GOVERNMENT MOVES TO DISMISS ITS FIRST JANUARY 6 CASE: CHRISTOPHER KELLY

The government just moved to dismiss the case against Christopher Kelly, whose Facebook seemed to show that he went to January 6 with some Proud Boys and his brother, a former NYPD cop.

OPSEC CONFUSION ON THE OATH KEEPER CONSPIRACY

The Oath Keepers went to some lengths to hide their communications. And then they made their hotel reservations via an interlocking set of bookings and payments that makes plain they were an organized interstate network.

CRYSTALIZING CONSPIRACIES: FOURTH SUPERSEDING, JAMES BREHENY, PUMA'S GOPRO, [REDACTED], AND THE WILLARD

HOTEL

The developments in the Oath Keepers prosecution in the last week have added a call for insurrection, a planning meeting with other militia, and a third witness to what happened at the Willard Hotel before Oath Keepers rushed from there to the Capitol.

LATEX GLOVES HIDING EVIDENCE OF CONSPIRACIES: ON THE UNKNOWN ADEQUACY OF THE JANUARY 6 INVESTIGATION

If Donald Trump and his close associates are going to be held accountable for January 6, it will be via a conspiracy charge, almost certainly involving the Oath Keepers and Proud Boys. But thus far, we have no idea what evidence of conspiracy prosecutors have.

REPUBLICANS FILIBUSTER KEEPING THE CAPITOL SAFE

Republicans just filibustered the bill to create a bipartisan commission to investigate January 6, 54-35. It was the first bill killed by filibuster in this Congress.

I never held out much hope that the commission would work with our partisanship anyway. But this vote has now made it clear that Republicans put party above country.

IN [LEGAL] DEFENSE OF THE NAZI

The government has been holding January 6 defendant, Nazi sympathizer Timothy Hale-Cusanelli for four months, but they have yet to show that he was a key player in the January 6 attack.

RICO COMES TO THE JANUARY 6 INVESTIGATION — BUT NOT THE WAY YOU THINK

DOJ argues that they can seize the funds John Earle Sullivan made by selling his video of the insurrection by going through RICO thinking.

DOJ MOVES TO LABEL JOHN SULLIVAN A

PROFESSIONAL PROVOCATEUR

Yesterday, the government released a superseding indictment for John Earle Sullivan, the guy who filmed video of the insurrection and then sold it to CNN and other media outlets. In addition to adding two crimes for his possession of a knife he boasted of having in his own video but then allegedly lied to the FBI about, the government moved to seize almost $90,000 in forfeiture. The move is an aggressive step that may be justifiable for Sullivan, but has implications for the five or so other propagandists arrested as part of the riot.

Sullivan was first charged, with civil disorder and trespassing, on January 13, after several FBI interviews. His arrest affidavit described how, repeatedly during the video he filmed of the riot, he made comments egging on the rioters. At the moment he caught Ashli Babbitt's shooting on film, he had pushed himself to the front of that mob by calling out that he had a knife.

When the government first indicted Sullivan on February 3, the added obstruction and abetting charges to the civil disorder and trespass charges. That happened at virtually the same time the government moved to revoke his bail, based off several violations of the limits imposed on his use of social media. Sullivan responded by arguing that all that media contact was his job; his lawyer even provided evidence of the funds CNN have paid him to obtain his video of the insurrection. In response, Sullivan remained on bail with more explicit limits to his Internet access.

The one public discovery notice provided to Sullivan so far includes:

- Earlier publications showing his efforts as a provocateur, including

"Let's start a riot" and "How to Take Down a Monument"
- His criminal arrest record that includes association with past outbreaks of violence at protests
- An interview he did on Infowars after the riot
- Subpoenas to CenturyLink and Beehive Broadband, suggesting they were tracking traffic on Sullivan's website

Then things went quiet in his case until, on May 7, his lawyer filed a motion to get funds in a Utah bank released he said had been seized without warning. It argued that Sullivan is entitled to a hearing at which he can contest that he committed a crime and the funds being seized came from the crime.

