ORAL ARGUMENT NOT YET SCHEDULED

APPELLEE'S MEMORANODUM OF LAW AND FACT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-3029

UNITED STATES OF AMERICA, Appellee,

v.

TIMOTHY HALE-CUSANELLI, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Cr. No. 21-37 (TNM)

On January 6, 2021, appellant Timothy Louis Hale-Cusanelli, an avowed white supremacist and Nazi sympathizer, joined a mob that overran the United States Capitol with the intent to prevent Congress from certifying the 2020 presidential election. By his own admission, appellant used his military training to overcome chemical irritants used by the United States Capitol Police (USCP), employed tactical hand and verbal signals to direct the movements of other rioters in an effort to breach police barricades, and entered the Capitol building through doors that had been kicked open by rioters.

Appellant is now charged with offenses arising from his participation in those events. He appeals the district court's order detaining him pending trial under the Bail Reform Act (BRA), 18 U.S.C. §3142(f). Because the district court did not clearly err in finding that no condition or combination of conditions will reasonably assure the safety of any person or the community, the detention order should be affirmed.

BACKGROUND

Procedural History

On January 15, 2021, appellant was arrested in New Jersey on a warrant issued by the United States District Court for the District of

Columbia (Dkt.1; Dkt.3:1).[1] At his initial appearance on January 19, 2021, the government moved for pretrial detention under 18 U.S.C. §3142(f)(2)(B) (Dkt.3:1-2). A magistrate judge ordered appellant conditionally released, but granted the government's motion for a stay of that order (*id.*). Later that day, the government applied to the District Court for the District of Columbia for a stay and review of the release order under 18 U.S.C. §3145(a), which Chief Judge Beryl A. Howell granted (Dkt.3; Dkt.5).

On January 29, 2021, an indictment issued charging appellant with civil disorder (and aiding and abetting thereof) (18 U.S.C. §231(a)(3) and 2); obstruction of an official proceeding (and aiding and abetting thereof) (18 U.S.C. §1512(c)(2) and 2); entering and remaining in a restricted building or grounds (18 U.S.C. §1752(a)(1)); disorderly and disruptive conduct in a restricted building or grounds (18 U.S.C. §1752(a)(2)); impeding ingress or egress in a restricted building or grounds (18 U.S.C. §1752(a)(3)); disorderly conduct in a Capitol building (40 U.S.C.

[1] "Mem." refers to appellant's memorandum of law and fact. "A._" refers to appellant's appendix. "Dkt." refers to documents filed in *United States v. Timothy Louis Hale-Cusanelli*, Docket No.1:21-cr-00037-TNM (D.D.C.).

§5104(e)(2)(D)); and parading, demonstrating or picketing in a Capitol building (40 U.S.C. §5104(e)(2)(G)) (Dkt.9).

On March 2, 2021, appellant moved for conditional release, which the government opposed (Dkt.13; Dkt.14; Dkt.16; Dkt.18; Dkt.19). After a hearing on March 23, 2021, the Honorable Trevor N. McFadden ordered appellant detained pending trial (A.26-31). On April 2, 2021, appellant moved for reconsideration (Dkt.21; Dkt.25). The government again opposed (Dkt.26; Dkt.27). Judge McFadden held another hearing on April 28, 2021, and orally denied appellant's motion (A.38-41). Appellant noted a timely appeal (Dkt.28).

The Charged Offenses

As described in the government's pleadings, appellant is alleged to have participated in the storming of the Capitol by a mob on January 6, 2021 (Dkt.3:2-5; Dkt.18:23-31). The riot took place during a joint session of Congress convened to certify the votes of the Electoral College (Dkt.3:2-3). The rioters' forced entry into the Capitol building required the evacuation of the Members of Congress from the House and Senate chambers, suspending the session for nearly six hours (Dkt.3:3).

