson.

19 THE COURT: Okay. Mr. Orenberg, what about Daniel  
20 Johnson turning around and using his back to get more leverage  
21 to push against the crowd with the officers in front of the  
22 door?

23 MR. ORENBERG: Again, Your Honor, as Mr. Davis  
24 observed and told the Court, these are actions that happened in  
25 seconds. They were reactionary to the crowd, what was going on

1 there in that, as the Court has called it, the scrum of the  
2 crowd. Someone was pushing them from behind. Unfortunately,  
3 Mr. Johnson then turned around and perhaps -- it looks like he  
4 was using his back, but again, my observation, it's not totally  
5 clear exactly what was going on in there. It was a very  
6 confusing moment in time.

7 THE COURT: All right. Let me start with Mr. Daryl  
8 Johnson. You have the right to make a statement. Again, I've  
9 reviewed your letter, which I appreciate greatly. But if you  
10 would like to make any additional comments, you have the right  
11 to do so.

12 DEFENDANT DARYL JOHNSON: Thank you. Thank you, Your  
13 Honor.

14 January 6 was, obviously, not one of my shining moments in  
15 my life for many, many reasons. But the emotional toll on  
16 myself and my family prior to January 6 really can't be  
17 overstated. With the COVID shutdowns that the whole world was  
18 dealing with, unchecked rioting and looting in many of our  
19 cities, burning of our American cities, the whole world seemed  
20 to be upside down. Wrong was called right, or it was excused.  
21 It just felt to me as if the whole world went a little crazy.

22 I've worked my whole life to secure my family's future and  
23 to have a legacy to leave to my family, and it almost completely  
24 vanished in just a few short months during the summer of 2020.  
25 And it felt so unfair and so wrong, and I felt hopeless or I

1 felt that it was beyond my ability to control.

2 As I look back on, you know, the events, the life events  
3 that happened prior to me going on January 6, it's obvious that  
4 I was in a pretty emotional state. I just didn't -- with  
5 everything that happened, I just really didn't have a good  
6 understanding of emotionally where I was at, what was going on,  
7 the worry and the fretting of potentially losing our business.  
8 Our business spent most of 2020 on the edge of having to be  
9 closed. And I was simply just not in a good place when I took  
10 off to go to Washington, D.C., on January 6.

11 And all I can say is that even being there was a huge  
12 mistake. Being able to look back on it, I wouldn't do it. I  
13 wouldn't even attend the rally, to do it again. If similar  
14 circumstances were to come about, I wouldn't even go. But at  
15 the time, I just didn't understand where -- I don't want to use  
16 the word "fragile," but just the emotional position that I was  
17 in and the challenges and stress that I was dealing with.

18 So the best way that I can describe where I'm at as I've  
19 watched the video and I've reflected on that day is heart-  
20 breaking. I'm -- I've spent over two decades of my life helping  
21 people with their marriages, and many, many times, the marriages  
22 that came in to get help from me, a lot of it was pain and  
23 anguish from other circumstances, not necessarily so much  
24 circumstances in their life but just pain and anguish of life.  
25 Right? Sexual abuses, different things like that.

1           And for me to -- as I look back on it and I realize that  
2           our legislators and the officers and the aides and everybody  
3           that works and does business in and around the Capitol, for me  
4           to be a part of something that caused that pain and anguish that  
5           they're going to have to deal with really causes me heartbreak.  
6           And I'm truly, truly sorry. If it was possible to go to each  
7           one of those persons that were affected and ask for forgiveness  
8           and tell them how sorry I am, I would do it in a heartbeat.  
9           Obviously, it's just not possible.

10           So living with a felony, obviously, changes the direction  
11           of our business. It's going to change the direction of our  
12           family. As I learn to live with the knowledge that the felony  
13           conviction is going to take away some of the hopes and dreams  
14           that we had for our family, international travel, places in the  
15           world now that I'll never be able to go and things that we will  
16           never be able to do as a result of living with a felony, that  
17           changes our entire family.

18           And that's no small fact. That's no small consequence.  
19           It's something that my wife and I and my kids, we worked super  
20           hard and put in untold amount of hours to build a legacy and  
21           build a future and build a business for our family so we can  
22           live a good life and retire well. And a lot of those things  
23           that we desired to do are now gone.

