

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA)	
Plaintiff)	Criminal Case 21-CR-28
)	
v.)	Trial: February 1, 2023
)	
WILLIAM ISAACS)	Judge Amit P. Mehta
Defendant)	

WILLIAM ISAACS' OMNIBUS MOTION IN LIMINE

PLEASE TAKE NOTICE that Defendant William Isaacs ("Mr. Isaacs"), through undersigned counsel, hereby respectfully submits to this Honorable Court his Omnibus Motion in Limine in this matter.

I. PROCEDURAL HISTORY

Mr. Isaacs has asked for a jury trial, which will be conducted in February or April 2023. This Court has not yet determined the exact date of his trial.

On May 27, 2021, the Government initially indicted Mr. Isaacs on six felony counts relating to his alleged activities on January 6, 2021. Mr. Isaacs pleaded not guilty to each count. This Court released Mr. Isaacs on his own personal recognizance. He has been fully compliant with his bond conditions.

On June 22, 2022, in the Eighth Superseding Indictment, Mr. Isaacs was charged with the following crimes: Count 1, 18 U.S.C. § 1512(k) (Conspiracy to Obstruct an Official Proceeding); Count 2, 18 U.S.C. §§ 1512(c)(2), 2 (Obstruction of an Official Proceeding and Aiding and Abetting); Count 3, 18 U.S.C. § 372 (Conspiracy to Prevent an Officer from Discharging Any Duties); Count 4, 18 U.S.C. §§ 1361, 2

(Destruction of Government Property and Aiding and Abetting), Count 5, 18 U.S.C. § 1752(a)(1) (Entering and Remaining in a Restricted Building or Grounds); and Counts 6 and 7, 18 U.S.C. §§ 231(a)(3), 2 (Civil Disorder and Aiding and Abetting). Mr. Isaacs has pleaded not guilty to these charges.

As of the time of filing of this Omnibus Motion in Limine, the Government has not yet provided a list of exhibits, witnesses, or statements tailored to Mr. Isaacs. Accordingly, Mr. Isaacs respectfully reserves his right to supplement the Omnibus Motion in Limine and to otherwise respond to any motion or filing in the above-referenced matter.

II. NOTICE OF MOTION TO JOIN IN MOTIONS IN LIMINE PREVIOUSLY FILED

Mr. Isaacs hereby joins and adopts the applicable factual and legal arguments set forth in the following motions filed in *Rhodes* I trial and *Rhodes* II trial:

- Rhodes I Defendants' Supplement and Renewed Joint Motion to Transfer Venue, ECF No. 339 in Case No. 22-CR-15-APM;
- Defendant Roberto Minuta's Motion in Limine No. 1 – Witness Narration of Video and Documentary Evidence, ECF No. 386 in Case No. 22-CR-15-APM;
- Defendant Joseph Hackett's Omnibus Motion in Limine, ECF No. 387 in Case No. 22-CR-15-APM;
- Defendant Joseph Hackett's Reply to ECF 392 and Additional Objections, ECF No. 399 in Case No. 22-CR-15-APM; and

- Defendant Roberto Minuta's Supplemental Brief in Support of Co-Defendant Hackett's Motion in Limine Regarding "Montage" Exhibits, ECF No. 413 in Case No. 22-CR-15-APM.
- Defendant Roberto Minuta's Motion in Limine to Preclude Admission under Rule 801(D)(2)(E) of Statements by North Carolina Oathkeeper, ECF No. 421 in Case No. 22-CR-15-APM.
- Defendant Roberto Minuta's Motion in Limine to Preclude Admission under Rule 801(D)(2)(E) of Statements by Thomas Caldwell, ECF No. 422 in Case No. 22-CR-15-APM.

Mr. Isaacs incorporates by reference the arguments raised and the case law cited in the above motions. To the extent the motions are fact specific to those defendants, the legal analysis nonetheless applies to Mr. Isaacs.

III. MOTIONS IN LIMINE

Mr. Isaacs seeks to bar the argument, accusation, innuendo, testimony, and other evidence as set forth in the below motions in limine:

A. MOTION IN LIMINE TO PRECLUDE GOVERNMENT'S USAGE OF CERTAIN WORDS AND PHRASES

Pursuant to Fed. R. Evid. 403, Mr. Isaacs respectfully requests this Court preclude the government and witnesses from using the following terms when referring to or describing Mr. Isaacs, his co-defendants, and/or the Oath Keepers organization during this trial:

- "anti-government;"
- "extremism;"

- “extremist;”
- “insurrection;”
- “insurrectionist;”
- “militia;”
- “mob;”
- “organized militia;”
- “racism;”
- “racist;”
- “riot;”
- “rioters;”
- “stack;”
- “white nationalism;”
- “white nationalist;”
- “white supremacism;” and/or
- “white supremacist.”