Appellant's role in storming the Capitol was established by (1) digital and physical evidence recovered from appellant's home and cell phone; (2) admissions he made to law enforcement after his arrest; and (3) recorded statements made by appellant to a confidential human source (CHS) after the riot (Dkt.18:23-31). That evidence indicated that appellant, himself a member of the military, used "military tactics," such as tactical hand signals and commands to "advance," to induce and assist rioters in breaching USCP barriers to the Capitol (*id.*:25-27, 30). Appellant subsequently entered the Capitol after others broke through police lines and locked windows (*id.*:26-29). Appellant also used his military training to overcome his exposure to chemical irritants used by the police in an attempt to disperse the rioters (*id.*:25). Finally, appellant claimed that he "picked up a flag and flagpole that he had seen another rioter throw 'like a javelin' at a [USCP] officer," and intended to destroy or dispose of it, along with appellant's clothing and other physical evidence that would implicate him in the riot (*id.*:2-3, 30). Prior to his arrest, appellant deleted several online accounts he used to espouse his extreme ideology (*id.*:3, 11, 15-17).

Appellant later explained that officers' efforts to keep the mob out of the building "encouraged" him and others to force their way in (Dkt.18:25). He further boasted that he felt "exhilirat[ion]" during the riot, and "if they'd had more men[,] they could have taken over the entire building and held it" (*id.*:19-20). Appellant stated that he wanted to feel such exhilaration again through "[c]ivil war," and when asked about the potential loss of life, quoted Thomas Jefferson, that it was necessary to "refresh the tree of liberty with 'the blood of patriots and tyrants'" (*id.*).

Additional Information on Appellant's Violent Ideology

The government also provided evidence establishing appellant's long-standing white supremacist and Nazi beliefs (Dkt.18:11-19). Interviews of appellant's co-workers revealed, inter alia, that appellant had claimed to be a Nazi; talked "constantly" about how Jewish people should be killed;[2] used derogatory terms for black people; spoke disparagingly of women; said disabled or deformed babies should be shot in their foreheads; and wore a "Hitler mustache" to work (*id.*:6-8). In

[2] Appellant had said that "Hitler should have finished the job," and claimed that "he would kill all the Jews and eat them for breakfast, lunch, and dinner, and he wouldn't need to season them because the salt from their tears would make it flavorful enough" (Dkt.18:7).

advance of January 6, 2021, appellant posted messages at his workplace stating that a "major announcement [was] coming soon," and proclaiming the "final countdown" (*id.*:7-8). He further stated his intent to leave his employment "in a blaze of glory" (*id.*). Appellant's co-workers described him as "unstable" and "crazy," and had been "afraid [appellant] would find" out if they reported him (*id.*).

Photographs found on appellant's phone depicted appellant with a Hitler-style mustache and posing as a Nazi (Dkt.18:12-13, 22). The phone also contained Hitler imagery and cartoons glorifying Nazism and white supremacy (*id.*:12-19). The government recovered from appellant's home copies of Hitler's *Mein Kampf*, and *The Turner Diaries*, a white-supremacist novel depicting a violent revolution in the United States, the overthrow of the federal government, a nuclear war, and a race war which leads to the systematic extermination of non-whites (Dkt.3:9).

Appellant's criminal history indicated that his belief in this ideology dated to at least August 2010, when he was arrested with three others with a homemade "potato gun" emblazoned with "WHITE IS

RIGHT" and a Confederate flag logo (Dkt.18:19, 21).[3] More recently, in February and March 2020, two people, both of whom are Jewish, filed complaints with police alleging that he had harassed them online (A.11-12).

The Bond Review Motion

The Defense Motion

In his March 2, 2021, motion for release, appellant noted that he was not charged with violent or armed offenses, and was not alleged to be a member of any organized group (Dkt.13:10-12). Appellant argued that he had been exercising his First Amendment rights, intending to "stop the steal" as directed by then-President Trump (Dkt.13:17-19). Appellant insisted that his release would not pose a danger to the community because, although "things undoubtedly got out of hand" at the

[3] According to the information provided to the district court about this incident, appellant was arrested August 4, 2010, with three others, and found in possession of a "potato gun" that appellant allegedly used to "shoot" frozen corn at a house (Dkt.18:18-19, 21; A.12-13, 15-16). The potato gun was described as a pneumatic device made from PVC pipe (Dkt.18:19; A.15-16). Police also recovered a "punch" or "push dagger" from appellant (Dkt.18:19 & n.6). Appellant subsequently plead guilty to disorderly conduct (A.12-13, 15-16).

Capitol grounds, he did not "personally attempt[] to physically harm anyone" (*id.*:17).

