

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	.	
	.	
Plaintiff,	.	CR No. 21-0198 (TSC)
	.	
v.	.	
	.	
TROY ANTHONY SMOCKS,	.	Washington, D.C.
	.	Thursday, October 21, 2021
Defendant.	.	1:50 p.m.
. . . . .	.	

TRANSCRIPT OF SENTENCING HEARING  
BEFORE THE HONORABLE TANYA S. CHUTKAN  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government:	MICHAEL J. FRIEDMAN, AUSA U.S. Attorney's Office 555 Fourth Street NW Washington, DC 20530 (202) 252-7566
For the Defendant:	JOHN L. MACHADO, ESQ. Law Office of John Machado 503 D Street NW Suite 310 Washington, DC 20001 (703) 989-0840
Court Reporter:	BRYAN A. WAYNE, RPR, CRR U.S. Courthouse, Room 4704-A 333 Constitution Avenue NW Washington, DC 20001 (202) 354-3186

Proceedings reported by stenotype shorthand.  
Transcript produced by computer-aided transcription.

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

2 THE DEPUTY CLERK: Your Honor, we have criminal  
3 action 20-198, United States of America versus Troy Smocks.  
4 We have Mr. Michael Friedman representing the government,  
5 Mr. Michael Machado representing the government, we have  
6 Ms. Aidee Gravito representing probation, and we're in an  
7 in-person hearing.

8 THE COURT: All right. Good afternoon, everyone.  
9 Good afternoon, Mr. Smocks.

10 THE DEFENDANT: Good afternoon.

11 THE COURT: We are here for the sentencing of Troy  
12 Anthony Smocks, who pleaded guilty to Threats in Interstate  
13 Communications in violation of 18 U.S.C. § 875(c) on September  
14 29, 2021.

15 I just want to caution anyone who might be calling in,  
16 listening to this hearing, that it is not permitted to record  
17 any portion of this hearing, audio or taking screenshots or any  
18 such thing. Since we are in person, obviously, the screenshot  
19 doesn't apply, but no one who is participating or calling in to  
20 the hearing is allowed to record any portion of the hearing.  
21 That is barred by our federal and local court rules.

22 Now, in preparation for this hearing, I have received and  
23 reviewed the following: the presentence report and sentencing  
24 recommendation from the probation department, a copy of the  
25 plea agreement signed by Mr. Smocks, a copy of the sentencing

1 memorandum from the government, sentencing memorandum from  
2 Mr. Smocks, obviously the statement of offense.

3 Is there anything else that I'm missing here? Those are  
4 the documents that I've reviewed. And the plea agreement. I  
5 don't know if I said that.

6 Mr. Friedman, you don't plan on any witnesses or anything,  
7 do you?

8 MR. FRIEDMAN: No.

9 THE COURT: Mr. Machado, does that comport with your  
10 understanding?

11 MR. MACHADO: Yes, Your Honor. We filed a memorandum  
12 in aid of sentencing as well.

13 THE COURT: It was not given to me a week before  
14 sentencing, by the way.

15 MR. MACHADO: My apologies, Your Honor.

16 THE COURT: All right. The final presentence report  
17 and sentencing recommendation were filed in this matter on  
18 October 4, 2021. Both parties raised a number of objections  
19 to the report's contents. Specifically, the government objected  
20 on September 24 to paragraphs 20 to 24, 27, 28, 61, and 90.  
21 Mr. Smocks objected on the same date to page 2, paragraphs 20,  
22 24, 27, 28, 61, 81, 85, 90, 98, and 102.

23 I'll address each objection in turn, offer the parties  
24 an opportunity to provide any additional information not  
25 contained in the papers already presented, and rule accordingly.

1           As a preliminary matter, none of these objections touch  
2 on the factual recitation of the circumstances of the offense  
3 that Mr. Smocks has pleaded guilty to.

4           "A district court may consider relevant information  
5 without regard to its admissibility under the rules of evidence  
6 applicable at trial, provided that the information has  
7 sufficient indicia of reliability to support its probable  
8 accuracy." That's 5 U.S. Sentencing Guideline at §6A1.3.

9           "A district court errs in relying on a presentence  
10 report's findings when they are internally contradictory,  
11 wildly implausible, or in direct conflict with other evidence."  
12 And I'm citing from *United States v. Pinnick*, 47 F.3d 434, 437.

13           Now let me start with Mr. Smocks' individual objections.  
14 With regard to Mr. Smocks' aliases, Mr. Smocks objects to the  
15 inclusion of aliases on page 2 of the presentence report and  
16 denies their usage. The Probation Office indicates that this  
17 information was obtained by Mr. Smocks' National Crime  
18 Information Center -- that's NCIC -- record.

19           Mr. Machado, do you have any other information that you  
20 want on the record in this instance other than Mr. Smocks'  
21 denial?

22           MR. MACHADO: Besides the comments that are in our  
23 objection, no, Your Honor. We'd just comment that Kenneth  
24 Harris is the name of his nephew, and Vincent Shelton is the  
25 name of his brother. So there may be some confusion.

1 THE COURT: That's neither here nor there. They may  
2 still be aliases that Mr. Smocks has used, and certainly NCIC  
3 records indicate that he's used those aliases. Do you have  
4 anything you want to add to the record that disputes or rebuts  
5 that?

6 MR. MACHADO: No, Your Honor.

7 THE COURT: Okay. Mr. Friedman, do you have any  
8 further information on that issue?

9 MR. FRIEDMAN: No.

10 THE COURT: Okay. Given this information was obtained  
11 from NCIC records, the Court finds that the information from the  
12 NCIC database has sufficient indicia of reliability to support  
13 its probable accuracy per §6A1.3, and page 2's content as to  
14 Mr. Smocks' aliases will be adopted by this court.

15 With regard to Mr. Smocks' military service that is in  
16 paragraph 81 of the presentence report, Mr. Smocks objects to  
17 the statement in paragraph 81 that he did not serve in the  
18 United States Army, and I note for the record that at his plea,  
19 at the completion of his plea, Mr. Machado stood up and wanted  
20 to represent to the Court that Mr. Smocks, while not a retired  
21 officer, previously served in the military.

22 Mr. Smocks states that he was stationed at Fort Sill for  
23 three years and received an Army Achievement Medal and the  
24 distinguished Howitzer Section Medal. The Probation Office  
25 indicates that a Bureau of Prisons Supervised Release Plan

1 signed and dated by Mr. Smocks in 2012 indicates that Mr. Smocks  
2 has not served in the U.S. armed forces, U.S. military reserves,  
3 and/or U.S. National Guard.

4 Further, the Probation Office maintains that the Department  
5 of Defense indicates that it has no record of Mr. Smocks ever  
6 serving in the armed forces of the United States.

7 Mr. Machado, do you have any further information you  
8 wish to add to the record other than Mr. Smocks' assertion?

9 MR. MACHADO: Your Honor, with regard to the  
10 presentence report that was prepared back in -- I think it  
11 was 2005 --

12 THE COURT: By whom?

13 MR. MACHADO: I'm sorry?

14 THE COURT: By whom?

15 MR. MACHADO: In Kansas -- or -- in Texas. There was  
16 some issue. They could not find the records, and in fact there  
17 had been an agreement by the government --

18 THE COURT: I don't have it. Did you proffer it?  
19 Did you give me the page? I mean, you're just telling me stuff  
20 here, Mr. Machado. You've disputed this assertion on September  
21 24. Do you have a page from that report? Can I see that  
22 report?

23 MR. MACHADO: I do not. I thought it was in the hands  
24 of the presentence report writers.

25 THE COURT: What paragraph?

1 MR. MACHADO: It was not cited. I'm talking about the  
2 presentence report from prior.

3 THE COURT: Mr. Machado, you have come into this court  
4 to dispute assertions made in the presentence report, and you're  
5 telling me about a prior presentence report that has not been  
6 presented to me, that I haven't seen, it's your characterization  
7 only. That's not sufficient. Is that what you have?

8 MR. MACHADO: At this point, yes, Your Honor.

9 THE COURT: All right. Mr. Friedman?

10 MR. FRIEDMAN: Nothing additional from us.

11 THE COURT: All right. The Court finds -- I would  
12 note that not only paragraph 81 -- just a minute.

13 All right. The Court finds that the information the  
14 Probation Office gleaned from the 2012 supervised release plan,  
15 as well as the representations from the Department of Defense,  
16 are reliable enough to avoid the bar set in *Pinnick*, and Section  
17 81's content as to Mr. Smocks' military service will be adopted  
18 by the Court.