> Accordingly, the federal courts have held that when the government restrains a criminal defendant's assets before trial on the assertion that they may be subject to forfeiture, due process requires that the defendant be afforded a post-deprivation, pretrial hearing to challenge the restraint. If certain minimal conditions are satisfied, "[t]he wholesale use of…forfeiture proceedings [should cause] grave concern when the Government has clearly focused its law enforcement energies and resources upon a person and attempts to restrain his property…." United States v. $39,000 in Canadian Currency." 801 F.2d 1210, 1219 n.7 (10th Cir. 1986).
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> The United States Supreme Court has made clear that pretrial seizure, pursuant to 21 U.S.C. Sec. 853 (f) requires two

> probable cause findings: (1) that the defendant committed an offense permitting forfeiture and (2) that the property at issue has the requisite connection to that crime." Kaley v. United States, 134 S. Ct 1090,1095 (2014).
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> At the outset, defendant notes that he needs the funds in the seized bank account in order to pay his rent and household necessities. Additionally, the proceeds of the seized bank account are not the product of criminal activity alleged in the indictment.

Thus the new indictment, I guess.

The indictment ties the forfeiture not to Sullivan's civil disorder charge, which would seem to make sense given Sullivan's past history of profiting off inciting violence at peaceful protests, but instead to Sullivan's obstruction charge. That seems to argue that Sullivan's filming of the insurrection, in which he cajoled police to step down (including from the confrontation before Babbitt was shot) and cheered on the seizure of the Capitol, was part of the successful obstruction of the vote count.

Given Sullivan's past incitement (which, ironically, was well-documented by leftist activists months before Trump supporters and Sullivan's own brother tried to base an Antifa false flag claim on Sullivan's presence), this may be a reasonable argument for Sullivan.

But there are at least five other right wing propagandists who were present at the insurrection for whom that might be a really troubling precedent (an InfoWars video editor Sam Montoya also witnessed and magnified Babbitt's death).

Again, this may all be merited. And perhaps DOJ is tying Sullivan's new charges for his knife to the seizure. But it seems an important development to track.

Update: Sullivan's motion for a hearing on the seizures alluded to more discovery. This letter may describe that discovery. It describes a slew of subpoenas, including Square, JP Morgan, Venmo, Discover, Amazon, and others. In other words, the letter reflects a concerted effort to figure out how Sullivan's finances work.

But the more interesting detail is item 21, reflecting the HIGHLY SENSITIVE estimate from the Architect of the Capitol estimating the cost of replacing a window. Sullivan's own video strongly implies he broke that window. But he hasn't been charged with it yet. That's important, because he could be — and if he is, it could trigger terrorism enhancements.

It was harsh of the government to seize Sullivan's funds. But what might come next will be far more harsh.

Update: Justin Rohrlich found and shared the seizure warrants. The logic behind this seizure is as follows:

¶31: The affidavit lays out evidence of Sullivan admitting he's not a journalist, including hims saying on January 5 that he made that claim up "on the fly."

¶32: A description of how after the riot, Sullivan changed his webpage description to incorporate a claim to be a journalist.

¶34: Citations to the hearing on his release violations in which he presented the contracts he got for the video.

¶35: A brag, right after he left the Capitol, saying, "Everybody's gonna want this. Nobody has it. I'm selling it, I could make millions of dollars. … I brought my megaphone to instigate shit."

¶36: A summary of the deposits paid for use of the video.

Y'ALL QAEDA NORTHWEST: ETHAN NORDEAN PROVIDES YET MORE PROOF OF THE PROUD BOYS' SOPHISTICATION AND RESILIENCE

The government and Ethan Nordean are having a dispute that is, at least procedurally, about whether by giving Nordean the Telegram text messages he demanded in prioritized fashion, the government committed a Brady violation. Nordean started this dispute on April 29 with a filing admitting that the texts he received before his detention hearing were the ones he asked for specifically but still complaining that he didn't get all his texts at once.

> Today, the government produced for the first time additional Telegram messages extracted from Nordean's phone. The government provided no explanation as to why they were produced after the hearing on its third detention motion and not beforehand.1 Like the Telegram chats it used to support detention, today's production was drawn from the same device (Nordean's phone), the same app (Telegram), and only postdate by some days the chats the government used to detain Nordean. In reviewing the following chats, the Court may recall that because the Telegram messages are encrypted and, according to the government, "designed to evade law enforcement," the government would have the Court believe the app users are

> speaking candidly in Telegram.
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> On March 25, Nordean requested that the government produce, at least by March 30, Telegram chats on Nordean's phone sent and received between 1/4/21 and 1/8/21. Nordean did not say that no other chats should be produced, nor did he waive any right to Brady material of which the government was aware. On March 9, Nordean served a discovery letter on the government seeking all of the defendant's statements and requesting that Brady material be produced according to the schedule in Rule 5.1.