24           So I guess all I can say is I understand that my behavior  
25           was wrong. I understand the consequences of having to live with

1 a felony and deal with this is my fault. There is no excuse.  
2 There is no -- I can't blame this on anybody else. I've got to  
3 own it. This is me. It's something that I did, and again, like  
4 I say, I'm heartbroken.

5 But I'm a hard-working man. We've literally busted our  
6 rear our entire life to get to where we are at, and I spent 51  
7 years of my life and never ever been in a situation like this.  
8 I made a horrible, horrible mistake, just not understanding what  
9 was going on in the moment at the Capitol, not understanding  
10 emotionally where I was at, just the whole circumstance  
11 surrounding, you know, COVID-19 and the shutdowns. I didn't  
12 understand it, and that's my mistake, and there's consequences.

13 But I can tell you this, Your Honor: You won't see me back  
14 in your court again. I've learned my lesson. I won't allow  
15 myself to be put in this situation ever again.

16 THE COURT: Thank you, Mr. Johnson.

17 Mr. Daniel Johnson, would you like to make a statement?

18 DEFENDANT DANIEL JOHNSON: Yes, Your Honor. Thank  
19 you.

20 I would like to start by apologizing to everybody who  
21 worked at the Capitol and was present at the Capitol that day  
22 for what I put them through, their families through.

23 My actions that day are not excusable in any way, shape, or  
24 form. I don't think they -- I mean, it was really out of  
25 character for me. None of this was my intention or even a

1 thought in my mind when we decided to go to D.C. and when we  
2 arrived and even when we were at the rally all the way up to the  
3 Capitol. It never was a thought of to do -- to have any of this  
4 happen or have any of this behavior. My behavior is  
5 inexcusable.

6 I've worked hard my entire life. I work 60 hours a week,  
7 sun up to sun down. I always strive for excellence in  
8 everything I do. And in one day, I've compromised everything  
9 that I've worked for. I ask forgiveness for my actions. I  
10 realize my behavior was unacceptable. I will have life-long  
11 consequences as a result. And rest assured, this entire  
12 experience has been life-changing for me.

13 THE COURT: Thank you, sir.

14 MR. DAVIS: Your Honor, Mrs. Johnson wanted to address  
15 the Court briefly, and I believe she's going to address both her  
16 husband and her son.

17 THE COURT: Good morning, ma'am.

18 MRS. JOHNSON: Your Honor, these are good men.  
19 They're hard-working men. They both grew up knowing how to put  
20 in a day's work. They care about their community. They're  
21 involved with their community. And they're devoted to their  
22 family and friends.

23 This past year has been absolutely devastating to our  
24 entire family. The threats that my daughter and I have received  
25 on social media because of this, the threats that were made to

1 both Daryl and Daniel has put an unimaginable amount of stress  
2 on the entire family. What's decided today doesn't affect just  
3 Daryl and Daniel, but it affects myself and the rest of the  
4 family and has the potential to cause severe setback to my  
5 health as I have a heart condition. The added stress has not  
6 been good for that.

7 You're seeing a blip in a lifetime for both of them. They  
8 made a terrible error in judgment in the heat of the moment.  
9 But I just want you to know this is not who they are, and they  
10 have to live with the consequences of their actions for the rest  
11 of their lives.

12 I'm begging the Court to show mercy. You both literally  
13 and metaphorically hold my heart in your hands as you make your  
14 decision.

15 Thank you.

16 THE COURT: Thank you, Ms. Johnson.

17 All right. Is there any reason why sentence should not be  
18 imposed at this time?

19 MR. DAVIS: None on behalf of Mr. Johnson.

20 MR. ORENBERG: None on behalf of Daniel Johnson.

21 MR. DALKE: None on behalf of the government, Your  
22 Honor.

23 THE COURT: All right. So before I impose a formal  
24 sentence, I want to give my reasons for the record for both  
25 defendants.