19 I'm sorry. Probation Officer, can you refer me to the  
20 paragraph of the report where it refers to the Department of  
21 Defense? I'm looking for that. I just want to make sure it's  
22 in the report and I'm not imagining it.

23 MR. FRIEDMAN: Judge?

24 LAW CLERK: 68.

25 THE COURT: Oh, thank you. Paragraph 68 of the

1 presentence report indicates that the defendant was born in  
2 Kansas City, Missouri. In 1981 -- this is the defendant's  
3 version -- that he enlisted at the age of 19 in the United  
4 States Army and was stationed at Fort Sill in Lawton, that he  
5 served as an active-duty Post Staff College for three years, and  
6 that after the end of his service, he relocated to Kansas City.  
7 The government asserts that they received no information -- oh.

8 The government claims that they received information  
9 obtained from the Department of Defense which states, "There is  
10 no record of the defendant having served in the United States  
11 military." Is that correct, Mr. Friedman?

12 MR. FRIEDMAN: Yes. We had provided to Your Honor  
13 in earlier briefing, on earlier litigated issues in this case,  
14 the sworn testimony of an FBI agent who testified in Texas  
15 shortly after the defendant was arrested, and he testified  
16 that the FBI had communicated with the Department of Defense --  
17 and I'm sure I'm paraphrasing, but that the Department of  
18 Defense had no record of anyone by the defendant's name serving  
19 in the U.S. --

20 THE COURT: That's correct. I remember that.  
21 We were litigating the Speedy Trial Act violation issue.

22 MR. FRIEDMAN: Right.

23 THE COURT: Right. Okay. So my finding is not only  
24 based on the representations made from the 2012 supervised  
25 release plan as provided by the Probation Office, but also from



1 the testimony proffered by the FBI agent during litigation on  
2 a motion to dismiss on Speedy Trial Act violation.

3 All right. There are some purported typographical errors  
4 in paragraphs 85 and 98. Mr. Smocks objects to the phrasing of  
5 both paragraphs. In paragraph 85 he indicates that the \$2,000  
6 the Probation Office lists as an expense before his arrest is  
7 his rent payment. Probation Office observes that the beginning  
8 of the paragraph indicates that the accounting is from before  
9 his arrest.

10 In paragraph 98 he indicates that the paragraph regarding  
11 a recommendation to the Bureau of Prisons is incomplete. The  
12 Probation Office responds by noting that paragraph 98's content  
13 continues in the next paragraph as indicated by the colon in  
14 paragraph 98. Just a minute.

15 Mr. Machado, do you want to be heard on that or want to add  
16 any further information to your challenge to those paragraphs?

17 MR. MACHADO: No, Your Honor. My pointing out on  
18 85 was it listed the defendant reported his monthly expenses  
19 including, colon, \$2,000 and then semicolon, and then explaining  
20 400 for groceries --

21 THE COURT: You have to speak slower, Mr. Machado.

22 MR. MACHADO: My apologies, Your Honor. The way  
23 that it was written is defense reported his monthly expenses  
24 included, colon, \$2,000, semicolon, 400 for groceries, 158 for  
25 utilities, etc. So I was just explaining the \$2,000 was for the

1 rent specifically.

2 THE COURT: All right.

3 Mr. Friedman, do you wish to be heard on that?

4 MR. FRIEDMAN: No.

5 THE COURT: All right. The Court finds there's  
6 no difference of opinion, really, as to paragraphs 85 and 98.  
7 Both paragraphs 85 and 98 will be adopted by this court. I  
8 understand your explanation, Mr. Machado; I just don't think  
9 it's necessary.

10 With regard to the total base offense level that's in  
11 paragraphs 20 to 24, 27, 28, 90, and 102, both the government  
12 and Mr. Smocks object to the presentence recommendation's  
13 inclusion of a four-level addition to Mr. Smocks' base level  
14 for actions resulting in substantial disruption of public,  
15 governmental, or business functions or services, or (b), a  
16 substantial expenditure of funds to clean up, decontaminate,  
17 or otherwise respond to the offense, as well as a one-level  
18 decrease for acceptance of responsibility by timely notifying  
19 authorities of the intention to enter a plea of guilty.

20 Both parties indicate that the plea agreement indicates  
21 a base offense level of 10 is appropriate for Mr. Smocks. I'm  
22 going to discuss these contentions later and make no finding now  
23 as they do not touch on the circumstances of the offense.

24 With regard to Mr. Smocks' incarceration status as of  
25 January 2006, that's paragraph 61, this paragraph concerns a

1 corroboration of certain information about Mr. Smocks with his  
2 niece. Specifically, paragraph 61 indicates that information  
3 about Mr. Smocks' personal and family data remains  
4 uncorroborated since contact with Mr. Smocks' niece was not  
5 established by a phone call. This phone call would have  
6 confirmed Mr. Smocks' incarceration status as of January 2006.

7 The government objects, requesting that further  
8 corroboration be included. Mr. Smocks objects, stating that  
9 his niece is still waiting for the phone call. To this the  
10 Probation Office responds that information was corroborated from  
11 a docket search of the U.S. District Court for the Eastern  
12 District of Texas. My understanding is that Probation was  
13 unable -- at least Probation in the report was unable to make  
14 contact with Mr. Smocks' niece.

15 Mr. Machado, do you have any further information not in  
16 the record you wish to add?

17 MR. MACHADO: Your Honor, I followed up with  
18 Ms. Harris. She indicated that she had never received a call.  
19 I've been able to reach her every time I've called her, but I'm  
20 in no position to say she was or was not available.

21 THE COURT: Did Ms. Harris submit any letters or  
22 anything?

23 MR. MACHADO: No.

24 THE COURT: Okay. Mr. Friedman, do you have any  
25 further information not in the record to add?

1 MR. FRIEDMAN: No.

2 THE COURT: And, Probation, I believe you made a  
3 representation regarding your attempts to contact Ms. Harris?

4 PROBATION OFFICER: Yes, Your Honor.

5 THE COURT: Could you state your name for the record?

6 PROBATION OFFICER: Yes, Your Honor. Aidee Gravito  
7 for the Probation Office. I did contact -- I attempted to  
8 contact the defendant's niece. There was no voicemail  
9 activated. Voicemail message was not able to be left on an  
10 answering machine. There was no answer on the telephone either.

11 THE COURT: All right. Thank you.

12 The Court finds that the docket search conducted by  
13 the Probation Office has sufficient indicia of reliability  
14 to support its probable accuracy per §6A1.3, and therefore  
15 paragraph 61's content will be adopted by this court.

16 All right. Mr. Friedman, does the government have any  
17 further objection not yet mentioned to any of the factual  
18 determinations set forth in the presentence report?

19 MR. FRIEDMAN: No, Your Honor.

20 THE COURT: Mr. Machado?

21 MR. MACHADO: Court's indulgence.

22 I believe the Court has covered them with the exception,  
23 obviously, of the sentencing issue.

24 THE COURT: All right. Yes.

25 Mr. Machado, have you and Mr. Smocks read and discussed the

1 presentence report?

2 MR. MACHADO: Yes, we have, Your Honor.

3 THE COURT: All right. And are there any disputed  
4 issues of fact -- any further objection not yet mentioned to  
5 any of the factual determinations as set forth in the report?

6 MR. MACHADO: None as to factual determinations.

7 THE COURT: Mr. Smocks, are you fully satisfied with  
8 the services of your attorney, Mr. Machado, in this case?

9 THE DEFENDANT: Yes, ma'am.

10 THE COURT: And do you feel you've had enough time  
11 to talk with him about the probation department's presentence  
12 report and the papers that were filed by the government in  
13 connection with the sentencing?

14 THE DEFENDANT: Yes, ma'am.

15 THE COURT: All right. Thank you.

16 All right. Hearing no further objection, I will accept the  
17 factual recitation set forth in the presentence report regarding  
18 the circumstances of the offense, and therefore the facts as  
19 stated in the presentence report will be my findings of fact  
20 for the purpose of this sentencing. Well, having dealt with  
21 the objections, I should have said, not hearing no objections,  
22 having dealt with the objections that have been stated regarding  
23 the report.