The government response doesn't point out that they gave Nordean precisely what Nordean asked for. It does describe how they provided Nordean's Telegram chats in three waves, with the entire content of his phone provided by April 30.

> On April 29, 2021, the government produced to defendant Nordean eleven (11) strings of text messages, totaling over 5,000 pages, that contained the terms "Ministry of Self-Defense" or "MOSD," and that were recovered from defendant Nordean's phone.
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> Thereafter, on April 30, 2021, a full copy of an extraction from defendant Nordean's phone was produced to Nordean's counsel. That production included approximately 1,172 Telegram message strings (totaling over 1.3 million messages). The extracted text of the Telegram messages in Nordean's phone runs over 204,000 pages when printed in .pdf format, which does not include any of the images, audio, or video files that are associated with the message strings. In addition to the Telegram messages, the phone contains hundreds of other communications using other platforms, including other encrypted

> platforms such as Signal and WhatsApp. The government's review of these message strings, hundreds of which contained communications between December 2020 and January 2021, is ongoing, and all of this information is in defendant Nordean's possession.

Nordean's reply doubles down on the accusations of misconduct, now claiming the government intentionally withheld substantiation of Nordean's claim to have disavowed rallies.

> Nordean had presented an audio recording of himself in a conversation with members of his group in which he rejected political rallying. The recording shows him annoyed with how often he had to "repeat himself" on the point. The clip was recorded in February, shortly before his arrest. It is not "self-serving," as he was communicating with his in-group and through the medium that the government alleges was used "to evade detection."1 The Court found that the clip "does suggest that, at some point, [Nordean] agreed that the Proud Boys should stop rallying." Hr'g Trans., 4/19/21, p. 55:21. However, the Court also found that "without any further context there's no indication that that was some kind of permanent decision." Id., p. 55:22.
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> At the time of the hearing, there was "further context." The government knew it and did not inform the defense or the Court. Shortly after that hearing, on April 29, the government produced late January chats in which Nordean repeatedly discussed "bans on rallies"; in which Nordean said, "fuck politics, build communities and local economy" (Cf. the Court: "politics has not [passed]"); where Nordean endorses the doubly capital notion "THE PROUD BOYS

> ARE NOT MARCHING ON CAPITAL BUILDINGS”; and in which Nordean reacts dismissively, in real time, to the conspiracy charge supposedly predicating his detention. On its own, the government’s late production of these chats is unequivocally a violation of the Due Process Protections Act and Local Criminal Rule 5.1. It is also a violation of Rule 3.8(e) of the D.C. Rules of Professional Conduct for prosecutors.2
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> 2 “The prosecutor in a criminal case shall not . . . Intentionally fail to disclose to the defense, upon request and at a time when use by the defense is reasonably feasible, any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or mitigate the offense.” Rule 3.8(e) of the D.C. Rules of Professional Conduct.

In his reply Nordean asks a fair question — why the government didn’t just keep screen-capping texts that were a “two-second scroll” down Nordean’s phone from the chats the government had turned over in response to Nordean’s specific request. It seems the government has a reasonable answer: because it was responding to a specific request, though they have yet to say that specifically.

Nevertheless, neither side is treating this as a dispute over misconduct. The government notes that his original motion asks for no relief.

> Defendant Nordean’s notice alleging a violation of those provisions (ECF 79) seeks no relief, and no relief or further action by the Court is necessary or appropriate.

Nordean’s reply asks for no relief either. It instead says that he is “developing evidence,”

but once again asks for no relief.

> The government concludes its response by saying Nordean's "notice seeks no relief because defendant is entitled to no relief." ECF No. 84, p. 12. The government is mistaken. The notice sought no relief because Nordean is developing further evidence of the government's misconduct in filing a series of misleading claims in this matter and in withholding evidence so that it cannot be timely used.