1           In addition to considering the guidelines that are  
2 advisory, I'm also required to consider the various factors  
3 outlined in Title 18 United States Code Section 3553(a) in  
4 deciding what sentence to impose. I'm familiar with all of  
5 those factors, and I've considered them all here, even if I  
6 don't mention each one.

7           Let me just say at the outset, this is an extremely  
8 difficult case. On the one hand, looking at the nature and the  
9 circumstances of the offense, like all of the Capitol riot  
10 cases, this is a very, very serious offense.

11           Here, the defendants stand convicted of felony civil  
12 disorder offense. Although the Court appreciates that there's  
13 no evidence that the Johnsons came to D.C. on January 6  
14 intending to break the law or to engage in any civil  
15 disobedience, at some point that day, their intentions went well  
16 beyond exercising their First Amendment rights at a political  
17 rally.

18           After attending the stop the steal rally, the defendants  
19 joined a large crowd that walked towards the Capitol. And  
20 although they were not a part of the initial violent mob that  
21 breached the west side of the Capitol building, they did breach  
22 leaf barriers that surrounded the exterior of the building, and  
23 they climbed through a broken window to enter the Capitol  
24 building shortly after that initial pack of rioters overcame  
25 police officers. And they did so within minutes of the others,



1 I think eight minutes after the initial violent breach occurred.  
2 So they clearly witnessed that breach.

3 At the time members of Congress had gathered to certify the  
4 vote count of the Electoral College for the 2020 presidential  
5 election. When the defendants entered the Capitol at  
6 approximately 2:20 p.m., they went first to the crypt and then  
7 to the rotunda. At approximately 2:37 p.m., they walked out of  
8 the rotunda towards the east rotunda doors, where they  
9 encountered a large mob that was pressuring three police  
10 officers who were standing in front of the east rotunda doors  
11 not letting a large mob from the outside enter the Capitol.

12 As the officers tried to prevent the east rotunda doors  
13 from being breached, the mob, including the defendants  
14 themselves, appear to have yelled and chanted at the officers.  
15 We've watched this chilling footage here today. The two other  
16 videos we didn't watch that the Court has watched multiple times  
17 have audio in them. As the government pointed out, in these  
18 videos, you can hear the blaring alarms. You can hear the loud  
19 yelling and the chants by the rioters. We can't hear exactly  
20 what the defendants said, but it appears that they too were  
21 yelling. And regardless whether they were yelling, they  
22 certainly could hear the chants that are audible on the video.

23 The officers were under intense pressure to step aside, and  
24 they were far outnumbered. As they stood pinned against the  
25 east rotunda doors, the crowd, including the defendants, charged

1 towards them. It was a very, very dangerous situation. And  
2 although neither defendant -- the Court can't tell, but I will  
3 assume that there's no evidence that the defendants actually  
4 touched the officers. The video clearly shows them at the front  
5 of the mob charging towards the officers along with the rest.  
6 The mob rushed the police line and pushed through the officers  
7 to open the east rotunda doors, allowing an even larger mob of  
8 rioters to flood the Capitol building.

9 The Court recognizes that this conduct lasted only seconds,  
10 and again, there's no evidence that either of the Johnsons  
11 planned when they entered the Capitol to engage in this conduct.  
12 But I do believe that they both did more than just move with the  
13 crowd. I think that they intentionally stepped forward, and  
14 again, whether they made statements or not, they were surrounded  
15 by others who were yelling at the officers. There's no question  
16 what the intent of the mob was, and there's no question that the  
17 defendants knew officers were present defending those doors and  
18 that they knowingly put these officers at great risk of harm.  
19 We watched on the video, one of the videos, it wasn't the video  
20 we watched today here, but the government is correct that an  
21 officer or two noticeably walks away, limping away from that  
22 experience that they faced as they were in great danger.

23 The defendants didn't stop there. Instead, they climbed  
24 another flight of stairs to the third floor, and while walking  
25 through the hallway, Daniel Johnson appeared to attempt to open

1 a door to a private room. The room appeared to be locked. The  
2 defendants continued walking down the hallway, and eventually,  
3 they exited the building around 2:46 p.m., approximately 26  
4 minutes after they initially entered the building.