Appellant further argued that his personal "history d[id] not suggest that he [wa]s likely to resume" his behavior during the riot if released (Dkt.13:18). Appellant asserted that he had no criminal convictions, and only one arrest;[4] was a member of the Army Reserves for approximately eleven years; and had been employed as a security officer at Naval Weapons Station (NWS) Earle in Colts Neck, New Jersey (*id.*:2, 13). Appellant highlighted his community ties in New Jersey, including close friends whom he proposed as third-party custodians, and his prospective employment as a landscaper (as he was no longer able to work at his previous employment) (*id.*:15-16 & nn.5-7).[5] He denied that he was a Nazi or white supremacist, and asserted that his copies of *Mein Kampf* and *The Turner Diaries* were merely part of his "small personal

[4] The arrest to which appellant referred was one in which he asserted that he stabbed his mother's boyfriend in order to defend her from an assault (Dkt.13:13; A.16-17). As appellant subsequently acknowledged, however, he had also been arrested in August 2010 and pled guilty to disorderly conduct arising from his alleged use of the "potato gun" emblazoned with white supremacist imagery (A.15-16).

[5] Following his arrest, appellant was administratively discharged from the Army Reserves and barred from NWS Earle (Dkt.18:1 n.1).

library of world history" (*id.*:14-15). Appellant subsequently supplemented his motion with a unsigned, undated letter attesting to his character (Dkt.16:Att.). Its author, who wrote that he had known appellant for approximately two years and supervised him at NWS, denied that appellant was a white supremacist, insisting that he "[n]ever" saw appellant "treat any of his African-American co-workers differently," and had never "heard any distasteful jokes or language leave his mouth" (*id.*).

The Government's Opposition

In its opposition to appellant's motion, the government noted, inter alia, that appellant had taken steps to destroy or conceal evidence of his participation in the insurrection, and thus "there [wa]s a serious risk that, if released, [he] w[ould] obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness" (*id.* at 3 (citing 18 U.S.C. §3142(f)(2)(B))).

The government also informed the district court that, during an interview by Naval Criminal Investigation Service ("NCIS") agents, John Getz confirmed that he authored the unsigned letter submitted on

appellant's behalf (Dkt.18:5). During that interview, and an interview that predated the letter, Getz contradicted the representations he made in his letter, reporting that appellant had repeatedly made racist statements and jokes at work, and was a Nazi sympathizer and Holocaust denier (*id.*:4-6, 8, 22-23).[6]

The government also reported that appellant's proposed third-party custodians shared, encouraged, or tolerated appellant's racist ideology (Dkt.18:21-23). Of particular significance, one of those proposed custodians, J.H., had been arrested with appellant in 2010 in the potato-gun case (*id.*:18-19, 21). And, during an interview after appellant's arrest in this case, J.H. admitted that s/he shared appellant's ideology, that "s/he was in 'Facebook jail' because s/he posted that New Jersey Governor Phil Murphy should be beaten to death," and that s/he stood by that comment (*id.* at 21-22). J.H. also asked for "the names of every law enforcement officer involved in arresting [appellant]" (*id.*).

[6] The government later reported that Getz had been placed on administrative leave due to the inconsistencies between his letter and his statements to NCIS (A.7).

The government subsequently informed the court that police reports had been filed against appellant for harassment in February and March 2020 (A.11-12). The complainants, who were both Jewish, reported that appellant had posted their names and addresses online, and "[s]uggested that [appellant] wasn't scared of people knowing his face[and] that it would be easy to swing by their address and talk to them about their differences" (*id.*).

The March 23, 2021, Ruling

At the conclusion of its March 23 hearing on appellant's motion, the court found that the first factor under the BRA – the nature and circumstances of the offense – weighed "just slightly" in favor of release (A.26-27). The court was "concerned" that appellant encouraged others to storm the Capitol Building (*id.*:27). The court noted, however, that appellant apparently wore a suit on January 6, suggesting that he was not coming armed for battle, and there was no evidence that he committed any violent or destructive acts (*id.*). The court found, however, that the second factor – the weight of the evidence – favored detention, because the evidence appeared to be "overwhelming" that appellant committed the charged offenses (*id.*:27-28).

