ZIP TIE GUY ERIC MUNCHEL GETS A SECOND CHANCE AT RELEASE

The DC Circuit just remanded the case of Zip Tie Guy Eric Munchel and his mother Lisa Eisenhart for reconsideration of their bid for release. Robert Wilkins wrote the opinion, joined by Judith Rogers; Gregory Katsas dissented in some but not all of the opinion.

I wrote here and here about how this was a close case. As such, this opinion will provide important guideposts for other January 6 making similar arguments.

The opinion agreed that January 6 posed an urgent risk to our democracy, generally presenting a broad authority to detain people. But it also emphasized that only some of the participants in the insurrection pose enough of a danger to afford exceptional authority to detain people.

> It cannot be gainsaid that the violent breach of the Capitol on January 6 was a grave danger to our democracy, and that those who participated could rightly be subject to detention to safeguard the community. Cf. Salerno, 481 U.S. at 748 ("[I]n times of war or insurrection, when society's interest is at its peak, the Government may detain individuals whom the government believes to be dangerous." (citations omitted)). But we have a grave constitutional obligation to ensure that the facts and circumstances of each case warrant this exceptional treatment.

In the case of Munchel and his mom, the opinion found that the analysis of the danger that Munchel and his mom present to the community was

not forward looking, and because they had not done a number of things — actually broken through barricades, assaulted cops, planned the operation, or abetted that process — their dangerousness was not sufficient to make their unwillingness to follow release conditions a factor. In particular, without the special circumstances of the vote certification and the violent mob, the mother and son likely would not pose the same threat to our country.

> Here, the District Court did not adequately demonstrate that it considered whether Munchel and Eisenhart posed an articulable threat to the community in view of their conduct on January 6, and the particular circumstances of January 6. The District Court based its dangerousness determination on a finding that "Munchel's alleged conduct indicates that he is willing to use force to promote his political ends," and that "[s]uch conduct poses a clear risk to the community." Munchel, 2021 WL 620236, at *6. In making this determination, however, the Court did not explain how it reached that conclusion notwithstanding the countervailing finding that "the record contains no evidence indicating that, while inside the Capitol, Munchel or Eisenhart vandalized any property or physically harmed any person," id. at *3, and the absence of any record evidence that either Munchel or Eisenhart committed any violence on January 6. That Munchel and Eisenhart assaulted no one on January 6; that they did not enter the Capitol by force; and that they vandalized no property are all factors that weigh against a finding that either pose a threat of "using force to promote [their] political ends," and that the District Court should consider on remand. If, in light of the lack of evidence that Munchel or Eisenhart

> committed violence on January 6, the District Court finds that they do not in fact pose a threat of committing violence in the future, the District Court should consider this finding in making its dangerousness determination. In our view, those who actually assaulted police officers and broke through windows, doors, and barricades, and those who aided, conspired with, planned, or coordinated such actions, are in a different category of dangerousness than those who cheered on the violence or entered the Capitol after others cleared the way.
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> [snip]
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> The District Court also failed to demonstrate that it considered the specific circumstances that made it possible, on January 6, for Munchel and Eisenhart to threaten the peaceful transfer of power. The appellants had a unique opportunity to obstruct democracy on January 6 because of the electoral college vote tally taking place that day, and the concurrently scheduled rallies and protests. Thus, Munchel and Eisenhart were able to attempt to obstruct the electoral college vote by entering the Capitol together with a large group of people who had gathered at the Capitol in protest that day. Because Munchel and Eisenhart did not vandalize any property or commit violence, the presence of the group was critical to their ability to obstruct the vote and to cause danger to the community. Without it, Munchel and Eisenhart—two individuals who did not engage in any violence and who were not involved in planning or coordinating the activities— seemingly would have posed little threat. The District Court found that appellants were a danger to "act against Congress" in the future, but

> there was no explanation of how the appellants would be capable of doing so now that the specific circumstances of January 6 have passed. This, too, is a factor that the District Court should consider on remand.

I suspect mom, at least, will get bail on remand. And I suspect other defendants will try to argue (some with likely success) that they fit the same categories as Munchel and his mom — willing participants in an insurrection, but not key enough players to detain awaiting trial.