5 I find the defendants' criminal conduct on that date,  
6 particularly their efforts to shove aside officers to assist the  
7 larger mob of rioters attempting to enter the Capitol building,  
8 I find it not only demonstrated extreme disrespect for the law  
9 and the democratic process, it also put those law enforcement  
10 officers at enormous risk, and it heightened the risk to members  
11 of Congress, the vice president, and their staffers whom the  
12 officers were defending.

13 As we all know, the Capitol riot resulted in physical harm  
14 and millions of dollars of property damage to the Capitol,  
15 although the Court recognizes that there's no evidence that  
16 either defendant caused physical injury or property damage, but  
17 again, their actions there at the east rotunda doors could have  
18 led to serious injury. And for that reason, the nature and  
19 seriousness of this offense weighs in favor of imposing a term  
20 of imprisonment.

21 The defendants' post-offense statements also undermine any  
22 suggestion that their actions on January 6 showed a momentary  
23 lack of judgment. As the government's noted, Daryl Johnson  
24 posted disturbing comments days later and even more than a month  
25 after the Capitol riot. Daniel Johnson made clear that he had

1 been trying to find a way into the house speaker's chamber that  
2 day.

3 I do agree with the defendants that the aggravated role  
4 adjustment is not appropriate in this case, nor is a minor role  
5 adjustment. Again, neither defendant helped plan the events of  
6 January 6. Again, the evidence suggests that neither had any  
7 intention of engaging in violence when they traveled to D.C. or  
8 even when they entered the Capitol.

9 Even so, contrary to statements in their sentencing  
10 memoranda and statements today, I don't see their conduct as  
11 equivalent to that of the average January 6 participant that  
12 day. I do find that their conduct was aggravated at the east  
13 rotunda doors. Again, there's no doubt they put the officers'  
14 safety at extreme risk in a way that most January 6 defendants,  
15 not all, but most did not.

16 On the other hand, turning to the Johnsons' history and  
17 characteristics, there are a number of positive factors here  
18 that the Court's considered. As defense counsel has pointed  
19 out, the letters that I have received on behalf of both of them  
20 are highly supportive. They show that both of them have been  
21 very solid employees who have done good works in the community,  
22 and they have a lot of support, both family support and  
23 community support.

24 And although their remorse was slow in coming, I credit  
25 both defendants for their early acceptance of responsibility and

1 their truthful interviews with the FBI. I also believe that the  
2 statements they've made today and in their letters to the Court  
3 are genuine and heartfelt.

4 I do view particularly for Daryl Johnson, I view this  
5 conduct as truly aberrant behavior. I do appreciate what he  
6 said about the emotional toll of 2020 and the pandemic, and I  
7 thought Daryl Johnson showed a lot of self-awareness when he  
8 talked about not being in a good place and how wrong seemed  
9 right in those months in and around January 6, and he was in a  
10 highly charged emotional state at the time.

11 He is 51 years old, is married with two adult children.  
12 He's not had any criminal history whatsoever in his life. He  
13 received an associate degree in 1991. He owns and operates a  
14 number of successful businesses, including laundromats, a  
15 tanning salon, and a manual car wash. The PSR reflects that he  
16 has substantial assets from these businesses. In addition to no  
17 known criminal history, he has no known substance abuse or any  
18 mental health concerns.

19 And as the letters to the Court attest, he's led truly an  
20 exemplary life. To this point, he's been active in his  
21 community and has done a great deal over the last decade to help  
22 the neediest customers in the laundry industry he serves. He's  
23 also volunteered as a marriage counselor and has done various  
24 other good works in his neighborhood and his community.

25 Turning next to Daniel Johnson, he's 32 years old. He

1 resides with his parents. He graduated from high school with a  
2 dual enrollment diploma and is employed as a roofer. He has  
3 ambitions to buy the roofing business and run that in the near  
4 future. He's never been married, does not have any children.

5 He has three prior convictions, all misdemeanor  
6 convictions. They include a disorderly conduct and a possession  
7 of marijuana case. The PSR reflects ongoing marijuana use  
8 during the pendency of his supervision in this case.