Rule 403 gives federal courts wide discretion to preclude the usage of certain unfairly prejudicial terminology at trial. *See, e.g., Sabre Int’l Sec. v. Torres Advanced Enter. Sols., LLC*, 72 F. Supp. 3d 131, 150 (D.D.C. 2014); *United States v. Asuncion*, No. 1:17-CR-02015-EFS-1, 2017 WL 11530425, at *1 (E.D. Wash. Nov. 15, 2017); *United States v. Dimora*, 843 F. Supp. 2d 799, 847 (N.D. Ohio 2012); *United States v. Carr*, 2:13-cr-00250-JAD-VCF-3, 2016 U.S. Dist. LEXIS 64822 (D. Nev. May 16, 2016). In considering whether to preclude the usage of certain terminology, courts “look[] beyond the technical accuracy of a phrase and consider[] such factors as the ‘threat of unfair prejudice, frequency of use, and alternative means of description.’” *United States v. Diaz*, No. 213CR00148JADGWF, 2014 WL 12708688, at *3 (D. Nev. Apr. 14, 2014) (quoting *United States v. Felton*, 417 F.3d 97, 103 (1st Cir. 2005)).

Courts often preclude the use of conclusory terms that embrace an underlying assumption of guilt, particularly where that assumption does not relate to the crimes

charged. *Dimora*, 843 F. Supp. 2d at 847; *Diaz*, 2014 WL 12708688, at *3-4. For example, the court in *Dimora* prohibited the government from using the phrase “corrupt commissioner” when referring to a defendant indicted on conspiracy charges. *Dimora*, 843 F. Supp. 2d at 847. It reasoned that this phrase was “gratuitously inflammatory” because the word “corrupt” was conclusory, suggested guilt without reference to the crimes charged, and neutral alternative phrases were available. *Id.* The court in *Diaz* similarly prohibited use of the term “organized crime,” finding that it carried an obvious stigma and was suggestive of racketeering activity, which was not at issue in the case. *Diaz*, 2014 WL 12708688, at *3-4.

Courts also routinely preclude the use of charged terms that will needlessly inflame the jury. *Carr*, 2016 U.S. Dist. LEXIS 64822; *Asuncion*, 2017 WL 11530425, at *1. In *Carr*, the government was precluded from using the word “gang” when referring to a group of motorcycle riders charged with conspiracy to interfere with commerce. *Carr*, 2016 U.S. Dist. LEXIS 64822. The court ruled that while group membership activity was relevant to determining whether the defendants had conspired, referring to the defendants as a “gang” as opposed to simply a “club,” “group,” or “organization” made no fact of consequence more or less likely. *Id.* The probative value of the term therefore was substantially outweighed by the danger of unfair prejudice. *Id.* In *Asuncion*, the court likewise found that referring to the defendant as a “violent offender” in connection with the activities of a “Violent Offender Task Force” was not relevant to the charge at issue and improperly suggested that the defendant should be considered a violent offender. *Asuncion*, 2017 WL 11530425, at *1.

Allowing the Government in this trial to use the terms “insurrectionist,” “insurrection,” “militia,” and/or “organized militia” when referring to Mr. Isaacs, the other defendants, individually or collectively, or the Oath Keepers organization would improperly suggest that the defendants are guilty of crimes not charged. Like the word “corrupt,” which was found conclusory and suggestive of guilt in *Dimora*, “insurrectionist” is a conclusory label that necessarily suggests its subject is guilty of insurrection, a crime not charged against Mr. Isaacs or the defendants in this trial. Further, this label is fraught with divisive connotations due to widespread negative media coverage surrounding January 6th and the media frequently using the term “insurrection.”

The terms “militia” and/or “organized militia” also carry an obvious stigma as was found of the phrase “organized crime” in *Diaz*. These terms imply a level of formal militaristic conduct and are likely to bring forth violent imagery in the minds of the jury; imagery that is not probative of the charges and unnecessary when terms like “group” or “organization” are available.