With respect to the third factor – appellant's history and characteristics – the court acknowledged that appellant essentially had no criminal record, was employed, and was a military veteran with a secrecy clearance (A.27-28). However, the court was "very concerned about [appellant's] well-documented history of racist and violent language," and the "substantial evidence" that appellant had a "neo-Nazi racist ideology" and had "engaged in hateful conduct" (*id.*:28). The court noted that the law did not "typically penalize people for what they say or think" (*id.*:29). The court did, however, "take note" of appellant's arrest for using a potato gun with white-supremacist imagery emblazoned on it, during which appellant was found to have a push dagger (*id.*). Although appellant was young at the time, the court found that the incident suggested that appellant had harbored neo-Nazi beliefs for a number of years, and had acted on them (*id.*).

Finally, the court found that the fourth factor – appellant's danger to the community - weighed in favor of detention (A.29-31). The court cited appellant's "violent language," desire for a "civil war," and reference to "liberty" needing the "blood of patriots" (*id.*:30). The court further noted the evidence that appellant "appear[ed] to have surrounded

himself" with "people who have encouraged this behavior and people who may even agree with him" (*id.*). The court was accordingly "concern[ed] regarding [the] potential escalation of violence," and "concerned for the safety of the" CHS, because appellant almost certainly knew who the person was, and had spoken in the past about "committing violence against those who[m] [appellant] feels are pitted against him" (*id.*). Thus, although the court acknowledged it was a "close case," the court detained appellant pending trial, finding that no condition or combinations of conditions of release would assure the safety of the community (*id.*:30-31).

The Motion for Reconsideration

Appellant moved for reconsideration on April 14, 2021, following this Court's decision in *United States v. Munchel*, 991 F.3d 1273 (D.C.Cir. 2021) (Dkt.21:1-4). In a supplement to that motion addressing the court's concern for the CHS, appellant informed the court that he believed that person had left New Jersey and relocated more than 1,500 miles away from appellant's intended residence (Dkt.25:2). Appellant further asserted that the three other young men arrested with him in connection

with the potato-gun incident were "of Jewish or Puerto Rican descent" (*id.*:3).

The government opposed the motion, arguing, inter alia, that appellant's "apparent, intimate knowledge of who [the] CHS is, where he lives, and when he moved, suggests that, contrary to his argument, [he] is actually keeping careful tabs on [the] CHS," and that although distance may make physical confrontation more difficult, appellant could also threaten, intimidate or influence the CHS remotely (Dkt.26:5). The government reiterated that the danger posed by appellant rested not simply on his actions on January 6, but on his documented Nazi/white supremacist ideology, desire to start a civil war, and admissions that participating in the riot provided him with an adrenaline rush and "purpose" (*id.*:3-4). Finally, the government noted that appellant's animosity towards the Jewish population posed a threat to the Jewish community in New Jersey (*id.*).

The April 28, 2021, Ruling

At the April 28 hearing on the motion to reconsider, Judge McFadden noted that in *Munchel*, the district court had detained the defendants based on the nature and circumstances of their January 6

offenses, without individually assessing the danger each defendant posed (A.39). By contrast, Judge McFadden had based detention in this case on an individualized assessment of the danger appellant posed if released (*id.*:39-40). The court explained that although appellant's conduct during the riot was "serious," the court had not found that it "tilted toward detention" (*id.*). Instead, the court had "primarily relied on" the "extensive submissions from the government regarding [appellant's] comments about people of different races, of different religions" (*id.*:40). Combined with the evidence of the potato-gun incident, the court was "concerned" that appellant bore "real animus against groups of people in this country," which had led appellant to engage in "dangerous conduct in the past," both "several years ago" and "in this case" (*id.*). Thus, although the court acknowledged that if it "was just looking at what [appellant] did on January 6th, he would be a free man," that conduct, when combined with "the evidence of what [appellant] has said and done in the past" was more concerning (*id.*:40-41). Furthermore, the court did not find that the possibility that the CHS might have moved was a reason to release appellant, because appellant apparently knew the CHS well,

and might know where CHS had moved (*id.*:41). The court accordingly denied the motion (*id.*).