Among the principles it lays out:

January 6 was a Constitutional risk, but some defendants were only a threat on that day with that mob

As noted, the Circuit agrees that January 6 presented such a risk to the country that extraordinary detention authorities may be necessary. It included a list of circumstances — similar to the ones that Beryl Howell laid out — that reach this heightened level of risk. Some defendants (particularly the far right lone actors who did not engage in violence personally) will likely be able to ask for review of their own detention. But others — including some of the Oath Keepers — will have the case for their detention reinforced because of their role aiding and abetting a concerted attack on democracy.

DC District judges can review detention

remotely

While dicta, a footnote complains that it took so long — until they had been transported to DC — for the two to have a detention review in DC. It asks why a District judge could not have conducted the review remotely.

> While COVID-19 issues caused a delay in the appellants' transport to the District of Columbia, the record does not indicate why a D.C. District Judge could not have heard this matter prior to February 17, even if the appellants were in another location. Ultimately, this issue, while troubling, is not presented as a ground for reversal in this appeal.

This is something that has come up in other cases, repeatedly. This panel, at least, seems to agree that a DC District judge can review detention remotely.

DC District judges don't have to defer to the local Magistrates' decisions *if there's new evidence*

Munchel and his mother argued that once the Magistrate in Tennessee judged them not to be a danger, the District had no authority to review that determination. The Circuit disagrees, but only with regards to the circumstances of this case, where the government provides new evidence to the District.

> The statute concerning review of a Magistrate Judge's release order says nothing about the standard of the district court's review, see 18 U.S.C. § 3145(a), and we have not squarely

> decided the issue.3 We need not break new ground in this case, because as the appellants maintain in their briefing, Munchel Reply Mem. 8, n.3, the government submitted substantial additional evidence to the district judge that had not been presented to the Magistrate Judge, including the 50-minute iPhone video, a partial transcript of the video, and several videos from Capitol CCTV.4 As a result, this was not an instance where the District Court made its dangerousness finding based on the same record as was before the Magistrate Judge. Here, the situation was more akin to a new hearing, and as such, the issue before the District Court was not really whether to defer (or not) to a finding made by the Magistrate Judge on the same evidentiary record.
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> 3 This court stated long ago, in dictum, in a case arising under the predecessor Bail Reform Act that district courts review such prior determinations with "broad discretion." Wood v. United States, 391 F.2d 981, 984 (D.C. Cir. 1968) ("Evaluating the competing considerations is a task for the commissioner or judge in the first instance, and then the judges of the District Court (where they have original jurisdiction over the offense) have a broad discretion to amend the conditions imposed, or to grant release outright, if they feel that the balance has been improperly struck.").

Before we're done, I wouldn't be surprised if the DC Circuit is asked to weigh in directly on the standard of review here.

DC District judges can consider whether a defendant will abide by release conditions

Munchel and his mother had tried to limit when a District judge can consider whether they will abide by release conditions, not to reconsider bail but only to revoke it.

> Second, we reject the argument that the District Court inappropriately relied on a finding that appellants were unlikely to abide by release conditions to detain them, because that factor is applicable only to revocation of pretrial release. The District Court's finding as to appellants' potential compliance is relevant to the ultimate determination of "whether there are conditions of release that will reasonably assure . . . the safety of any other person and the community." 18 U.S.C. § 3142(f) and (g). Indeed, other courts have found a defendant's potential for compliance with release conditions relevant to the detention inquiry.
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> [snip]
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> While failure to abide by release conditions is an explicit ground for revocation of release in 18 U.S.C. § 3148(b), it defies logic to suggest that a court cannot consider whether it believes the defendant will actually abide by its conditions when making the release determination in the first instance pursuant to 18 U.S.C. § 3142.

This has come up with other defendants. That said, this opinion as a whole says that a refusal to abide by release conditions *by itself* is not enough to detain someone. This part of the ruling will be particularly impactful for

those detained because either a belief in QAnon or Nazism suggests a general disdain for our existing government.