Unfair prejudice would also result from the government’s usage of the terms “extremist,” “extremism,” “racist,” “racism,” “white supremacist,” “white supremacism,” “white nationalist,” “white nationalism,” and/or “anti-government” due to their irrelevance to the crimes charged and highly negative connotations. Just as it was more prejudicial than probative to call the defendant a “violent offender” in *Asuncion*, where that description did not relate to the charge at hand, it would be prejudicial to categorize the defendants by reference to offensive ideologies. These

labels all assert that their subject holds certain beliefs, none of which make any fact of consequence in this case more or less likely, and several of which arouse disgust or strong negative feelings in many Americans. Even if the Government were to allege an abstract connection between these beliefs and the elements of the crimes charged, any minimal probative value would be far outweighed by the obvious prejudice these labels carry.

Finally, usage of the terms "stack," "mob," "riot," and/or "rioters" to describe the events at the U.S. Capitol will create prejudice that is unnecessary in light of the various alternative phrases available to describe these events. These terms all also carry connotations of violence and unrest similar to the usage of "gang" in *Carr*. The *Carr* court found that although "gang" served the function of suggesting group activities, which were relevant to the conspiracy charges, the negative connotation accompanying that descriptive function added nothing probative (noting that other neutral phrases could serve the same descriptive function). Here, the government could use any number of terms that do not carry violent connotations to describe the activity at the capitol. To name a few, neutral terms like "line" (as an alternative to "stack"), "crowd," "group," "assembly" (as alternatives to "mob" or "riot"), "protest," "protestors," or "demonstrators" (as alternatives to "rioters") are all available. The terms "stack," "mob," "riot," and "rioters" thus have effectively no probative value to weigh against the unfair prejudice that would flow from their usage.

Allowing the Government and/or its witnesses to use the terms detailed above would serve only to inflame and confuse the jury, risking a conviction based not on the

actions of Mr. Isaacs or the other defendants, but on what the jury perceives to be their divisive ideologies, future dangerousness, or some other inappropriate basis.

Accordingly, each of these terms should be excluded pursuant to Fed. R. Evid. 403.

B. MOTION IN LIMINE TO EXCLUDE MR. ISAACS' COMMENT ABOUT THE DISTRICT OF COLUMBIA'S MAYOR

Mr. Isaacs respectfully moves this Court to exclude a comment he made—in jest—in a text message to his aunt about the District of Columbia's mayor. Because of its extremely inflammatory and prejudicial nature, Mr. Isaacs will provide a copy of this message under seal to the Court. Moreover, Mr. Isaacs strenuously objects to the Government's reference to this message in any public filing.

1. Mr. Isaacs' Comment is Irrelevant and Inadmissible Character Evidence

The Government has asserted that it will try to introduce a text, dated January 3, 2021, from him to his aunt. The text was transmitted in response to a text Mr. Isaacs received from his aunt that included the message, "Saw this on iFunny" and a picture of the Mayor of D.C., which states that the Mayor "ordered all hotels, restaurants, grocery stores, gas stations, and convenience stores to close Jan 4th, 5th and 6th to discourage Trump supporters from gathering in D.C." and requests that "all the Patriots heading to D.C. bring extra food, water, blankets, supplies, and have a plan where to sleep." Introduction of the foregoing text is barred by Federal Rule of Evidence 404(b)(1).

Rule 404(b)(1) provides that "[e]vidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b)(1). Such

evidence, however, “may be *admissible for another purpose*, such as proving motive, opportunity, *intent*, preparation, plan, knowledge, identity, absence of mistake, or lack of accident” Fed. R. Evid. 404(b)(2) (emphasis added).

To determine whether the evidence is admissible, courts must first inquire “whether the evidence is probative of a material issue other than character.” *U.S. v. Miller*, 895 F.2d 1431, 1435 (D.C. Cir. 1990).

Here, Mr. Isaacs’ statement concerning the D.C. mayor is in jest and is not probative of anything, except foolish, poor, and tasteless humor intended only for a private audience of two people: him and his aunt. Any attempt by the Government to introduce the text should be prohibited because it is not probative of anything allowed under Rule 404(b)(2).