9 Again, the letters that the Court's received on behalf of  
10 Daniel Johnson as well makes clear he's a hard worker. He  
11 applies himself, gives 100 percent in his job. And I would note  
12 also that the statements of Ms. Johnson support all the letters  
13 that I've received as well. So I don't want to in any way  
14 minimize the good work both defendants have done in their jobs  
15 and their employment and in the community.

16 Looking at the range of sentences available here, both  
17 defendants face up to five years' imprisonment, a fine of up to  
18 \$250,000, and a term of supervised release of not more than  
19 three years.

20 Consistent with the plea agreement, I will impose  
21 restitution. Both defendants agree to pay \$2,000 to defray  
22 costs associated with the January 6 damage to the Capitol.

23 Moving on to the need to avoid unwarranted sentencing  
24 disparities, we've talked a lot about these cases that the  
25 government's highlighted in its sentencing memorandum as

1 analogous here. As I stated at the outset, I don't understand  
2 why a number of the other defendants also are not charged with a  
3 felony offense.

4 With that said, I do think the felony charge is appropriate  
5 here, given the criminal conduct, and I would simply encourage  
6 the government going forward to ensure that it is treating  
7 similarly situated defendants similarly. The government's  
8 credibility is undermined with the court, the judges when  
9 similarly situated defendants appear to not be charged with  
10 similar offenses based on the underlying conduct. But again, to  
11 be clear, I do think the felony charge is appropriate in light  
12 of the evidence before the Court.

13 Looking at -- so far as the Court is aware, only one other  
14 Capitol riot defendant has been sentenced to a civil disorder  
15 felony violation under Section 231(a)(2) -- 231(a), and that's  
16 Aaron Mostofsky, who was sentenced by Judge Boasberg to eight  
17 months' incarceration. Like the Johnsons, he was a part of a  
18 crowd that pushed against officers who were attempting to keep  
19 rioters from entering the Capitol building.

20 But Mostofsky is distinguishable from this case in a number  
21 of respects, including the fact that he pled guilty to two other  
22 offenses. He pled guilty to a theft offense for stealing police  
23 protective riot gear, as well as a misdemeanor trespass offense.  
24 He also had no criminal record, but his guideline range was 12  
25 to 18 months in prison, significantly higher than either

1 defendant in this case.

2 The other Capitol rioters who pled guilty in connection  
3 with the breach of the east rotunda doors all entered pleas to a  
4 misdemeanor. And yet, the conduct in this case is similar in  
5 many respects to those other cases involving Jeffrey Smith,  
6 Frank Scavo, and Mark Simon, all of whom were sentenced --  
7 although they were allowed to plead guilty to misdemeanors, they  
8 were sentenced to terms of imprisonment ranging from 35 days' to  
9 90 days' imprisonment. I'm not going to go through each case.  
10 We've discussed some of the similarities and the differences.  
11 But I do find that they are analogous cases in many respects.

12 Before I announce the sentence I will impose in this case,  
13 I do want to make clear that I'm not punishing the defendants  
14 for any statements they've made, nor am I punishing them for  
15 coming to D.C. to exercise their First Amendment rights to  
16 protest and participate in political activity. They had every  
17 right to do those things.

18 What makes this case so difficult for the Court is the  
19 nature of the offense here, and that makes it more -- as I said,  
20 more egregious than most of the January 6 cases that I've  
21 sentenced to date, the fact that these defendants subjected law  
22 enforcement officers to a substantial threat of harm as the  
23 officers stood guard at the east rotunda Capitol doors, pinned  
24 against the doors, facing a large, violent crowd both inside and  
25 outside the Capitol. And even though, I'm assuming for purposes



1 of the sentence, that neither defendant touched the officers, I  
2 do believe they heightened the risk to those officers by joining  
3 the crowd and pressing forward with the crowd. And I don't  
4 credit the argument that they were pushed forward solely by  
5 people behind them. I saw them stepping forward. I think they  
6 were leaning forward. I think they were fully engaged, though I  
7 do appreciate that this was, perhaps, impulsive behavior, split-  
8 second decision that only lasted -- I think the whole scrum was  
9 around 20 seconds.

10 And yet, that is the case with a lot of crimes that this  
11 Court has to face in the courtroom. Many, many defendants are  
12 held responsible for impulsive decisions they made in seconds.