24 Now, with regard to the guidelines, the presentence report  
25 lays out the Probation Office's calculation of the advisory

1 guideline range that applies to this case. The calculation  
2 was done using the 2018 guidelines manual and is as follows:

3 Beginning with the guidelines offense level, the applicable  
4 guideline in this case is §2A6.1, which has a base offense level  
5 of 12. The Probation Office maintains, although this is  
6 challenged by both the defense and the government, that when  
7 an offense resulted in (a) substantial disruption of public,  
8 government, or business functions or services, or (b) substantial  
9 expenditure to clean up, decontaminate, or otherwise respond to  
10 the offense, a four-level increase is applicable pursuant to  
11 §2A6.1(b)(4).

12 The government has also represented that Mr. Smocks has  
13 demonstrated acceptance of responsibility in a manner that  
14 entitles him to a two-level reduction under §3E1.1(a) and that  
15 Mr. Smocks assisted authorities in the investigation and  
16 prosecution of this matter in a manner that entitles him to an  
17 additional one-level reduction under §3E1.1(b).

18 Therefore, before I consider any departures or variances,  
19 the Probation Office has calculated Mr. Smocks' total offense  
20 level to be 13. I realize that that is different than what the  
21 government and the defense have calculated it to be, and I will  
22 address that.

23 Turning to the applicable criminal history category, the  
24 presentence investigation has found that Mr. Smocks has one  
25 prior conviction that receives criminal history points in the

1 guidelines manual and that this conviction gives him a criminal  
2 history point subtotal of 3. This puts Mr. Smocks in criminal  
3 history category II. Based on the offense level and criminal  
4 history category I've just discussed, the presentence report  
5 calculates the guidelines sentencing range to be 15 months to  
6 21 months of imprisonment.

7 Now, having determined the applicable guideline range,  
8 or at least recommended in the presentence report, the next  
9 step would be for me to consider departures and variances.  
10 The presentence report does not include any departure grounds;  
11 however, the plea agreement varies from the presentence report  
12 on its computation of Mr. Smocks' offense level. There's  
13 further disagreement as to whether Mr. Smocks' criminal history  
14 category is II or III.

15 First, as to the offense level, the plea agreement states  
16 that the four-level increase contemplated by §2A6.1(b)(4) should  
17 not apply to Mr. Smocks. The first social media post that  
18 Mr. Smocks sent on January 6, 2021, was before the start of the  
19 riot and referred to conduct to occur on January 19.

20 The second social media post that Mr. Smocks sent out on  
21 January 6 was sent after the riot had concluded. Thus, both  
22 parties agree Mr. Smocks' posts were not responsible for any  
23 disruption or expenditure, and he should not be subject to the  
24 four-level increase.

25 The plea agreement also does not include a one-level

1 reduction under §3E1.1(b) for acceptance of responsibility by  
2 timely notifying authorities of the intention to enter a plea  
3 of guilty.

4 Second, the plea agreement and subsequent memoranda filed  
5 by the government and defendant indicate that Mr. Smocks may  
6 have two applicable prior convictions rather than just the one  
7 indicated by the presentence report. The 15-year period used by  
8 §4A1.2(e)(1) for including prior convictions or sentences in a  
9 criminal history category calculation would begin on January 6,  
10 2006.

11 Mr. Smocks has one prior conviction that falls into this  
12 range. Government counsel states, and defendant does not rebut,  
13 that a prior Missouri conviction from 2003 may extend into this  
14 period. If it did, Mr. Smocks would have a criminal history  
15 point subtotal of 6 rather than the 3 indicated in the  
16 presentence report.

17 The plea agreement thus indicates a base offense level of  
18 12 under §2A6.1 with a two-point reduction for acceptance of  
19 responsibility under §3E1.1, giving Mr. Smocks a total estimated  
20 offense level of 10.

21 With a criminal history category of II, this would result  
22 in a guidelines sentencing range of 8 months to 14 months of  
23 imprisonment. With a criminal history category of III, this  
24 would result in a guidelines sentencing range of 10 months to  
25 16 months of imprisonment.



1 Do the parties agree as to my analysis of the various  
2 ranges under the different criminal history categories,  
3 Mr. Friedman?

4 MR. FRIEDMAN: Yes.

5 THE COURT: Mr. Machado?

6 MR. MACHADO: Yes, Your Honor. But just to clarify,  
7 the issue of the one-point reduction, the additional one, in  
8 our arguments did not apply because the base offense level being  
9 12, it doesn't get the additional --

10 THE COURT: Yes. I agree. Yes. Thank you.

11 Now, Section 3553 requires me to consider a variety  
12 of factors including the sentencing ranges the guidelines  
13 prescribe, which I've discussed, and also the applicable  
14 penal statutes. Just a minute.

15 The charge of Threats in Interstate Communications in  
16 violation of 18 U.S.C. § 875(c) carries a statutory maximum  
17 penalty of five years' imprisonment or a probation term of one  
18 to five years. If a term of imprisonment is imposed, the  
19 statutes provide that Mr. Smocks face a supervised release range  
20 of up to three years. Per the guidelines, that range is one to  
21 three years.

22 The statute of conviction sets a maximum fine of up to  
23 \$250,000, while the guidelines fine range is between \$5,500 and  
24 \$55,000. A special assessment of \$100 per count is mandatory.  
25 The statutory and guidelines restitution provisions are

1 inapplicable because there is no identified victim. I'll note  
2 for the record that Mr. Smocks, as part of his plea agreement,  
3 has agreed to pay \$500 in restitution.

4 Counsel, have I stated accurately the statutory framework  
5 here? Mr. Friedman.

6 MR. FRIEDMAN: I just want to check on the restitution  
7 you raised, Your Honor.

8 THE COURT: Sure. Let me double check myself.

9 This is a felony, so I may have the....

10 MR. FRIEDMAN: I don't recall there being restitution.

11 THE COURT: Hold on. Let me just check. I'm so used  
12 to having it in these cases.

13 Oh, you're right. Paragraph 12 of the plea agreement --  
14 hold on. You're right. It does not provide for the typical  
15 \$500 restitution. All right. Although the plea agreement  
16 states that Mr. Smocks understands that I have an obligation  
17 to determine whether and in what amount mandatory restitution  
18 applies in this case at the time of sentencing under 18 U.S.C.  
19 § 3663(a). Okay. Thank you for pointing that out.

20 Mr. Machado?

21 MR. MACHADO: Your Honor, just because we're talking  
22 financial amounts, I just want to make sure that the Court knows  
23 he does have to pay the \$100.

24 THE COURT: Right. \$100 is mandatory per felony  
25 conviction.

1 MR. MACHADO: Correct. Thank you, Your Honor.

2 THE COURT: All right. Going now to -- I'm going  
3 to skip ahead. Here are my options given the disagreement with  
4 Probation and the parties with regard to Mr. Smocks' criminal  
5 history category and the enhancements. It appears that I have  
6 four choices here.

7 So I can, one, rely on the presentence report's calculation  
8 of a final offense level and not include Mr. Smocks' 2003  
9 Missouri conviction in calculating his criminal history  
10 category.

11 Two, I can rely on the presentence report's calculation of  
12 a final offense level and include Mr. Smocks' 2003 conviction --  
13 the first one was not included. The second one would include  
14 Mr. Smocks's 2003 conviction in calculating the criminal history  
15 category.

16 Three, I can rely on the plea agreement's calculation and  
17 the government and defense's assertion that that is a correct  
18 calculation of a final offense level and not include Mr. Smocks'  
19 2003 Missouri conviction in calculating the criminal history  
20 category.

21 And four, I can rely on the plea agreement's calculation  
22 of a final offense level and include the 2003 conviction in  
23 calculating the criminal history category. A lot of options  
24 there, but I've thought about this.

25 And with regard to the offense level calculation, the

1 presentence report and the plea agreement vary on two fronts,  
2 first over the four-level special offense increase, and second,  
3 over a one-level acceptance of responsibility decrease. The  
4 presentence report indicates that the four-level -- I've already  
5 said why, because of disruption of public, governmental, or  
6 business functions or substantial expenditure of funds to clean  
7 up.

8 There's very little case law, especially in this circuit,  
9 analyzing this, but other courts have indicated that district  
10 courts should consider the interconnectedness between the threat  
11 in question and the substantial disruption or expenditure  
12 caused.