Mr. Isaacs’ statement was made in jest. Even if judicial interpretation could be stretched to provide evidentiary value to a meaningless text, the text would still not show any intent to commit an act that is related to the seven charges set forth in the Eighth Superseding Indictment. Indeed, not one of the criminal charges has anything to do with the Mayor. Mr. Isaacs’ text message simply does not prove the intent to commit any of the crimes charged by the Government. If such evidence is admitted, it will impugn Mr. Isaacs’ character and portray him as a contemptuous person. Jurors will be unable to resist the impulse to convict Mr. Isaacs based on his character. *See Michelson v. United States*, 335 U.S. 469, 475-76 (1948) (“it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him fair opportunity to defend against a particular charge.”). Since, under 404(b),

propensity evidence may not be used to prove that a person's actions conformed to his character, the inflammatory text must be precluded. *U.S. v. Foskey*, 636 F.2d 517, 523 (D.C. Cir. 1980).

2. Mr. Isaacs' Comment is Unfairly Prejudicial

In addition, this evidence should be excluded because the probative value of the evidence is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. Fed. R. Evid. 403; *U.S. v. Bowie*, 232 F.3d 923, 930 (D.C. Cir. 2000) ("A proper analysis under Rule 404(b) begins with the question of relevance: is the other crime or act relevant and, if so, relevant to something other than the defendant's character or propensity? If yes, the evidence is admissible unless excluded under other rules of evidence such as 403").

In *United States v. Fitzsimons*, the court ruled that a threatening phone call was unfairly prejudicial and therefore excluded the effort to introduce the call into evidence. 2022 WL 1658846, *5 (D.D.C. May 24, 2022). The case is also related to the incidents of January 6, 2021. *Id.* at *1. On March 2020, Fitzsimons called the Congressional office, demanded the phone number of Chinese President Xi Jinping, and threatened to "go out on the streets and start talking to the Chinese people that I see." *Id.* at *5. The court explained that "the irrational nature of Fitzsimons's demands and the racial animus he expresses risk inflaming the jury against him." *Id.* The court ultimately considered the charged nature of Fitzsimons's statements and the highly attenuated connection to the charges and determined that any probative value was unfairly prejudicial. *Id.* As in

Fitzsimons, Mr. Isaacs' words carry a grave risk that the jury's passions will be inflamed to an extent it would convict him based on this statement as opposed to the strength of the evidence of the charged crimes. *See Foskey*, 636 F.2d at 526.

There is a high risk of unfair prejudice where "the prior-act evidence so shocks the conscience that the jury may decide that the defendant is a bad person and deserves to be convicted, even if his guilt were unproven in the instant case, 'because a bad person deserves punishment.'" *United States v. Hazelwood*, 979 F.3d 398, 412 (6th Cir. 2020) (quoting *U.S. v. Asher*, 910 F.3d 854, 861 (internal quotation omitted)); *See also U.S. v. Ebens*, 800 F.2d 1422, 1434 (6th Cir. 1986) (evidence of the defendant's using a racial slur eight years prior to beating Vincent Chin to death was excluded for being "highly prejudicial" . . . observing that "it does not take much imagination to understand how such grossly biased comments would be viewed by the jury . . . for nearly all citizens find themselves repelled by such blatantly racist remarks and resentful of the person claimed to have uttered them.").

The *Hazelwood* case is instructive. There the defendant was secretly recorded making racist and sexist jokes about African Americans and women. *Id.* at 405. In holding that the district court abused its discretion by declining to exclude the offensive recordings under Rule 403, the federal appellate court stated that

[t]he extraordinary risk of prejudice posed by the offensive recordings needs little explanation. Decent society roundly condemns the backward and intolerant views heard on the recordings. Nearly anyone would form a negative opinion of a person who holds (and heartily expresses) those views. For that reason, this court has not been shy about protecting the least desirable defendants from this form of evidence in the administration of criminal justice[.] [T]he prejudicial

effect of these recordings to all three defendants is obvious. As to [defendant], the fear is that the jury would judge him for being a bigot rather than defrauding customers of fuel discounts. *Id.* at 412-13.

Similarly, as the courts in *Fitzsimons*, *Hazelwood*, and *Ebens* determined, the racial animus imbedded in these jokes make them unfairly prejudicial and should be excluded. The jury will be unable to compartmentalize and may be unable to view Mr. Isaacs as anything but a bigot, racist, or political fanatic and convict him on emotions instead of evidence. *See Hazelwood*, 979 F.3d at 412-13.