13 But these actions are what distinguish this case from many  
14 of the other January 6 trespassing cases for which I've imposed  
15 probationary sentences with or without periods of home  
16 detention.

17 But for -- I will start with Daryl Johnson. But for his  
18 incredibly exemplary record to date in the community and in his  
19 work and in his family, I would sentence him to a longer period  
20 of prison absent his exemplary role. But consistent with the  
21 recommendation of the Probation Office, I will impose a sentence  
22 of 30 days in prison.

23 I will also order him to pay a \$2,000 fine in addition to  
24 \$2,000 in restitution to help further defray the costs of his  
25 imprisonment and the costs associated with the Capitol riot.

1 I will also follow the recommendation of Probation and  
2 sentence Daniel Johnson to a term of imprisonment based on his  
3 criminal history and his resulting guideline range and his  
4 actions that day, which I do view as more egregious. He was the  
5 first to enter the Capitol. He did step forward first. He did  
6 try to open a door in the Capitol.

7 And for those reasons, again coupled with his criminal  
8 history, I will sentence him to four months in prison. But  
9 because of his limited financial assets, I will not order him to  
10 pay a fine, but only the \$2,000 of restitution.

11 I believe these sentences are sufficient but not greater  
12 than necessary to achieve the goals of sentencing. Considering  
13 the nature of the offense and the other relevant factors, I  
14 believe these sentences are adequate to protect the community  
15 and to fulfill the goals of deterrence, both specific and  
16 general, as well as to punish the defendants for their criminal  
17 acts.

18 So I will now read the formal sentence of the Court, and I  
19 will give both sides a chance to object before I impose  
20 sentence.

21 So with respect to Daryl Johnson, pursuant to the  
22 Sentencing Reform Act and in consideration of the provisions of  
23 Title 18 United States Code Section 3553, as well as the  
24 advisory guideline range, it is the judgment of the Court that  
25 you are hereby committed to the custody of the Bureau of Prisons

1 for a term of 30 days as to Count 1. You're further sentenced  
2 to serve a supervised release term of one year as to Count 1.  
3 In addition, you're ordered to pay a special assessment of \$100.

4 While on supervision, you shall abide by the mandatory  
5 conditions as well as the standard conditions of supervision.  
6 The mandatory conditions include not committing another federal,  
7 state, or local crime, not unlawfully possessing a controlled  
8 substance, refraining from any unlawful use of a controlled  
9 substance.

10 You must cooperate with the collection of DNA as directed  
11 by the Probation Office.

12 You must make restitution, and those payments can be made  
13 to the Architect of the Capitol in the amount of \$2,000, and the  
14 payment shall be made to the Clerk of the Court for the U.S.  
15 District Court. You're also ordered to pay a fine in the amount  
16 of \$2,000. The defendant may pay interest on restitution and a  
17 fine of more than \$2,500 unless the restitution or fine is paid  
18 in full before the 15th date after the date of judgment. So the  
19 lump sum payment of \$2,000 is due immediately, payments in equal  
20 monthly installments of \$200 over a period of ten months to  
21 commence 30 days after release from imprisonment to a term of  
22 supervision.

23 You also must provide the Probation Office access to any  
24 requested financial information. You must not incur new credit  
25 charges or open additional lines of credit without approval.

1           Within 60 days from release of incarceration or placement  
2 on supervision, I will order a re-entry progress hearing. At  
3 that time I will consider -- I will consider a progress report  
4 that Probation shall prepare, and if there's a need for a  
5 hearing, I will order a hearing. I will also at that time  
6 consider whether it's appropriate to transfer supervision to the  
7 home district.

8           To the extent you have not validly waived your right to  
9 appeal as a part of the plea agreement, you do have the right to  
10 appeal the conviction and the sentence imposed by this Court.  
11 You must do so within 14 days after the Court enters judgment.  
12 And if you are unable to pay the cost of appeal, an appeal can  
13 be filed without any cost to you.

14           Before I order that sentence be imposed, Mr. Davis,  
15 Mr. Dalke, and Ms. Field, are there any objections to the  
16 sentence announced with respect to Mr. Daryl Johnson?  
17 Mr. Davis?