13 Having reviewed some of those cases, one is *United States*  
14 *v. Bourquin*. The other is *United States v. Anwar*, *United States*  
15 *v. Mohammed*, and *United States v. Dudley*. I do find that  
16 Mr. Smocks' threats were not the cause of the January 6 riots.  
17 There's no quantifiable effect attributable to his threats, nor  
18 has the government alleged any.

19 For its part, the government, per the plea agreement,  
20 does not seek the application of 2A6.1(b)(4) and the subsequent  
21 four-level increase. Though the authority is not controlling,  
22 it is compelling enough for me to decline to give the four-level  
23 increase, and therefore I will make the applicable final offense  
24 level 10 as contemplated by the plea agreement.

25 Okay. The question, then, is whether to include

1 Mr. Smocks' 2003 Missouri conviction in considering a criminal  
2 history category. Doing so, if I include it, it changes  
3 Mr. Smocks' criminal history category to III instead of II and  
4 gives him a guideline range of 10 to 16 months instead of 8 to  
5 14 months. The plea agreement and the government's sentencing  
6 memorandum indicate the possibility of this conviction  
7 qualifying for consideration under the guidelines, but neither  
8 proves that it does.

9 Therefore, upon consideration, the Court will not apply  
10 Mr. Smocks' criminal history category. I just don't have  
11 sufficient corroboration to make me confident that that  
12 enhancement is applicable. The conviction does not apply to  
13 Mr. Smocks' criminal history category per §4A1.2(e)(1), and  
14 therefore Mr. Smocks' criminal history category is II.

15 The guidelines suggest a range of 8 to 14 months'  
16 imprisonment for this category or 1 to 5 years of probation.  
17 Supervised release may be between 1 and 3 years.

18 All right? So that's where I am. I end up, despite some  
19 indication that the probation -- I believe the presentence  
20 report recommendations and findings were definitely reasonable  
21 based on their interpretation of the facts as they saw them, but  
22 I agree that the government and the defense seem oddly united on  
23 this, and I don't think there's sufficient enough evidence to go  
24 against both of their assertions. So it's going to be what was  
25 contemplated in the plea agreement.

1 MR. FRIEDMAN: Your Honor?

2 THE COURT: Yes.

3 MR. FRIEDMAN: Just to clarify, the plea agreement  
4 did acknowledge the uncertainty.

5 THE COURT: Yes. As it always did. And I explained  
6 that very firmly to Mr. Smocks at the plea, that that was simply  
7 an estimate, that I was not bound by that estimate, I don't have  
8 to go along with it, and I didn't. But I do believe that  
9 there's a colorable case to be made for the enhancement and for  
10 the category of III for sure, but I'm just not -- in the end, I  
11 come down to believing that there's not enough.

12 MR. FRIEDMAN: Thank you, Your Honor.

13 THE COURT: But I was prepared to add the enhancement  
14 had I found there was sufficient basis, for sure.

15 Okay. Any further objection, Mr. Machado, before I go on?

16 MR. MACHADO: Your Honor, and I apologize for being  
17 the person doing this, but the Court mentioned the minus 1 as  
18 part of what it was considering.

19 THE COURT: Well, it's no longer applicable.

20 MR. MACHADO: Just wanted to make sure your record  
21 was clear.

22 THE COURT: Yes. Given the range that I found, that  
23 one-level reduction is not applicable.

24 MR. MACHADO: And we are not seeking it, obviously,  
25 for those reasons.

1 THE COURT: Okay. Thank you.

2 Now, after calculating the sentencing guidelines and  
3 departures and deciding on whether to apply the enhancements  
4 in this case, I will now hear from the parties with regard to  
5 what they believe an appropriate sentence will be.

6 Mr. Friedman?

7 MR. FRIEDMAN: Yes, Your Honor.

8 Your Honor, this was a serious crime. The making of  
9 threats, the transmission of them through social media  
10 interstate communications in a manner that the threats were  
11 widely disseminated, is a serious violation of our federal  
12 criminal law.

13 What makes it more serious is that the threats really  
14 involved the threat of political violence of the sort that is  
15 anathema of our democratic system and culture. The defendant's  
16 social media account falsely purported to identify him as a  
17 retired military officer, which would reasonably make the reader  
18 of the posts give extra credence to such a threat given the  
19 appropriately high esteem that our society places on a retired  
20 military officer.

21 And the defendant, this wasn't a one-time thing. It was  
22 more than one threatening social media post on the same day  
23 directed at different groups of people. And as we explained  
24 in our sentencing memorandum, there was a history of vitriolic  
25 language from the social media account from the time period of

1 the November 2020 election and going forward.

2 Turning to the defendant's history and characteristics,  
3 the defendant clearly has a very lengthy criminal history, with  
4 around 18 prior criminal convictions. What those criminal  
5 convictions largely have in common is efforts by the defendant  
6 to obtain money from victims by false pretenses, sometimes by  
7 dramatically false pretenses, including pretending to be federal  
8 agents, law enforcement officers.

9 The defendant also has a history of violating terms of  
10 probation and violating terms of supervised release, resulting  
11 at times in revocations of supervised release in the past.

12 But the vast majority of the defendant's criminal  
13 convictions occurred more than 20 years ago, and that's the  
14 reason why the criminal history score is not so high as one  
15 might imagine. The presentence report indicates that the  
16 defendant recently successfully completed a term of supervised  
17 release in 2019.

18 The defendant does have some history of employment, a  
19 high school equivalency degree at least, and he did the right  
20 thing by accepting responsibility for his misconduct and  
21 pleading guilty in this case.

22 The sentence that Your Honor imposes, of course, must  
23 promote respect for the law. It must provide for a just  
24 punishment. The sentence should send a message in a form of  
25 punishment to this defendant and as a deterrent to the community



1 that threatening statements made in interstate communications  
2 are serious, that they will not be tolerated, that they can  
3 and will result in criminal prosecution and punishment from  
4 the Court.

5 And in this case it's -- of course, there's a need for the  
6 sentence to avoid any unwarranted sentence disparities, and if  
7 Your Honor imposes a sentence within the sentencing guidelines  
8 range, there won't be any unwarranted sentence disparities.

9 So given all the issues and in the unique circumstances  
10 of this case, we do think that a sentence at the low end of the  
11 guidelines range is the appropriate one, which in this case  
12 would essentially be the same as a sentence of time served.

13 It's very important, we believe, that Your Honor impose a  
14 lengthy term of supervised release given the criminal history  
15 and the long-ago but not-that-long-ago history of some probation  
16 violations and supervised release revocations. We think it  
17 very important that Your Honor impose a full three-year term  
18 of supervised release, during which time the defendant should be  
19 ordered to participate in vocational training with the Probation  
20 Office. Thank you, Your Honor.

21 THE COURT: Thank you, Mr. Friedman.

22 Mr. Machado?

23 MR. MACHADO: Thank you, Your Honor.

24 Your Honor, since January 15, my client has been detained.  
25 And it took approximately over two months, as the Court knows,

1 because of some litigation we had getting him here to this  
2 location.

3 Now, we are in an interesting time where we're dealing with  
4 a pandemic as well as having Mr. Smocks incarcerated, which  
5 essentially has the two strongest things that I can mention in  
6 that regard is that, as the Court saw from some documentation,  
7 Mr. Smocks, while he was in Grady County in Oklahoma, he  
8 contracted COVID.

9 The verdict is still out, no pun intended there, with  
10 regard to the aftereffects or long-term effects of COVID.  
11 Apparently, since he did have it, hopefully that's not an issue  
12 that he'll have to be dealing with, but given his age, there may  
13 be some effects.

14 But more importantly, while he's been at the jail, his  
15 conditions have been rougher than usual in that he's had to  
16 be 23 hours a day within his cell. There's been lockdowns for  
17 various reasons, and apparently Mr. Smocks has not -- there have  
18 not been any violations, and he's behaved in an appropriate  
19 manner while at the jail.

20 I would ask also the Court to consider the fact that,  
21 speaking to the factors of 3553, first of all, obviously,  
22 Mr. Smocks has accepted responsibility, and he acknowledges that  
23 his threats were inappropriate and has therefore pled guilty to  
24 the charges. I realize that any threat is a bad threat, but I  
25 would -- not to minimize the threat itself, but we don't have

1 any -- the threats that he did make were ones that were of  
2 a general population. While still being wrong, it wasn't  
3 individual people who had to be concerned about his individual  
4 threat.