C. MOTION IN LIMINE TO EXCLUDE CO-CONSPIRATOR STATEMENTS

Mr. Isaacs moves this Court to: (i) order the Government to make a particularized disclosure of all out-of-court statements it intends to offer as co-conspirator statements pursuant to Federal Rule of Evidence 801(d)(2)(E); and (ii) exclude any co-conspirator statements unless the Government shows by a preponderance of the evidence in a pretrial written proffer or during a pretrial evidentiary hearing that the threshold requirements of Rule 801(d)(2)(E) are met.

At trial, Mr. Isaacs anticipates that the Government will attempt to introduce out-of-court statements made by alleged co-conspirators pursuant to Federal Rule of Evidence 801(d)(2)(E) including, but not limited to, statements made by various Oath Keeper members and affiliates. *See Eighth Superseding Indictment* at ¶ 13. Should the Government move to introduce any co-conspirator statements, Mr. Isaacs respectfully requests that this Court make a pretrial determination on the admissibility of any such statements in order to minimize the prejudicial impact of such statements.

If this Court admits co-conspirator statements conditioned on a later showing of independent evidence of the Rule 801(d)(2)(E) prerequisites for their admission and the Government fails to meet its burden, the jury will have heard the damaging statements. Even with a curative instruction, the jury will have difficulty not considering the statements in their deliberations. *See* Fed. R. Evid. 103, Advisory Committee Notes to Subdivision (c) (“[A] ruling which excludes evidence in a jury case is likely to be a pointless procedure if the excluded evidence nevertheless comes to the attention of the jury.”). A mistrial could result, which would needlessly waste this Court’s time and resources. *See U.S. v. Jackson*, 627 F.2d 1198, 1218 (D.C. Cir. 1980) (“Although we are sensitive to the possibility of prejudice arising from the introduction of hearsay evidence that the judge’s later instruction to strike cannot divest of its prejudicial effect, the defendant may request, and should receive, mistrial in these circumstances.”). Mr. Isaacs submits that it would be more efficient and less prejudicial to require the Government to meet its burden pre-trial.

i. Legal Standard

The Confrontation Clause of the Sixth Amendment prohibits admission of testimonial hearsay in criminal cases unless the declarant is unavailable and the defendant has been afforded a prior opportunity for cross-examination. *See Crawford v. Washington*, 541 U.S. 36, 68–69 (2004); *U.S. v. Straker*, 800 F.3d 570, 595 (D.C. Cir. 2015). Fed. R. Evid. 801(d)(2)(E) provides that an out-of-court statement made “by a co-conspirator of a party during the course and in furtherance of the conspiracy” is not hearsay and, therefore, evidence of such a statement is admissible to prove the truth of

any matter asserted therein. Fed. R. Evid. 801(d)(2)(E). Of course, to be admissible, such a statement must also be relevant under Federal Rule of Evidence 401 — i.e., it must tend to make a fact more or less probable than it would be without the evidence.

In order to admit a statement under Rule 801(d)(2)(E), the district court must find by a preponderance of the evidence: (i) that a conspiracy existed; (ii) that the defendant and the declarant were members of that conspiracy; (iii) that the statement was made during the course of the conspiracy; and (iv) that the statement was made in furtherance of the conspiracy. *Bourjaily v. U.S.*, 483 U.S. 171, 175 (1987). The requirement that the statement be made “in furtherance of the conspiracy” is a limitation that contemplates that not all statements made by alleged conspirators during the course of a conspiracy are made in furtherance of the conspiracy’s objectives. *See U.S. v. Tarantino*, 846 F.2d 1384, 1411–12 (D.C. Cir. 1988) (“[M]ere narratives of past successes and failures, for example, are not admissible. Nor are a conspirator’s casual comments to people outside or inside the conspiracy admissible under this rule.” (internal quotation marks and citations omitted)).

This Court may consider a co-conspirator statement itself in determining whether a conspiracy existed, but the statement may not be the sole basis for a finding that the Rule 801(d)(2)(E) prerequisites are satisfied. *U.S. v. Beckham*, 968 F.2d 47, 51 (D.C. Cir. 1992). Notably, “there must be independent evidence of a conspiracy as well.” *Id.*; *see also U.S. v. Gatling*, 96 F.3d 1511, 1520 (D.C. Cir. 1996) (“This circuit additionally requires that there be independent evidence of the conspiracy apart from the statement,

although the content of the statement itself can also be considered in determining whether such independent evidence exists.”).