A taser counts as a weapon

Munchel and his mother also argued that their alleged crimes don't merit detention because the taser Munchel brought with him is not a weapon. Not only did the Circuit disagree, but it also readily applied the analysis to Eisenhart's abetting exposure.

> Third, we reject Munchel and Eisenhart's arguments that the charged offenses do not authorize detention. Under 18 U.S.C. § 3142(f)(1)(E), detention is permitted if the case involves "any felony . . . that involves the possession or use of a . . . dangerous weapon." (emphasis added). Two of the charges in the indictment meet this description: Count Two– entering a restricted building "with intent to impede and disrupt the orderly conduct of Government business . . . while armed with a dangerous weapon," in violation of 18 U.S.C. § 1752(a)(1) and (a)(2) and 18 U.S.C. § 2 (aiding and abetting charge for Eisenhart); and Count Three–violent entry or disorderly conduct, again "while armed with a dangerous weapon," in violation of 40 U.S.C. § 5104(e)(1) and (e)(2) and 18 U.S.C. § 2. Indictment, ECF No. 21 at 2. The Bail Reform Act thus explicitly authorizes detention when a defendant is charged with committing certain felonies while possessing a dangerous weapon, as is alleged in this indictment.5
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> 5 Eisenhart's argument that a taser is not a dangerous weapon– which Eisenhart raises for the first time in reply, and which Munchel seeks to adopt in his

> reply—is without merit. The relevant statute, 40 U.S.C. § 5104(a)(2)(B), defines the term "dangerous weapon" to include "a device designed to expel or hurl a projectile capable of causing injury to individuals or property. . . ." While the record contains no evidence or proffer as to how Munchel's taser operates, a taser is commonly understood as a device designed to expel a projectile capable of causing injury to individuals. See Cantu v. City of Dothan, 974 F.3d 1217, 1224–25 (11th Cir. 2020); Mattos v. Agarano, 661 F.3d 433, 443 (9th Cir. 2011) ("[A] taser uses compressed nitrogen to propel a pair of 'probes'—aluminum darts tipped with stainless steel barbs connected to the taser by insulated wires—toward the target at a rate of over 160 feet per second. Upon striking a person, the taser delivers a 1200 volt, low ampere electrical charge. The electrical impulse instantly overrides the victim's central nervous system, paralyzing the muscles throughout the body, rendering the target limp and helpless." (internal alterations and quotation marks omitted)). Thus, at this stage, the evidence sufficiently demonstrates that Munchel's taser is a dangerous weapon under the statute.

This ruling matters specifically for Richard "Bigo" Barnett (who also brought a taser with him), but also holds that the weapons enhancement on the 1752 and 5104 charges that other defendants face will merit detention. The Circuit also readily approved Eisenhart's exposure on account of Munchel's taser. That matters because many defendants are charged with abetting certain conduct that merits detention.

Detention analysis remains individualized

Munchel and his mom, like virtually all defendants arguing for release, have compared their own case to that of others who got released. Because Munchel only raised this in his reply, the Circuit didn't address the comparison per se. But said that the District Court is in better position to review such claims.

> Finally, Munchel and Eisenhart argue that the government's proffer of dangerousness should be weighed against the fact that the government did not seek detention of defendants who admitted they pushed through the police barricades and defendants charged with punching officers, breaking windows, discharging tasers at officers, and with planning and fundraising for the riot. See Munchel Reply Mem. at 9–12. Appellants did not raise this claim before the District Court and the government did not substantively respond to it on appeal because Appellants raised it for the first time in Munchel's reply. Whatever potential persuasiveness the government's failure to seek detention in another case carries in the abstract, every such decision by the government is highly dependent on the specific facts and circumstances of each case, which are not fully before us. In addition, those facts and circumstances are best evaluated by the District Court in the first instance, and it should do so should appellants raise the issue upon remand.

As several people watching the hearing for Connie Meggs' attempt to get release, every detention fight going forward will have to

account for this one. With its broad support for holding conspirators accountable for the violence of others, it may not help Meggs all that much. But it will crystalize these ongoing detention disputes.

Update: I’m wrong. Judge Amit Mehta just released Meggs.