5 THE COURT: Wait. He made threats against members  
6 of Congress and tech company executives. Those aren't people?  
7 I mean, granted, they're groups of people. He didn't call out  
8 Bill Gates or anything, but that's not specific enough?

9 MR. MACHADO: Well, Your Honor, my point is that he  
10 was saying, this person is going to have to -- you know -- that  
11 is a lot worse than a larger group.

12 THE COURT: I don't know. You might want to ask  
13 the members of Congress who were hiding under the desks in  
14 the Capitol that day.

15 MR. MACHADO: And we're not in any way trying to  
16 minimize that. But we don't have a specific person who had  
17 a situation where because of this threat they were concerned  
18 for their safety. I'm not in any way saying -- it's a threat.  
19 He pled to it. We're not disputing that. But I would suggest  
20 that when you're talking in general, particularly when we're  
21 talking, for instance, RINOs, as in Republican in Name Only,  
22 I mean what group is that being defined as?

23 THE COURT: I'm not even going to go there,  
24 Mr. Machado.

25 MR. MACHADO: All right, Your Honor. I'll move on,

1 but I hope the Court --

2 THE COURT: That's open to a lot of debate, but that's  
3 a political question and certainly not one that I'm going to --

4 MR. MACHADO: Nor was I asking the Court to answer,  
5 nor would I even try to answer. But my point being just we  
6 have generalized groups as opposed to individual people, which  
7 obviously could put a lot more fear into a particular person  
8 seeing that there was a specific threat made to them. I'll move  
9 on. I'm not trying to make too much out of that, but I did want  
10 to raise that point.

11 Your Honor, his criminal history is quite dated. His most  
12 recent contact, I believe, was in 2006. And so he therefore has  
13 had -- he has not been in the past -- well, over a decade --

14 THE COURT: Well, his last contact may have been in  
15 '6, but then because of various revocations and issues like  
16 that, he remained under supervision till at least 2019. Isn't  
17 that correct?

18 MR. MACHADO: I thought it was 2015.

19 THE COURT: '15? Maybe it was '15.

20 MR. MACHADO: If I'm correct. 2015?

21 THE COURT: I think Probation can...

22 PROBATION OFFICER: Your Honor, for the record,  
23 the last supervised release term expired January 16 of 2019.

24 THE COURT: Thank you.

25 MR. MACHADO: I understand the Court is asking for

1 vocational training, and Mr. Smocks will do it if needed, but  
2 he's been --

3 THE COURT: You mean that's Probation, not the Court.

4 MR. MACHADO: I'm sorry. Either probation or  
5 supervised release. I think both of them are an option given  
6 where he is as far as the zones for the sentencing guidelines.  
7 But he has his GED already but has been working and will proceed  
8 with continuing his work. He's an author. I think there was  
9 some issue originally about --

10 THE COURT: When you say continue his work, are you  
11 talking about his work as a currency trader?

12 MR. MACHADO: Day trader, and his own company having  
13 to do with disinfecting -- I believe it's in the record.

14 The name of the company? Court's indulgence.

15 (Counsel conferring with Defendant.)

16 MR. MACHADO: 74 Delta.

17 THE COURT: And again, other than the defendant's  
18 statements regarding this, I was given no corroboration that  
19 any of that is true.

20 MR. MACHADO: Okay. Well --

21 THE COURT: But I'll accept your representation.

22 MR. MACHADO: It's harder to do that at the jail, to  
23 be honest.

24 THE COURT: Yes.

25 MR. MACHADO: But nevertheless, he has been employed.

1 I think if the Court feels it's necessary for him to get some  
2 mental health treatment, just because of a mention he needed  
3 some counseling, I think that might be helpful and beneficial  
4 to Mr. Smocks.

5 Mr. Smocks has been a pleasure to work with, Your Honor.  
6 He's been one of my smarter and one of my more involved clients  
7 in wanting to make sure that both he knows everything that's  
8 going on, reviewing everything, helping me as far as preparing,  
9 and most importantly, Mr. Smocks was willing to accept  
10 responsibility even after reviewing all the law and all the  
11 case law and saying, I need to accept responsibility for this.

12 And I think that usually when you have clients who do  
13 research on their own, you turn out having to fight them over  
14 about what is their choice, what is the best option legally, and  
15 there's a lot more discussion and interaction and sometimes it  
16 ends up going to trial. But he wanted to accept responsibility,  
17 and so he did.

18 Your Honor, Mr. Smocks -- a lot of my comments had to do  
19 with the plus-four, so that saved about a third of my arguments.

20 He has a very supportive family. He has basically lost  
21 everything that he had in Texas, but he's going to return to his  
22 family in Missouri, who have been very involved. They've helped  
23 as far as getting communication, and they plan to allow him to  
24 live there. So he's going to have a place to go right back in,  
25 which is going to be a very good thing for him considering that

1 he's lost a lot over this.

2 I would note that his wife is still in Japan right now,  
3 and they're having issues. And so part of why he wants to  
4 resolve the issue is so that he can help his wife, who has  
5 been suffering -- they were married in 2019, but it's been a  
6 difficult challenge, and he wants to be able to help and knows  
7 that he can help more if he's out with conditions -- if the  
8 Court accepts it, of course. But he wants to get back to a  
9 normal life, and he wants to make sure he can assist his wife.

10 The one last thing, Your Honor, I'll just mention is the  
11 fact that during this process, at the time that Mr. Smocks was  
12 arrested, they basically used the terms of the Patriot Act  
13 against him, and they ended up closing his bank accounts, and  
14 also he was on the no-fly list.

15 And while I've been trying to find some case law that  
16 would indicate that in fact -- that that is something that the  
17 Court can take into consideration -- or the Court can act upon,  
18 I should say -- with regard to that, I'm going to make that  
19 request. I haven't seen anything specifically as to that.

20 Mr. Friedman has been more than helpful, and I'll be in  
21 communication with him, and I've already informed him of this  
22 issue. And again, Mr. Smocks wants to return to a normal life,  
23 and being on the no-fly list for -- and the actions taken under  
24 the Patriot Act make it very difficult for him to be able to do  
25 that. And we will ask that, to the extent that the Court feels

1 that it has some ability to assist in that regard -- again,  
2 I'll speak to Mr. Friedman, and have spoken to Mr. Friedman  
3 on this issue -- we would ask for that assistance. There's  
4 one additional point that I --

5 THE COURT: Well, let me just stop you there,  
6 Mr. Machado.

7 MR. MACHADO: Yes.

8 THE COURT: I have no idea what the law is. You  
9 haven't provided me with any authority. I'm certainly not  
10 going to just act off the top of my head and grant relief in  
11 an area where I'm not even sure that I have any jurisdiction  
12 or authority. If you are seeking relief for Mr. Smocks in that  
13 regard, you would have to file a written motion with this court  
14 explaining the basis of your request for the relief and why you  
15 believe I have jurisdiction or authority to grant that relief.  
16 And, obviously, the government would have an opportunity to  
17 respond. I'm not prepared to act on that today.

18 MR. MACHADO: I understand. And I will continue to do  
19 so. Unfortunately, all that I found had to do with just civil  
20 lawsuits specifically asking a judge for a person to be removed.

21 THE COURT: Right.

22 MR. MACHADO: But not in the criminal context. But  
23 I'll keep on trying, and if I find something appropriate, I'll  
24 file something with the Court, although I'm sure that I can try  
25 and make more headway with Mr. Friedman.



1 THE COURT: Maybe. Maybe the best way to get that is  
2 to go around me and straight to Mr. Friedman.

3 MR. MACHADO: Well, if I find a reason that the Court  
4 can help, I will present something.

5 THE COURT: Okay.

6 Sorry. Go ahead. I interrupted you.

7 MR. MACHADO: No, that's all right, Your Honor.  
8 The other thing I would like to raise is something I would like  
9 to approach the bench on. I don't know what the arrangements  
10 are.

11 THE COURT: We can use a microphone, right?  
12 The intercom?

13 THE DEPUTY CLERK: They took them out for trial.

14 MR. FRIEDMAN: Could I just very briefly respond  
15 to Mr. Machado's last point?

16 THE COURT: Sure.

17 MR. FRIEDMAN: He has raised some of those issues  
18 with me, but I have not indicated in any way that there's  
19 anything I could do to be helpful if any of those things are  
20 true.

21 THE COURT: Sure. Totally understood. You can  
22 negotiate with Mr. Friedman. If you think you have a legal  
23 basis to approach the Court for relief, you can do that, but  
24 I'm not dealing with that today.