While this Court has discretion to admit particular co-conspirator statements conditioned on a later showing of substantial independent evidence of the prerequisites for their admission, *see* Fed. R. Evid. 104(b), the D.C. Circuit has recognized that “[t]he preferred practice is for the trial court to make these determinations before the hearsay evidence is admitted.” *U.S. v. Slade*, 627 F.2d 293, 307 (D.C. Cir. 1980); *see also U.S. v. White*, 116 F.3d 903, 915 (D.C. Cir. 1997) (reaffirming that the favored approach, unless “trial exigencies” make it “impracticable,” is to “secure proof of the conspiracy adequate to sustain admission of the hearsay before the hearsay itself [is] received”).

ii. Argument

Before it is permitted to introduce evidence that violates Mr. Isaacs’ Confrontation Clause rights under the Sixth Amendment, the Government should be required to make a preliminary showing sufficient to allow this Court to make the necessary preliminary determinations concerning the admissibility of the evidence pursuant to Rule 801(d)(2)(E). Mr. Isaacs does not yet have a list of statements that the Government intends to introduce at trial. Based in part on the list of statements created by the Government for the *Rhodes* I trial, Mr. Isaacs anticipates certain categories of statements to which he objects:

a. Statements Before January 4 And After January 6, 2021

The Government alleges that a conspiracy involving co-defendants who will not be tried alongside Mr. Isaacs began soon after the November 3, 2020 presidential election when Elmer Stewart Rhodes III, the founder and leader of the Oath Keepers, “began encouraging members and affiliates of his organization to oppose by force the lawful transfer of presidential power.” Eighth Superseding Indictment at ¶ 3. The evidence demonstrates, however, that Mr. Isaacs was a participant in only one of the Signal chats the Government has identified as the primary sources of co-conspirator statements that it might seek to introduce at trial. That Signal chat began on or about January 4, 2021, and is innocuous with respect to any logistical travel-related matters, much less any fort of crime or planning.

Even if this Court determines that a conspiracy was formed prior to January 4, 2021, a finding regarding the existence of a conspiracy is but one prerequisite this Court must find before ruling on the admissibility of co-conspirator statements. The Government must also establish by a preponderance of the evidence that Mr. Isaacs and the out-of-court declarant were both members of that conspiracy, that the declarant’s statement was made during the course of the conspiracy, and that the declarant’s statement was made in furtherance of the conspiracy.

b. Statements Made To Or Within “Private Circles”

At the *Rhodes I* trial, the Government contended, *inter alia*, that “[a]s early as December 10, Mr. Rhodes began expressing in private circles his skepticism that the President would invoke the Insurrection Act and his belief that he and other Oath

Keepers members and affiliates would need to take matters into their own hands.”

Gov’t Opp. to Def. Mot. for Judgment of Acquittal, ECF 383, at p. 10. Mr. Isaacs objects to admission of statements made to or within “private circles” as they do not constitute statements made in furtherance of any conspiracy in which the Government alleges Mr. Isaacs to have been a participant. To the contrary, this evidence suggests the existence of an alleged separate conspiracy between Mr. Rhodes and others in his inner circle and what Mr. Rhodes said within private circles is certainly beyond that which was foreseeable or knowable to Mr. Isaacs.

As with the previous category of statements, even if this Court determines that there is evidence of a conspiracy independent of any co-conspirator statement itself, the Government must also establish by a preponderance of the evidence that Mr. Isaacs and the out-of-court declarant were both members of that conspiracy, that the declarant’s statement was made during the course of the conspiracy, and that the declarant’s statement was made in furtherance of the conspiracy.

c. Statements By Cooperating Witnesses

Co-conspirator statements made by cooperating witnesses are not admissible under Rule 801(d)(2)(E) because statements made by a cooperator are not in furtherance of a conspiracy. A cooperating witness is incentivized to cooperate in order to alleviate the cooperator’s own criminal exposure. Thus, the cooperator’s purpose is to obtain incriminating information in furtherance of a cooperation agreement, not to further the conspiracy. Consequently, any statements made by cooperating witnesses fail to satisfy the Rule 801(d)(2)(E) prerequisites for admission as co-conspirator statements.

C. MOTION IN LIMINE RELATED TO “ZELLO CHAT”

Mr. Isaacs respectfully requests this Court preclude the Government from introducing communications and/or statements set forth in a sixty-nine-page transcript of a Zello Chat (identified as 6 zello from [www.youtube.com watch v=nF1bud0Rqym.MP4](https://www.youtube.com/watch?v=nF1bud0Rqym)), which Mr. Isaacs anticipates the Government may introduce as trial evidence.