18           MR. DAVIS: No legal objections, Your Honor.

19           THE COURT: All right. Mr. Dalke?

20           MR. DALKE: No, Your Honor.

21           THE COURT: All right. Ms. Field?

22           PROBATION OFFICER: No, Your Honor. Thank you.

23           THE COURT: Okay. All right. So I will order that  
24 that sentence be imposed.

25           In addition, is there a motion to dismiss the remaining

1 charges?

2 MR. DALKE: Yes, Your Honor. The government moves to  
3 dismiss Counts 2 through 5 of the superseding indictment, which  
4 was filed December 20, 2021.

5 THE COURT: All right. That motion is granted.

6 And is there any objection to allowing Mr. Johnson to  
7 voluntarily surrender when directed by Probation?

8 MR. DALKE: No objection from the government, Your  
9 Honor.

10 THE COURT: All right. So in light of his performance  
11 on pretrial supervision, I will permit Mr. Daryl Johnson to  
12 voluntarily surrender.

13 All right. With respect to Mr. Daniel Johnson, again  
14 pursuant to the Sentencing Reform Act and in consideration of  
15 the provisions of Title 18 United States Code Section 3553, as  
16 well as the advisory sentencing guidelines, it is the judgment  
17 of the Court that you are committed to the custody of the Bureau  
18 of Prisons for a term of four months as to Count 1. You're  
19 further sentenced to serve a supervised release term of 12  
20 months as to Count 1. In addition, you're ordered to pay a  
21 special assessment of \$100.

22 While on supervision, you shall abide by the mandatory  
23 conditions, as well as the standard conditions of supervision.  
24 Those include not committing another federal, state, or local  
25 crime, not unlawfully possessing a controlled substance,

1 refraining from any unlawful use of a controlled substance,  
2 submitting to one drug test within 15 days of placement on  
3 supervision and at least two periodic drug tests thereafter,  
4 cooperating in the collection of DNA, and making restitution to  
5 the Architect of the Capitol in the amount of \$2,000.

6 Restitution payments shall be made to the Clerk of Court. I  
7 find you don't have the ability to pay a fine. Therefore, I  
8 waive imposition of a fine. I also waive imposition of interest  
9 on the restitution payments. You must pay the restitution  
10 balance at a rate of no less than \$200 each month.

11 You must provide the Probation Office access to any  
12 requested financial information, authorize the release of any  
13 financial information.

14 On supervision, you must submit to substance abuse testing  
15 to determine if you've used a prohibited substance. You must  
16 also participate in inpatient or outpatient substance abuse  
17 treatment and follow the rules and regulations of that program.

18 Again, within 60 days of release from incarceration, I will  
19 ask that the Probation Office submit a report summarizing the  
20 defendant's status and compliance with release conditions, and I  
21 will determine at that point whether it's necessary to hold a  
22 re-entry progress hearing. I will also consider at that time  
23 whether to transfer supervision to the home district.

24 The financial obligations are immediately payable to the  
25 Clerk of Court, and again, Probation shall release the

1 presentence investigation report to all appropriate agencies who  
2 shall return the report to the Probation Office upon completion  
3 or termination from treatment.

4 And consistent -- to the extent you have not validly waived  
5 your right to appeal the conviction or sentence imposed, you do  
6 have that right to appeal. In order to exercise that right, you  
7 must file any appeal within 14 days of the date that the Court  
8 enters judgment, and if you are unable to afford the appeal, the  
9 appeal will be filed without cost to you.

10 Again, I will ask the parties, is there any objection to  
11 the sentence imposed -- the sentence announced? Mr. Orenberg?

12 MR. ORENBERG: Your Honor, Mr. Johnson is asking if  
13 the Court would reconsider the sentence imposed so that he may  
14 have work release conditions.

15 THE COURT: You mean instead of imprisonment?

16 MR. ORENBERG: Correct.

17 THE COURT: No. I did consider whether to impose a  
18 split sentence, and I've decided against it.

19 MR. ORENBERG: Your Honor, we're asking for a judicial  
20 recommendation for FPC Yankton, which is in South Dakota near my  
21 client's home, and it may be the same request by Mr. Davis.