25 MR. MACHADO: This is a separate issue, Your Honor.

1 THE COURT: All right. You may approach.

2 (Sealed Bench Conference.)

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

1

2

3

(End of bench conference.)

4

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6

THE COURT: All right. I've heard the representations made at the bench, and Mr. Machado, I will take into account the information that you provided.

7

MR. MACHADO: Okay. Thank you, Your Honor.

8

9

10

11

Your Honor, as I said from the beginning, Mr. Smocks has been detained for over nine months. And as the government indicated, they're requesting the low end of the guideline, which would be eight months.

12

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We're asking the Court to give Mr. Smocks a sentence of time served given the fact that he has spent a rather grueling nine months detained, particularly the seven months over at the D.C. jail, or I should say CTF more specifically, and we believe that that has been a sufficient deterrent in order for Mr. Smocks not to proceed and commit any acts of this kind any further.

19

THE COURT: Let me ask you, Mr. Machado.

20

MR. MACHADO: Yes.

21

22

23

THE COURT: Mr. Smocks has 17 prior convictions. He spent repeated -- granted, a long time ago -- terms in prison. Why do you think this will be sufficient deterrence?

24

25

MR. MACHADO: Well, Your Honor, first of all, this is the type of deterrent that can easily be resolved with him not

1 doing -- putting threats out --

2 THE COURT: He could have not committed fraud and all  
3 those other 17 crimes that he committed by being sent to prison.  
4 He didn't. He just kept doing it for, you know, since he's been  
5 18 years old. Why would this period of nine months be any  
6 different than any other time of incarceration he served?

7 MR. MACHADO: I know that Mr. Smocks is going to make  
8 reference to that. In my opinion, I think Mr. Smocks was  
9 intending to -- he was -- well, first of all, he was giving his  
10 political opinion and crossed the line, and he knows that he  
11 crossed the line, which is why he accepted responsibility. And  
12 I think, now that he knows that there's a line that shouldn't be  
13 crossed, it's a matter of adjustment of attitude, and he can  
14 control that by not crossing that line any further.

15 And Mr. Smocks is a man of strong opinions, but he knows  
16 that when we get to a certain point, you cannot say the things  
17 that you say particularly when it causes fear and leads to  
18 people to be concerned about their safety. And so I think he  
19 gets that. And I think that's a matter of him being able to  
20 adjust his attitude while being true to his thoughts and  
21 convictions.

22 THE COURT: Okay.

23 MR. MACHADO: So it's just a matter of don't go that  
24 far, and I think he understands that.

25 THE COURT: All right. Thank you.

1 MR. MACHADO: Thank you, Your Honor.

2 THE COURT: Mr. Smocks, I told you at your plea that  
3 at your sentencing you would be free to speak to me, to speak to  
4 the Court, to address anything you wanted me to hear about your  
5 sentencing. But you're also free not to, and if you decided not  
6 to, I would not hold that against you. But if you have  
7 something you would like to say, I would certainly listen very  
8 carefully. Would you like to speak on your behalf?

9 THE DEFENDANT: Yes, Your Honor, I would.

10 THE COURT: All right. You may speak right into the  
11 microphone.

12 THE DEFENDANT: First, good afternoon, Judge.

13 THE COURT: Good afternoon.

14 THE DEFENDANT: Your Honor, first I would like to  
15 thank my attorney, Mr. Machado. Over the course of this case,  
16 we have developed a respectable attorney-client relationship  
17 as well as a pretty good personal friendship.

18 Your Honor, with that being said, Your Honor, I pleaded  
19 guilty to a criminal offense, and I stand by that. And however  
20 you punish me, well, ma'am, that's my punishment.

21 Your Honor, I'm no whiner. But, you know, there's some  
22 foul things that have been going on, and I'd like to bring the  
23 Court's attention to it. If I sit here today without addressing  
24 this issue, then I feel that I dishonor my grandmother, my  
25 uncles, and everybody else who got firehosed, bitten by dogs,

1 and beaten with billy clubs while marching in the streets for  
2 the rights of black people to be treated equal under the law.

3 And I understand what I'm saying is probably taboo, because  
4 a lot of people are uncomfortable talking about racism and  
5 injustice, but they don't seem to be uncomfortable with dishing  
6 it out.

7 This year the FBI arrested 638 people in connection with  
8 the Capitol riots of January 6, and personally, I think that  
9 what did end up happening at the Capitol, that was idiotic.  
10 It shouldn't have happened. And I'm not sure if the Court is  
11 aware of this, but of all 638 people to be arrested, I'm the  
12 only Black person in America sitting in jail for what happened  
13 on January 6.

14 THE COURT: You aren't. I had one before me  
15 yesterday, Mr. Smocks. You are incorrect.

16 THE DEFENDANT: Is he in jail, ma'am?

17 THE COURT: He's in jail.

18 THE DEFENDANT: I stand corrected, because he's not  
19 in the pod where we're in.

20 THE COURT: I think he's over at the D.C. jail.  
21 He's not at the CTF, but he was in front of me yesterday.  
22 And he's incarcerated, and I believe the government arrested  
23 somebody else this week or last week who is incarcerated.  
24 So you would not be correct.

25 THE DEFENDANT: Okay. Your Honor, on October 1

1 of this year, U.S. District Judge McFadden from right here in  
2 D.C., he gave an interview on CNN. And in that interview he  
3 said, and I'm quoting, I believe the Department of Justice has  
4 been uneven-handed with President Donald Trump supporters who  
5 stormed the U.S. Capitol on January 6, unquote.

6 THE COURT: Are you sure he gave that on CNN, or did  
7 he say that in open court?

8 THE DEFENDANT: It was reported on CNN.

9 THE COURT: It was reported on CNN. I believe he made  
10 that statement in court.

11 THE DEFENDANT: Yes, ma'am. And the Justice  
12 Department, they haven't been even-handed with me either, ma'am.  
13 They treated me differently or worse than they treated the white  
14 people that was inside the Capitol that day. I'd like to  
15 elaborate on that.

16 Your Honor, I'm a kid of the 1960s, the early 1960s, and  
17 I actually had to ride at the back of the bus with my mother  
18 because we weren't allowed to ride in the front. Only white  
19 people were supposed to do that. And I couldn't drink from  
20 the water fountain because they were only for white people.

21 I'm almost 60 years old. I've lived through segregation,  
22 discrimination, degradation, and a lot of humiliation. So I  
23 know a little bit about racism and bigotry, and both are alive  
24 and well right here in Washington, D.C.'s DOJ. Over the last  
25 four months I've looked as the government has allowed numerous

1 white people who was actually inside the Capitol on January 6  
2 and charged with felonies to plead guilty to misdemeanors and  
3 then go on with their lives, and I've expressed this concern  
4 with my attorney.

5 Your Honor, 81 days ago, my attorney informed this Court  
6 that we were trying to reach a misdemeanor plea deal with the  
7 government, and you said that you would still want a PSR before  
8 sentencing even for a misdemeanor.

9 THE COURT: And I have required it. I have gotten a  
10 PSR for every misdemeanor sentencing I've had.

11 THE DEFENDANT: Yes, ma'am.

12 But when we asked the government if I, you know, could  
13 plead guilty to a misdemeanor, I was told no, the DOJ won't  
14 approve it. However, Karl Dresch, who was detained in the  
15 cell right next to me, with three felonies and four misdemeanor  
16 charges from January 6, and was also on of the Florida Senate  
17 chambers with a violent criminal past, was allowed to plead  
18 guilty to a misdemeanor charge of picketing and then go on with  
19 his life, time served, he was white. And he was from the same  
20 group that the Department of Justice was calling extremists.

21 And then on September 29, the very same day that I was  
22 before this court pleading guilty to a felony, the Department  
23 of Justice was allowing Dawn Bancroft, a white woman from  
24 Pennsylvania, to plead guilty to a misdemeanor charge when she  
25 was actually inside of the Capitol on January 6 and wrote in her



1 social media post, and I quote, "I was looking for Pelosi so I  
2 could put a bullet in her freaking brain."

3 So we have social media posts threatening communications  
4 in interstate commerce, and by her own words, inference that she  
5 had a gun in the Capitol with intent to murder the Speaker of  
6 the House. But she gets to plead guilty to a misdemeanor and  
7 then go on with her life.

