

ANATOMY OF A POTENTIAL JANUARY 6 COOPERATION AGREEMENT

I've written in passing about Jon Ryan Schaffer, the front man for the heavy metal band Iced Earth who was arrested for involvement with spraying bear spray during the January 6 insurrection, several times. In this post I noted that there must be something more to his case because Schaffer had been sitting, uncharged, in jail for months.

Jon Ryan Schaffer: The front man for the heavy metal band Iced Earth and an Oath Keeper lifetime member, Schaffer was arrested for spraying some police with bear spray. But two months after his arrest and detention, he has not been (publicly) indicted and only arrived in DC on March 17. The government has not publicly responded to his motion to dismiss his case on Speedy Trial grounds. All of which suggests there's something more there that we can't see.

Yesterday I included Schaffer among those likely to get cooperation agreements (rather than straight guilty pleas), then updated the post with yet another data point suggesting I was correct.

[A]t least some of the expected pleas may be cooperation agreements. For example, Ryan Samsel – who breached the west side of the Capitol in coordination with Proud Boys Dominic Pezzola and William Pepe, knocking out a cop along the way – asked for a continuance to discuss a plea. One of the main Oath Keeper prosecutors, Ahmed Baset, asked

for a continuance before indicting Oath Keeper associate Jon Schaffer, who was among the worst treated defendants and who agreed to the continuance in spite of remaining in pre-trial detention. Kash Kelly, currently charged with trespassing but also someone raised in discussions between Proud Boys affiliate James Sullivan and Rudy Giuliani, got a continuance to discuss a plea. Bryan Betancur, a Proud Boy who got jailed for a probation violation after he lied to his probation officer to attend the event, also got a continuance to discuss a plea to resolve his trespassing charges. The aforementioned Riley Williams, who was charged with obstructing the vote count and stealing a laptop from Nancy Pelosi, was filmed directing movement inside the Capitol, and has ties with Nick Fuentes, also got a continuance to discuss pleading before indictment. All five of these people likely have information that would be of use to prosecutors. All could limit their prison time (which would likely be significant for Samsel, who is accused of assault, played a key role in the insurrection, and has a criminal record) by cooperating with prosecutors. If any of these people sign plea deals – especially Samsel – it will likely provide new insight into how the conspiracy worked. Even with a plea deal, Samsel may still face a stiff sentence.

[snip]

Update: Meanwhile, Jon Schaffer just agreed to two more weeks in jail.

So the signs suggesting the government was pursuing a cooperation agreement in this case have been pretty clear.

But yesterday, DOJ made that even more clear by

posting a filing to PACER – which was supposed to be sealed – making such negotiations explicit.

As stated in the Consent Motion to Continue, the government and counsel for the defendant have conferred and are continuing to communicate about this matter. This has entailed a series of debrief interviews with the defendant that began on March 2, 2021. Based on these debrief interviews, the parties are currently engaged in good-faith plea negotiations, including discussions about the possibility of entering into a cooperation plea agreement aimed at resolving the matter short of indictment. Among the contemplated plea terms upon acceptance of a plea are the defendant's release pending sentencing.

[snip]

[T]he parties request that this filing be docketed under seal. Such an order is appropriate because the filing relates to sensitive information about the defendant's cooperation with the government and ongoing plea negotiations that are not public. Accordingly, disclosure may reveal the existence, scope, and direction of the ongoing and confidential investigation. If alerted to this information, investigation targets against whom the defendant may be providing information about could be immediately prompted to flee from prosecution, destroy or conceal incriminating evidence, alter their operational tactics to avoid future detection, attempt to influence or intimidate potential witnesses, and otherwise take steps to undermine the investigation and avoid future prosecution. Accordingly, these facts present an extraordinary situation and a compelling governmental interest which

justify sealing of this filing
pertaining to this investigation that is
being submitted at this time. [my
emphasis]

You'll recall that PACER was one of the targets of the Solar Winds hack, which raised concerns that sensitive documents detailing things like cooperation agreements and investigative targets might have been compromised. The Courts' efforts to respond have bolloxed up PACER ever since, which has contributed to an unacceptable delay in postings of non-sensitive documents as the flood of January 6 filings hit.

One of the few things that DOJ has managed to post in timely fashion is this filing, which was supposed to be sealed.

This disclosure may make it harder to negotiate a cooperation agreement (or who knows? it might make it easier!). Certainly, it may present security concerns for Schaffer when he is released, whether or not he cops a plea, because he would get such a plea deal in exchange for testimony against a highly skilled armed militia, and they'll assume he got a deal if he is released pre-trial.

Aside from the very real concerns about how this might affect the investigation into the Oath Keepers, however, the release of the filing is useful for the details it provides.