ARGUMENT

A. Standard of Review and Applicable Legal Principles

Although "liberty is the norm, . . . [t]he Bail Reform Act of 1984 authorizes one of those carefully limited exceptions by providing that the court 'shall order' a defendant detained before trial if it 'finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community.'" *Munchel*, 991 F.3d at 1279 (quoting 18 U.S.C. §3142(e)). "'[T]he relevant inquiry is whether the defendant is a flight risk or a danger to the community.'" *Id.* (quoting *United States v. Vasquez-Benitez*, 919 F.3d 546, 550 (D.C.Cir. 2019); internal quotes omitted). "In assessing whether pretrial detention is warranted for dangerousness, the district court considers four statutory factors: (1) 'the nature and circumstances of the offense charged,' (2) 'the weight of the evidence against the person,' (3) 'the history and characteristics of the person,' and (4) 'the nature and seriousness of the danger to any person

or the community that would be posed by the person's release.'" *Id.* (quoting 18 U.S.C. §3142(g)(1)–(4)). "To justify detention on the basis of dangerousness, the government must prove by 'clear and convincing evidence that 'no condition or combination of conditions will reasonably assure the safety of any other person and the community.'" *Id.* at 1279-89 (quoting 18 U.S.C. §3142(f)). *See also United States v. Salerno*, 481 U.S. 739, 751 (1987) ("When the [g]overnment proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community . . . a court may disable the arrestee from executing that threat.").

This Court reviews the district court's "dangerousness determinations for clear error." *Munchel*, 991 F.3d at 1282. "When reviewing under the clear error standard, we do not weigh each piece of evidence in isolation, but consider the evidence taken as a whole." *United States v. Manafort*, 897 F.3d 340, 347 (D.C.Cir. 2018) (citation omitted). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985).

B. Analysis

The district court did not clearly err in finding that, under the BRA's four-factor test, there are no conditions or combination of conditions that would reasonably assure the safety of the community. Appellant, in essence, asks this Court to substitute its own judgment on dangerousness for the district court's. But that is flatly inconsistent with "deferential review [of] a district court's bail determination." *United States v. Mattis*, 963 F.3d 285, 291 (2d Cir. 2020) ("The clear error standard applies not only to the factual predicates underlying the district court's decision, but 'also to its overall assessment, based on those predicate facts, as to the . . . danger presented by defendant's release.'"). *See also Barhoumi v. Obama*, 609 F.3d 416, 423 (D.C.Cir. 2010) ("When reviewing for clear error, we may not reverse a trial court's factual findings even though convinced that had we been sitting as the trier of fact, we would have weighed the evidence differently.").

1. Nature and circumstances of the offense

Appellant does not challenge, and instead expressly adopts (at 14) the district court's finding that the nature and circumstances of the offense favored release. However, appellant ignores the court's further

finding that the factor weighed in favor of release "just slightly," because, although "there[wa]s no evidence that [appellant] committed any violence or [de]struction of property while he was there[, appellant] . . . admi[tted] that he urged people to advance . . . [and] to essentially storm the Capitol Building and enter it despite police presence, tear gas, fences and what have you" (A.27). Having failed to challenge that aspect of the court's finding on appeal, appellant has waived any such challenge. *See*, *e.g.*, *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 527 (1994) ("petitioners' brief on the merits fails to address the issue and therefore abandons it"). And, as discussed *infra*, the district court could not, and did not, "just look[]" at the charged conduct in isolation (*see* Mem.14), but instead in the wider context of appellant's violent ideology and past conduct.

2. Weight of the evidence

Appellant does not challenge (at 15) the court's finding that there was overwhelming evidence that he committed the charged offenses, but argues that those offenses only "slight[ly]" provide evidence of his dangerousness. As discussed further *infra*, although there is no allegation that appellant assaulted or threatened anyone on scene, that

fact is not dispositive on the issue of dangerousness. First, contrary to appellant's assertion (at 15) that "he did not disobey law enforcement," appellant saw barriers erected by police to keep rioters out of the Capitol, and admitted that "the pepper spray and the [USCP] officers' efforts to keep the mob out of the Capitol building 'encouraged him and others to move forward in an attempt to breach the building'" (Dkt.18:25). Second, appellant also "admitted to encouraging others to 'advance' past law enforcement officers into the Capitol building, and further admitted to using voice and hand signals to direct their movements" (*id.*:26). Judge McFadden properly found those lawless actions significant, particularly in combination with appellant's statements to the CHS appearing to revel in the violence and chaos created by the rioters.[7]