8 And, Your Honor, on the very same day, September 29, two  
9 other white men, Erik Rau and Derek Jancart, get a 45-day  
10 misdemeanor sentence, and they were also in the Capitol. I've  
11 been locked in a small, solitary confinement cell for over seven  
12 months. I'm not even allowed to get a haircut and a shave. But  
13 they get 45 days and then simply go on with their lives.

14 And it doesn't stop there. On October 6, the Department  
15 of Justice allowed Brandon Straka, who was originally facing two  
16 felonies from January 6, one with a ten-year statutory maximum,  
17 the other with a five-year statutory maximum, but he was allowed  
18 to plead guilty to a Class B misdemeanor with a \$500 fine.  
19 Again, he's a white guy.

20 Your Honor, this is racism. This is exactly why there  
21 are far too many black and brown men than there are whites  
22 in American jails and prisons today for the similar or same  
23 conduct. And this isn't the Deep South. This is Washington,  
24 D.C. This is the flagship of America.

25 The people working here, they're supposed to be the ones

1 fighting against systemic racism. But their words and their  
2 actions, they don't align. It was right here in 1963 in the  
3 District of Columbia that Dr. Martin Luther King gave his famous  
4 "I Have a Dream" speech. But 50 years later, Black Americans  
5 are still facing the same old dream for equal treatment under  
6 the law.

7 THE COURT: Is that what you were encouraging these  
8 protesters to do on January 6, Mr. Smocks, protest to end racism  
9 and discrimination? Is that what you were exhorting them to do  
10 from your hotel room?

11 THE DEFENDANT: No, ma'am. I don't believe in racism  
12 of any kind, whether it's BLM or the Trump supporters, you know.

13 THE COURT: All right.

14 THE DEFENDANT: Black people and white people, they  
15 should have equal civil rights. Everything should be equal.  
16 I don't approve of white supremacy or black power or anything.  
17 We're all Americans.

18 THE COURT: Sorry. I interrupted you.  
19 Please continue.

20 THE DEFENDANT: Your Honor, you know, I'm no Dr. King,  
21 not by a long shot. But we do share the same skin color, and we  
22 share the same sense of justice. I just want to be treated  
23 equal. If I do something wrong, then I'll take the punishment  
24 for that. But I want it to be equal with the white person that  
25 does the same wrong. That's all I'm asking.

1           But my question is, when will the bigotry end? You know,  
2           it's been over 50 years, and that's a long time. White police  
3           are still killing us in the streets, and white lawyers are still  
4           over-prosecuting us in the courts. When does it end? Your  
5           Honor, I'm just trying to figure it out. Thanks for allowing  
6           me to speak.

7                     THE COURT: All right.

8           As with all sentencings, the Court must balance the factors  
9           it has to consider in sentencing, bearing in mind that the  
10          sentence imposed should be sufficient but not greater than  
11          necessary to comply with the purposes of sentencing.

12          These purposes include the need for the sentence imposed  
13          to reflect the seriousness of the offense, to promote respect  
14          for the law, and to provide just punishment. The sentence  
15          should also deter criminal conduct, protect the public from  
16          future crimes by the defendant, and promote rehabilitation.

17          I must also consider the nature and circumstances of the  
18          offense, the history and characteristics of the defendant,  
19          the types of sentences available, the need to avoid unwarranted  
20          sentence disparities, and the need to provide restitution.  
21          I've considered all these factors, and I'll discuss some of  
22          them here.

23          With regard to the nature and circumstances of the offense,  
24          Mr. Smocks bought a plane ticket and traveled to the D.C. area  
25          on January 5, the day before the riot. On the morning of

1 January 6, he started posting messages on social media to tens  
2 of thousands of users. He claimed, falsely, to be a retired  
3 military officer and encouraged readers and listeners to stand  
4 with the so-called patriots who were converging in Washington,  
5 D.C.

6 After the riot was over and the Capitol was secured,  
7 Mr. Smocks again posted messages on social media, exhorting  
8 readers to, and I quote, "Get our personal affairs in order,"  
9 and I again quote, "Hunt these cowards down like the traitors  
10 that each of them are."

11 He went on to say, "Today the cowards ran as we took the  
12 Capitol. They have it back now only because we left. It wasn't  
13 the building that we wanted. It was them." And I'm not even  
14 going into the actual threats that he made against political  
15 representatives and tech executives in this case.

16 The irony of these statements, as I'm sure you're aware,  
17 is that Mr. Smocks, from the safety of his hotel room, actually  
18 had the nerve to call the people who were doing their jobs that  
19 day -- the true patriots, in my opinion, who were ensuring  
20 the transition of power -- cowards.

21 These people, these congressional representatives, their  
22 staffs, and the law enforcement officers who tried valiantly,  
23 even though they were outnumbered, to try to do their job that  
24 day, were the real heroes of that day, yet Mr. Smocks has the  
25 audacity to call the rioters who sought to violently overturn

1 the legitimate election results "patriots."

2 I've said before, and so have my colleagues, that what  
3 happened on January 6 was no less than an attempt to stop the  
4 orderly transition of power and to violently overthrow a duly  
5 elected government. I don't need to dwell on how seriously I  
6 take those events. Mr. Smocks wasn't there, but, by his words,  
7 he was encouraging the rioters, and he was threatening people.

8 With regard to the history and characteristics of the --  
9 and let me just address Mr. Smocks' words to the Court just now.  
10 Mr. Smocks, on January 6, encouraged people who were actively  
11 fighting law enforcement, people who were actively engaged in  
12 trying to stop the transition of power. Many of those people  
13 were violent. Many of them defaced the halls of Congress. Many  
14 of them stalked the halls, calling out for the Speaker of the  
15 House and the Vice President of the United States. They erected  
16 gallows outside.

17 Mr. Smocks now seeks to somehow compare himself and  
18 drape himself in the mantle of racial equality and civil  
19 rights, and I for one find that offensive.

20 Yes. A judge on this court, and others, have said --  
21 and that is their position -- that it is their belief that  
22 the Department of Justice has not been even-handed, and I  
23 have said in open court that I disagree with that position.

24 I disagree with the proposition that the Department of  
25 Justice has been uneven given that there were people

1 demonstrating, largely peacefully, for civil rights arising  
2 out of the murder of an unarmed man. That is not the same as  
3 an attempt to violently disrupt operations of Congress. Those  
4 two are not the same. That is a false equivalence. And I have  
5 said it before, and I will say it again.

6 You come into this courtroom and you sit here and you try  
7 and make yourself out to be a victim of racism, Mr. Smocks, and  
8 again, I find that offensive. People died fighting for civil  
9 rights. People were gassed. They were beaten. They were  
10 driven -- you know, they were tortured mentally and physically.  
11 And for you to hold yourself up as somehow a soldier in that  
12 fight is really quite audacious.

13 There were very few, as I understand it, African Americans  
14 participating in those protests on January 6. That's how it --  
15 them's the facts. I personally have had two African American  
16 defendants, both detained. One yesterday was before me, and  
17 you. So you're not the only one, and I believe there are  
18 others. So to somehow claim that you are the only person and  
19 you are somehow being singled out or treated unfairly, again,  
20 is pretty audacious.

21 I haven't seen any evidence that protesters are being  
22 treated differently because of their race or because of their  
23 gender or anything else. I have seen the prosecution make  
24 distinctions among people for their actions, whether they went  
25 into the Capitol, whether they assaulted law enforcement,

1 whether they damaged property, whether they stole property,  
2 whether they made threats. That is the distinction I've seen  
3 the Department of Justice make, and that is their right. I  
4 have not seen a scintilla of evidence that their prosecutions  
5 have been racially motivated.

6 With regard to the history and characteristics of the  
7 defendant, Mr. Smocks is 59. He has a lengthy criminal record  
8 of approximately 17 prior convictions, beginning when he was 18.  
9 Most of his crimes involved some form of deception and  
10 fraudulent behavior, and he's frequently impersonated a law  
11 enforcement or military officer, as he did in this case.

12 In fact, here Mr. Smocks falsely claimed to be a retired  
13 military officer and even told the presentence report writer  
14 that he served in the military. I have no reason to believe  
15 this is true, based on the Department of Defense representations  
16 to the FBI agent who provided those representations to this  
17 court in prior litigation, as well as a release plan that was  
18 prepared in a prior case. There appears to be no record of  
19 Mr. Smocks having served in the military, and this assertion  
20 appears to be just another in a long series of falsehoods.