First, this cooperation deal, if it happens, will be the first of all 350+ defendants.

The government's ongoing plea negotiations with this defendant are the first and most advanced plea negotiations involving any of the over 300 Capitol Riot defendants.

That would mean that others – like the cooperating witness with damning information on Dominic Pezzola and the un-indicted co-conspirator in the Proud Boys conspiracy – have

not been charged at all (as descriptions of them in filings imply). It also suggests that for all the reporting about imminent deals, the cooperation agreements, at least, are two weeks or more away. Every other potential cooperation deal I named in this post follows the same pattern of filings that Schaffer's does, but they have later deadlines for their continuance, though Ryan Samsel is the only other one who is in custody for January 6 (as opposed to other things), which adds urgency to any plea deal:

- Bryan Betancur (in MD state custody): April 27
- Ryan Samsel (in federal custody): May 7 (after being extended from April 1, moving to swap his attorney, then unmoving to do so, though currently he is represented by both)
- Christopher Kelly (not in custody): May 10
- Riley June Williams (not in custody): May 28
- Kash Kelly (in Federal prison for gang-related drug crimes which he also cooperated on): indefinite

It looks like Samsel *might* have been the first plea deal, but an aborted swap of lawyers suggests he may have gotten cold feet. (Recall that Rick Gates did something similar before he flipped in the Mueller investigation; because of his criminal record, Samsel faces a stiffer prison sentence than Schaffer regardless of what happens).

Schaffer's filing explains why cooperation agreements will be weeks away, too: First, plea deals are being reviewed "at various levels of government."

Plea terms have thus required extensive review and approval at various levels of government necessitating more time than usual to approve and negotiate.

Given that Biden doesn't have a confirmed US Attorney in DC, this likely means that at least Acting Deputy Attorney General and former National Security Division head under Obama John Carlin is reviewing these deals, if not Merrick Garland himself. Lisa Monaco should be confirmed as Deputy Attorney General imminently, and she's likely to be interested in all this, too. That is, the level of review this filing suggests this plea deal is getting also hints at the (unsurprisingly) high level involvement in the investigation as a whole.

Perhaps one of the most damaging disclosures by the release of this document is that Schaffer's attorneys have admitted, non-publicly, things they've argued against publicly. In a filing asking for pre-trial release, Schaffer's lawyers argued that merely possessing bear spray did not make Schaffer enough of a threat to require pre-trial detention.

The Government sought "detention based on [Mr. Schaffer] carrying a dangerous weapon inside a restricted ground." Reporter's Transcript of Detention Hearing, p. 7: 8- 10.2 Magistrate Judge Faruqui detained Mr. Schaffer "Upon the Motion of the Government attorney pursuant to 18 U.S.C. § 3142(f)(1)." (Doc. 12, p. 1)

Mr. Schaffer cannot be detained pursuant to 18 U.S.C. § 3142 (f)(1)(E) because the Government's allegation Mr. Schaffer simply possessed bear spray does not support a finding his case involved a dangerous weapon. The Government cannot establish a can of bear spray is dangerous weapon when it is simply possessed.

Schaffer's arrest warrant affidavit described him to be "among" a group of "rioters who sprayed" USCP with bear spray, but didn't say he personally had used the bear spray to assault the cops, nor did it charge him with doing so.

SCHAFFER was among the rioters who sprayed United States Capitol Police officers with "bear spray," a form of capsaicin pepper spray sold by many outdoors retailers, as part of their efforts to push the officers back inside the Capitol and breach the Capitol Building themselves.

According to this filing, however, Schaffer's lawyers conceded during a closed session that he could be charged, presumably including assault for spraying the bear spray, right away.

The parties agree that maintaining the current detention posture, as well as the government forestalling return of a grand jury indictment against the defendant¹, are necessary at this stage to facilitate good-faith plea negotiations.

¹ As acknowledged by the defense during the sealed portion of the April 2, 2021 status hearing, the government is in a position to rapidly obtain an indictment against the defendant should plea negotiations fail.

But the filing also suggests that the grand jury may be posing another bottleneck to this process.

Additional time may also be necessary in the event plea conditions require completion of certain requirements before entering into a formal agreement before the court, such as the defendant testifying before the grand jury.

That is, if and when a plea deal is agreed, they still may require Schaffer to provide any testimony to the grand jury before they finalize the plea and release him.

As noted, the unintentional release of this filing may undermine that process from the start. But it least it provides some clarity on how this process is working for Schaffer and others.

Update: Baked Alaska (real name Anthime Gionet) is another person in whose case the government got a consent motion to delay further proceedings. I'm less confident this would involve a cooperation agreement – it may be a way to forestall questions about whether he is media.