On August 25, 2022, the Government forwarded by email correspondence highlighted portions of a 69-page transcript of the Zello Chat, identifying statements between and amongst individuals identified by the aliases 1% Watchdog, General Mark Davis CFA, and iWatchDirectorLaureen. The Government has been unable to identify these individuals. *See* E-mail from AUSA Jeffrey Nestler (Aug. 22, 2022, 9:51 p.m.) (“[Y]ou asked us to provide the true identities of three individuals who can be heard on the Zello recording: 1% Watchdog, General Mark Davis CFA, and iWatchDirectorLaureen. We are not able to confirm these individuals’ identities for you.”). Notably, the Government never alleges that Mr. Isaacs was part of or even had knowledge of the Zello Chat. Nor has the Government alleged that Mr. Isaacs or any Defendant in this trial sent a message or responded to any communications in the Zello Chat.

The Government previously sought admission of the Zello Chat in the *Rhodes I* trial by arguing that Jessica Watkins was a member of the chat and that the statements were being admitted for their “effect on Ms. Watkins as a listener.” Critically, Ms. Watkins is not a defendant in *this* trial. Moreover, the Government does not allege that

Mr. Isaacs or any of his co-Defendants in this trial heard or participated in the Zello Chat communications.

Mr. Isaacs submits that the Zello Chat: (1) is inadmissible hearsay under the Federal Rules of Evidence; (2) violates the Confrontation Clause of the U.S. Constitution; (3) is not relevant or, alternatively, is only conditionally relevant; and (4) its probative value, if any, is substantially outweighed by its prejudicial effect on Mr. Isaacs.

i. Inadmissible Hearsay Not Subject To Any Exception

Should it seek to introduce the Zello Chat in this trial, the Government suffers a fatal flaw: Mr. Isaacs and his co-Defendants are not identified as listeners. To the contrary, the Zello Chat is an out-of-court conversation between unknown, unidentified people that the Government will likely proffer “to prove the truth of the matter asserted in the statement.” Fed. R. Evid. 801(c). The Zello Chat should be excluded because it does not fall within any of the categories of hearsay statements that are otherwise deemed “not hearsay” pursuant to Fed. R. Evid. 801(d).

Mr. Isaacs also submits that the Zello Chat also does not fall within any recognized hearsay exception. For example, there would be no viability to an argument of “trustworthiness” or reliability under Fed. R. Evid. 807 since the Government admittedly has not identified most of the participants in the Zello Chat. Similarly, and by analogy, this Court has also explained how the exception under FRE Fed. R. Evid. 803(6) does not permit the admission of a business record when the source is an outsider. *See Boca Investorings P’shp. v. United States* U.S., 128 F. Supp. 2d 16, 21 (D.D.C. 2000) (quoting *U.S. v. Baker*, 693 F.2d 183, 188 (D.C. Cir. 1982)). Further, any applicable

exception to the hearsay rule is extremely narrow and requires testimony to be “very important and very reliable.” *U.S. v. Kim*, 595 F.2d 755, 766 (D.C. Cir. 1979); *see also Sec. & Exch. Comm’n v. First City Fin. Corp.*, 890 F.2d 1215, 1225 (D.C. Cir. 1989) (recognizing that “the legislative history of the [Fed. R. Evid. 803(24)] exception indicates that it should be applied sparingly” and “acknowledg[ing] the broad discretion a trial court enjoys in assessing the probity and trustworthiness of documents”).

If the Government wishes to introduce the Zello Chat for its effect on the listeners, it must affirmatively demonstrate that Mr. Isaacs was listening to the chat and to its participants. *See U.S. v. Graham*, 47 F.4th 561, 567 (7th Cir. 2022) (“A statement is offered to show an effect on the listener only if the listener heard and reacted to the statement.”). Just as a statement heard after a crime took place could not affect the motivation of the person who had already committed that crime, a statement spoken, but never heard, by another could not have affected the other’s intent. *See U.S. v. Thompson*, 595 F. Supp. 2d 1, 5 (D.D.C. 2009) (finding that a post-transaction statement “could not have had any effect on Defendant’s state of mind at the time of the transaction itself”).

ii. Violation Of The Confrontation Clause

Even if this Court determines that some hearsay exception applies to the Zello Chat, admission of these statements would violate the Confrontation Clause. *See U.S. Const. Amend. VI*. Hearsay statements, like the Zello Chat, offend the Confrontation Clause: (1) when they contain testimonial statements; and (2) the defendant is unable to cross-examine the declarant. *See Crawford v. Washington*, 541 U.S. 36, 54 (2004).