3. History and characteristics of the defendant

Appellant raises two challenges (at 12-14) to the court's finding that this factor favored detention, namely that (1) the potato-gun incident had

[7] Thus, although appellant may not personally have engaged in the violent acts that led other judges to detain certain January 6 defendants (*see* Mem.15 n.11 (citing cases)), "the dangerousness inquiry [under §3142(g)] must be an individualized one." *See United States v. Stone*, 608 F.3d 939, 946 (6th Cir. 2010).

no bias-related or white-supremacist motive; and (2) even if he had been so motivated, appellant's positive attributes outweighed it. The first argument, however, is based on evidence that he concedes (at 13 n.10) was never presented to the district court, namely contemporary police reports about the incident.[8] Because the argument and information upon which he relies are being raised for the first time on appeal, and thus the district court never had the opportunity to make findings in the first instance, this Court should refuse to consider it. S*ee United States ex rel. Settlemire v. District of Columbia*, 198 F.3d 913, 920 (D.C.Cir. 1999) (additional evidence not presented to the district court is not ordinarily considered on appeal); *Munchel*, 991 F.3d at 1281–82 ("Appellants did not raise [this] argument below, so we decline to pass on it in the first instance without the benefit of full briefing.").[9]

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[8] Although both parties had copies of the police reports (which appellant has included in his supplement on appeal (A.52-66)), neither party included them in any pleadings before the district court (*see* A.12).

[9] In any event, appellant's reliance on the statement of one of the investigating officers that it did not "appear that there was any bias-related intent involved" in the potato-gun incident (see A.59) is misplaced. The officer drew that conclusion because (1) he was not "aware of any persons of African-American or Negro descent residing" at the particular house where the potato gun was fired before appellant's arrest,

(continued . . .)

Appellant's alternative argument (at 14), that even if the potato-gun incident was "'some evidence' of [appellant] actually acting out on a racist ideology, it is surely tempered by the absence of any 'acting out' in the intervening decade," fares no better. Appellant highlights (*id.*) his lack of a significant criminal record,[10] and his military and employment history. The court was aware of those facts, but took note of appellant's actions on January 6th, statements to the CHS thereafter, and "well-documented history of violent and racist language," and found that it went "beyond just being racist, but suggesting violence towards people who are not like" him and "suggest[ed] that the defendant poses a danger to the community" (A.28-29). That finding is amply supported by the reports of appellant's co-workers that he made racist and violent statements in the workplace, and that several co-workers feared

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and (2) one of appellant's juvenile companions had "prior issues" with the son of the homeowners (*id.*). That does not, however, establish that *appellant's* motive was unrelated to bias against non-whites or Jews. Moreover, the officer did not have the benefit of evidence of appellant's numerous hateful statements over the ensuing years, which shed additional light on appellant's motive at the time.

[10] Appellant erroneously asserts (at 12) that the court found he "had no criminal history." Rather, the court found that appellant had a limited criminal history, in the form of a possible misdemeanor conviction for disorderly conduct (A.28).

reporting him because he was "crazy" and "unstable" (Dkt.18:6-8). That finding is further supported by the police reports from 2020 indicating that appellant harassed people who were Jewish by putting their names and addresses on the internet and suggesting a confrontation (A.11-12).[11] Although appellant disagrees with the weight the district court accorded his past actions and statements, the court was charged with weighing that information, and, based on the totality of the record, its finding that appellant's history weighed in favor of detention is not clearly erroneous. *See Anderson*, 470 U.S. at 574 ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."); *Manafort*, 897 F.3d at 347 (When reviewing under the clear error standard, we do not weigh each piece of evidence in isolation, but consider the evidence taken as a whole.") (citation omitted).

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[11] Indeed, "Racially or Ethnically Motivated Violent Extremists [], specifically those who advocate for the superiority of the white race," have been identified as "[t]he top threat [this country] face[s] from [domestic violent extremists]." Oversight of the Federal Bureau of Investigation: The January 6 Insurrection, Domestic Terrorism, and Other Threats, S. Judiciary Comm., 117th Cong. 3 (2021) (statement of Christopher Wray, Dir., FBI) (available at https://www.judiciary.senate.gov/imo/media/doc/SJC%20Oversight%20Hearing%20-%20FBI%20Director%20Wray%20SFR%20-203.2.2021.pdf).