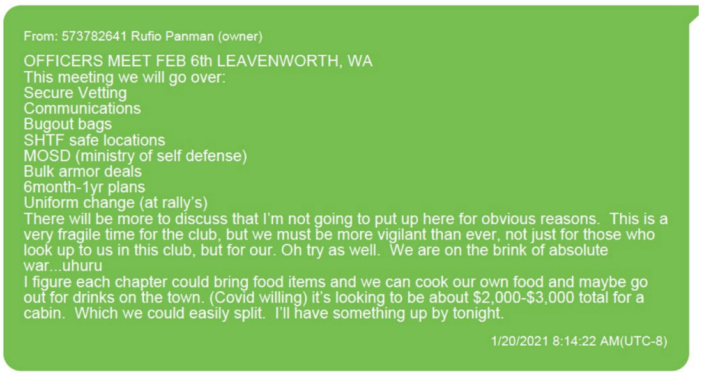
And Nordean goes from that comment — stating that it is incorrect that he asks for no relief by once again asking for no relief — to instead make an argument about bail. (This series of exchanges is actually about preparing a record for Nordean's detention challenge at the DC Circuit.)

Nordean points to this declaration from Daniel Aurellano stating that Ethan Nordean is no longer the President of Proud Boys Seattle Chapter, because he, Aurellano, was elected to replace him.

> Nordean is also developing evidence showing that the premises for revoking his release order are factually mistaken. For example, although Nordean's leadership role in the Proud Boys was cited to detain him, he is no longer a leader, in any sense of the word, in that organization, nor does he have any decision-making authority, as sworn statements indicate and will further indicate.

Aurellano says he was elected to replace Nordean "in February 2021," but doesn't say when that happened. Nor does Aurellano say when, in February 2021, the Proud Boys Northwest chose to dissociate from the national Proud Boys. He does, however, say Nordean stopped participating

in Proud Boys Internet communications after his arrest in February 2021. Which suggests Aurellano got elected to replace Nordean at a meeting that Nordean called for while still the head of the chapter, on January 20, and at which Nordean planned to discuss “bugout bags” and “bulk armor deals” because they were “on the brink of absolute war.”



Nordean makes much of the fact that subsequent to this January 20 statement, and so also subsequent to Joe Biggs’ arrest on January 20, he made a series of comments forswearing rallies.

But that means one of the last things Nordean did while still in charge was call for and prepare for war — not to mention to call for bugout bags for which the old passport of one’s ex-wife, such as the one the government alleges (though the allegation is contested) was out on Nordean’s bedroom dresser when the FBI came to search his house — would be acutely valuable. And then everyone started getting arrested and the Proud Boys took steps to cover their tracks.

Amid this whole bail dispute pretending to be a misconduct dispute, however, Nordean has helped to lay out both that this is a remarkably organized militia, and it is adopting a tactic other terrorist groups have in the past: to splinter and rebrand as a way to attempt to evade prosecution, as if the Proud Boys Northwest had adopted the name Y’All Qaeda Northwest like African branches of the Islamic State did.

Thus far, filings in the Proud Boys Leadership conspiracy case have shown that:

- The Proud Boys started preparing a compartmented cell structure in anticipation of the January 6 insurrection on December 29
- Enrique Tarrio anticipated he would be arrested when he came to DC on January 4 and so provided for a succession plan
- Charles Donohoe allegedly attempted to destroy evidence of past planning in the wake of Tarrio's arrest, specifically in an attempt to avoid gang charges (whether he succeeded or not remains contested)
- In the aftermath of January 6, the Proud Boys (and Nordean specifically) took steps to prepare for war
- In Seattle, the Proud Boys responded to Nordean's arrest by ensuring the continuity of the organization

Again, none of this is exculpatory for Nordean. It shows the Proud Boys operating like sophisticated terrorist groups have operated in the past, in an attempt to retain viability while under government scrutiny.

And along the way, Nordean and the government have been drawing an utterly convincing argument

– with two attempts to access passports and an explicit call for bugout bags – that he would flee the country the first chance he got.

JANUARY 6: A CHANGE OF PACE

The pace of arrests in the January 6 investigation has slowed of late. But there’s a lot more going on in the background.