22 THE COURT: Okay. I will make that recommendation to  
23 the Bureau of Prisons.

24 Any objection to allowing Daniel Johnson to voluntarily  
25 surrender?

1 MR. DALKE: Not from the government, Your Honor, and  
2 no objection to the sentence.

3 THE COURT: Okay. Any objections from Probation?

4 PROBATION OFFICER: No, Your Honor. Thank you.

5 THE COURT: All right. So that is the sentence I  
6 will -- the sentence I just announced will be the sentence  
7 imposed.

8 Is there a motion to dismiss the remaining charges with  
9 respect to Daniel Johnson?

10 MR. DALKE: Yes, Your Honor. Again, the government  
11 moves to dismiss Counts 2 through 5 of the superseding  
12 indictment as to Daniel Johnson as well.

13 THE COURT: All right. That motion is granted.

14 Are there any other remaining issues we need to address?  
15 Ms. Field, do you need time with counsel or the defendants now?

16 PROBATION OFFICER: Your Honor, my intent was to call  
17 both of them after the hearing just to go over the instructions  
18 for self-surrender.

19 THE COURT: Okay. All right. Mr. Davis,  
20 Mr. Orenberg, anything else we need to address?

21 MR. DAVIS: Your Honor, in addition to the  
22 recommendation for the FPC, federal prison camp, in Yankton, I  
23 would also ask, in the event that Yankton is full, that Your  
24 Honor as an alternative recommend federal prison camp in Duluth,  
25 Minnesota.



1 THE COURT: All right.

2 MR. DAVIS: FPC Duluth. And I also noticed  
3 Mr. Johnson is paying a \$2,000 fine, \$2,000 in restitution. He  
4 retained counsel. As Your Honor knows, I came in to the case  
5 after Mr. Abbenante's illness kicked in. He suffered severe  
6 financial consequences. I would ask that he not be held  
7 accountable to pay the costs of imprisonment.

8 THE COURT: To the extent that was ambiguous, I didn't  
9 intend to impose a fine and the cost of imprisonment. I'm  
10 imposing a fine to defer some of the costs of imprisonment and  
11 the damage to the Capitol.

12 MR. DAVIS: And then the final request would be that  
13 the two be incarcerated at the same facility and enter at the  
14 same time, if possible. I've requested that before, and the  
15 Bureau of Prisons has actually honored it in the past.

16 THE COURT: I certainly have no objection to that.  
17 Is that something Probation can help facilitate?

18 PROBATION OFFICER: Your Honor, I don't personally  
19 have experience with that. I know that the Court can make the  
20 recommendation, and the BOP will review that. If that's  
21 something the Court would like me to look into, I can.

22 THE COURT: That's all right. I'll make the  
23 recommendation.

24 MR. DAVIS: Thank you, Your Honor.

25 THE COURT: Okay. Anything else?

1 MR. ORENBERG: No, thank you, Your Honor.

2 MR. DAVIS: Nothing on behalf of Daryl Johnson, Your  
3 Honor.

4 MR. DALKE: Your Honor, my apologies. I think this  
5 was covered, but if not, the government does formally mark and  
6 move the video Exhibits 1, 2, and 3, which were discussed and  
7 presented to the Court, just to move them into the record, and  
8 the government will add those to the public database following  
9 this hearing.

10 THE COURT: All right. Okay.

11 Thank you, Mr. Daryl and Daniel Johnson, I wish you luck.  
12 I don't know that I will see you. I don't suspect that you will  
13 violate conditions of supervision.

14 And I know this is a tough consequence, and I just --  
15 understand that the nature of the offense was such that the  
16 Court could not justify, given the risk that you put those law  
17 enforcement officers to, not imposing a sentence of  
18 imprisonment.

19 So I don't expect to see you all again. I wish you all the  
20 best. Thank you.

21 (Proceedings adjourned at 12:04 p.m.)  
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CERTIFICATE OF OFFICIAL COURT REPORTER

I, Sara A. Wick, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

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

/s/ Sara A. Wick

June 22, 2022

SIGNATURE OF COURT REPORTER

DATE