21 Mr. Smocks -- and I'd also note that I clarified with  
22 the presentence report writer that Mr. Smocks' last period of  
23 supervision ended in 2019, just two years ago. Mr. Smocks'  
24 record is notable for his apparent inability to live a  
25 law-abiding life. While I believe, and I continue to believe,

1 that every individual is capable of change and growth, I'm not  
2 optimistic in this case, where it appears that Mr. Smocks is  
3 still engaging in deception.

4 He does not appear to have any genuine remorse for his  
5 actions. I listened to every word Mr. Smocks said today, and  
6 nowhere did I hear any remorse for his actions or any fear that  
7 he might have instilled for any role that he might have played  
8 in the events of January 6. No remorse.

9 All I hear is what you have suffered, Mr. Smocks. The  
10 treatment that you have suffered. You're being singled out.  
11 You're being persecuted. You're a victim of racism. You've  
12 endured terrible conditions at the D.C. jail. There's not a  
13 single word of acknowledgement of the enormity and seriousness  
14 of what you did.

15 With regards to the types of sentences available, the  
16 guideline range here is 8 to 14 months. And I will note that,  
17 as I said earlier, there was a plausible basis for the Probation  
18 Office to argue that a four-level enhancement was appropriate  
19 and that the sentencing category was three instead of two. And  
20 had that been the case, you would have been looking at a higher  
21 sentencing range. As it is, the government has asked for you to  
22 basically get a sentence of time served, as has your lawyer.

23 With regard to the need to avoid sentence disparity, I find  
24 that this is a factor, although I have found in the past and I  
25 find here that the crimes that occurred on January 6 are so



1 unusual and unprecedented that it is very difficult to find a  
2 proper basis for disparity.

3 But I will note that I -- you talked about other people  
4 have received sentences of incarceration. I have imposed  
5 sentences of incarceration in three misdemeanor cases where the  
6 defendants did not have your kind of criminal record, and other  
7 judges have given incarceration, probation, home detention. I  
8 will note here, as far as disparity goes, that I am being asked  
9 to give a sentence well within the guideline range, and I intend  
10 to give a sentence within the guideline range.

11 With regard to restitution, the government has not asked  
12 for restitution. You did not agree to pay restitution as part  
13 of your plea agreement here, and I will not order that  
14 restitution be paid.

15 The main factors driving the Court's sentencing decision  
16 here are the seriousness of the offense, the need for  
17 deterrence, and the need to protect the public from future  
18 criminal conduct that might be committed by the defendant.  
19 Although you were not present at the Capitol, Mr. Smocks, you  
20 encouraged the rioters and, even after the riot was over,  
21 transmitted threats to politicians and technology company  
22 executives.

23 As I said before, you do not appear to have any genuine  
24 remorse or even really an understanding of the seriousness of  
25 your actions. And moreover, you come into this court and

1 portray yourself as somehow a victim of racism, which I  
2 completely reject.

3 Notwithstanding the government's request at allocution and  
4 your lawyer's request, the Court believes that a sentence at the  
5 high end of the guidelines range is appropriate in this case.  
6 Therefore, based on my consideration of all the § 3553 factors,  
7 I'll now state the sentence to be imposed. Please rise.

8 (Defendant complies.)

9 It is the judgment of the Court, that you, Mr. Smocks, are  
10 hereby committed to the custody of the Bureau of Prisons for a  
11 term of 14 months of incarceration, and that you are further  
12 sentenced to serve supervised release for a term of three years  
13 with conditions as I will set, and to pay \$100 special  
14 assessment to the Clerk of Court for the U.S. District Court.  
15 The Court finds that you do not have the ability to pay a fine  
16 and therefore waives imposition of a fine in this case.

17 The special assessment is immediately payable to the Clerk  
18 of the Court for the U.S. District Court of the District of  
19 Columbia. Within 30 days of any change of address, you shall  
20 notify the Clerk of the Court of the change until such time as  
21 the financial obligation is paid in full.

22 Mr. Machado, do you have any recommendation -- given that  
23 it's not going to be a particularly -- you know, Mr. Smocks has  
24 already done nine months. 14 months is -- he may not even make  
25 it to a Bureau of Prisons facility, but do you have a

1 recommendation or request for a recommendation for a facility?

2 MR. MACHADO: May I have the Court's indulgence for a  
3 moment?

4 THE COURT: Yes.

5 (Counsel and Defendant conferring.)

6 MR. MACHADO: Thank you, Your Honor. I've spoken to  
7 Mr. Smocks, and he would like to be placed, if possible, within  
8 the Dallas, Texas, area.

9 THE COURT: All right. I will make a recommendation  
10 to the Bureau of Prisons that Mr. Smocks be housed at Bureau of  
11 Prisons in the Dallas, Texas, area.

12 All right. With regard to the conditions of your  
13 supervised release, while under supervision you shall abide  
14 by the following mandatory conditions as well as the standard  
15 conditions of supervision which are imposed to establish the  
16 basic expectations for your conduct while on supervision.

17 The mandatory conditions include: You must not commit  
18 another federal, state, or local crime. You must not unlawfully  
19 possess a controlled substance. The mandatory drug testing  
20 condition is suspended based on the Court's determination that  
21 you pose a low risk of future substance abuse. You must  
22 cooperate in the collection of DNA as directed by the probation  
23 officer.

24 You shall comply with the following special condition:

25 Computer monitoring and search. To ensure compliance with

1 the computer monitoring condition, you must allow the probation  
2 officer to conduct initial and periodic unannounced searches of  
3 any computers as defined in 18 U.S.C. § 1030(c)(1) subject to  
4 computer monitoring.

5 These searches shall be conducted to determine whether the  
6 computer contains any prohibited data prior to installation of  
7 the monitoring software, whether the monitoring software is  
8 functioning effectively after its installation, and whether  
9 there have been attempts to circumvent the monitoring software  
10 after its installation. You must warn any other people who use  
11 these computers that the computers may be subject to searches  
12 pursuant to this condition.

13 Within 45 days of release from incarceration, you will  
14 appear before the Court for -- well, no. Sorry. I don't need  
15 a reentry progress hearing.

16 The Probation Office shall release the presentence  
17 investigation report to all appropriate agencies, which includes  
18 the -- so the only special condition is the computer monitoring  
19 search condition.

20 Probation Office shall release the presentence  
21 investigation report to all appropriate agencies, which includes  
22 the United States Probation Office in the approved district of  
23 residence, in order to execute the sentence of the Court.  
24 Treatment agencies shall return the presentence report to the  
25 Probation Office upon the defendant's completion or termination

1 from treatment.

2 Pursuant to 18 U.S.C. § 3742, you have a right to appeal  
3 the sentence imposed by this court if the period of imprisonment  
4 is longer than the statutory maximum or the sentence departs  
5 upward from the applicable sentencing guidelines range. If you  
6 choose to appeal, you must file any appeal within 14 days after  
7 the Court enters judgment.

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

16 Any objections not already noted to the sentence of the  
17 Court, Mr. Friedman?

18 MR. FRIEDMAN: No, Your Honor.

19 THE COURT: Mr. Friedman, I can't remember from the  
20 plea agreement; were you going to make a motion to dismiss the  
21 remaining counts?

22 MR. FRIEDMAN: Yes, Your Honor.

23 THE COURT: All right. Are you going to make that  
24 motion now?

25 MR. FRIEDMAN: Yes. Count 2 of the indictment should

1 be dismissed.

2 THE COURT: All right. The motion will be granted.

3 Mr. Machado? Any further objection not already stated?

4 MR. MACHADO: No, Your Honor, although he will get  
5 credit for time served.

6 THE COURT: Yeah. He will obviously get credit for  
7 time served. He'll get credit for whatever appropriate time  
8 served is in this case. Now, I don't have any information that  
9 he was held on a detainer or serving out any other sentence. So  
10 the Bureau of Prisons should make that calculation. Obviously,  
11 if you challenge that, you can raise it.

12 MR. MACHADO: Yes, Your Honor. Thank you.

13 THE COURT: All right. Thank you. We're adjourned.

14 (Proceedings adjourned at 3:13 p.m.)  
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CERTIFICATE

I, BRYAN A. WAYNE, Official Court Reporter, certify that the foregoing pages are a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Bryan A. Wayne  
Bryan A. Wayne