4. Nature and seriousness of danger to the community

Finally, appellant argues (at 16-21) that the district court clearly erred in finding that appellant presented a danger to the CHS in particular, and the community in general. As the district court noted, however, appellant did not challenge the factual allegations against him concerning his conduct on and after January 6, or his statements to the CHS, police, and his coworkers (A.20-21, 26). The court accordingly did not rely on mere "speculati[on]" (Mem.16) that appellant posed a threat to the CHS. Instead, the court properly found that appellant's personal knowledge of the CHS's identity and whereabouts, combined with evidence that appellant had deleted video and digital files and destroyed or concealed other potential evidence against him, and the reports that appellant's coworkers were frightened of him, raised a significant possibility that appellant might take action against the CHS. Indeed, appellant's past use of the internet to harass people because of their religion in 2020, permitted a reasonable – and certainly not clearly erroneous – inference that appellant could use the internet to harass or intimidate a witness against him. Thus, the mere fact that appellant had not previously expressed hostility toward the CHS, or supposedly bears

the CHS no ill will (Mem.17-18) – arguably not a reasonable inference based on the record evidence – did not require the court to ignore the danger appellant poses.[12]

Further, appellant errs in suggesting (at 18-21) that the district court should have regarded his violent beliefs as mere "fantasy," and not evidence of danger to the community. The events of January 6, 2021, have exposed the size and determination of right-wing fringe groups and their willingness to place themselves and others in danger to further their political ideology. Although appellant asserts he is not a member of an organization or group responsible for the attack, he eagerly joined that attack and has espoused beliefs consistent with those groups.[13] The court

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[12] Although appellant also argues (at 19) he is not a danger because he owns no weapons, the court could reasonably have inferred he could get or make one. As the police report appellant submitted (A.61) shows, the potato-gun was a homemade device that used an explosion to fire a projectile.

[13] While organized groups that participated in the January 6 assault are certainly dangerous, appellant's lack of association is not evidence that appellant does not pose a danger. Indeed, as a recent Homeland Security Strategic intelligence assessment makes clear, "[t]he greatest terrorism threat to the Homeland we face today is posed by lone offenders, often radicalized online, who look to attack soft targets with easily accessible weapons." *Strategic Intelligence Assessment and Data on Domestic Terrorism*, p.2, Federal Bureau of Investigation, Department of

(continued . . .)

reasonably found that appellant's statements to the CHS and others espousing civil war and racially-motivated violence reflected his embrace of a philosophy posing a danger of "escalation of violence . . . given all that has occurred" (A.30). The court did not clearly err in considering appellant's extremist beliefs, in light of his willingness to take over the Capitol to prevent the peaceful transition of power. Contrary to appellant's argument (at 18-19), the government did not "concede" that appellant's *desire* for civil war was a "fantasy" (citing Dkt.26), but rather argued that his belief in the inevitability of such a war, and disregard of the loss of life that it would entail, posed a concrete threat to democracy and society at large. The court accordingly did not clearly err in concluding that appellant's threatening statements were not mere

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Homeland Security, May 2021, (available at https://www.dhs.gov/sites/default/files/publications/21_0514_strategic-intelligence-assessment-data-domestic-terrorism_0.pdf). *See also* Oversight of the Federal Bureau of Investigation: The January 6 Insurrection, Domestic Terrorism, and Other Threats, S. Judiciary Comm., 117th Cong. 3 (2021) (statement of Christopher Wray, Dir., FBI) ("The most significant threat to our homeland is posed by lone actors who often radicalize online and seek out soft targets to attack with easily accessible weapons.").

rhetoric, but an indication that appellant posed a sufficient danger to merit pretrial detention.

CONCLUSION

WHEREFORE, the government respectfully submits that the order of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I HEREBY CERTIFY pursuant to Fed. R. App. P. 32(g) that this brief contains 5,196 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Circuit Rule 32(e)(1), and therefore complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). This brief has been prepared in 14-point Century Schoolbook, a proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing Brief for Appellee to be served by electronic means, through the Court's CM/ECF system, upon counsel for appellant, Jonathan Zucker, Esq., Jonathanzuckerlaw@gmail.com, on this 7th day of June, 2021.

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