As for the first prong of the Confrontation Clause analysis, the D.C. Court of Appeals has recognized that documents prepared and statements made in preparation for a criminal trial are testimonial. *See U.S. v. Moore*, 651 F.3d 30, 70 (D.C. Cir. 2011) (citing *Crawford*, 541 U.S. at 51–52). The Supreme Court has recognized that the history of this rule is deeply intertwined with the use of hearsay evidence being used in politically charged trials without giving the accused the chance to confront their accusers. *See Crawford*, 541 U.S. at 44–45 (observing that the roots of the Confrontation Clause can be traced back to controversies surrounding the use of hearsay statements made by an unavailable declarant during Walter Raleigh’s treason trial).

The second prong of the Confrontation Clause analysis is easily satisfied here: the declarants are unavailable because a majority of their identities cannot be confirmed. Further, any declarants that the Government can identify and chooses to prosecute are also unavailable as they will presumably invoke their Fifth Amendment right against self-incrimination.

iii Irrelevant Or Only Conditionally Relevant

Even if this Court rejects the hearsay and Confrontation Clause arguments, it should still find that the statements in the Zello Chat are either not relevant or, alternatively, are only conditionally relevant. To receive this presumption of admissibility, evidence must be “relevant,” meaning the court must find: (1) “it has any tendency to make a fact more or less probable than it would be without the evidence;” and (2) “the fact is of consequence in determining the action.” Fed. R. Evid. 401. While this may be a low bar, it is a bar the Government cannot rise above in this trial.

In the *Rhodes I* trial, the Zello Chat was allegedly relevant for three purposes: (1) showing the statements' effect on Ms. Watkins, a defendant in that trial; (2) establishing communications between co-conspirators, i.e., Ms. Watkins and the individual identified as "FreedomD0z3r91" in the Zello Chat; and (3) establishing context for the communications admissible for (1) or (2). See *U.S. v. Rhodes I*, 1:22-cr-00015-APM, Doc. 322 (Sept. 19, 2022) (Mehta, J.).

Ms. Watkins is not a defendant in this trial and therefore these statements cannot be relevant for their effect on Ms. Watkins, because the fact of a statement's effect on Ms. Watkins is not a fact "of consequence in determining the action." Fed. R. Evid. 401. Further, the statements between co-conspirators in furtherance of a conspiracy are not relevant in this trial because there has been no showing that Mr. Isaacs or any other co-Defendant was a party to that conspiracy. Thus, any statement between co-conspirators is not relevant because it does not help establish a fact "of consequence in determining the action."

Alternatively, this Court should find that the Zello Chat is only conditionally relevant. Under this standard, the Government may only admit statements against defendants they have established were in the conspiracy by a preponderance of the evidence. See Fed. R. Evid. 104(b).

To demonstrate defendants' involvement in any conspiracy with the declarants, the Government must present independent evidence that Mr. Isaacs or his co-Defendants were involved in the conspiracy. See *U.S. v. Apodaca*, 275 F. Supp. 3d 123, 137 (D.D.C. 2017).

Further, to prevent a possibly irreparable evidentiary error, this Court should order a pretrial hearing to determine whether the Government can carry its burden of establishing the existence of a conspiracy in which Mr. Isaacs or his co-Defendants and the declarants were involved. While this method is disfavored, and often not utilized, it is appropriate here because of the nature of the charges and the prejudicial value of the statements to be admitted. *Cf. U.S. v. Loza*, 763 F. Supp. 2d 108, 113 (D.D.C. 2011) (finding that a pretrial hearing was not appropriate because the prosecutor had proffered independent evidence of the conspiracy, and was willing to bear the risk of a mistrial should they fail to meet their burden). Unlike other cases where the ends do not justify the means of a pre-trial hearing, this trial involves sensitive matters of national importance; if there were ever a case of sufficient enough weight to warrant this procedure, it is this case.

This Court should find that the statements contained in the Zello Chat are irrelevant to *this* prosecution, or alternatively find that the statements are inadmissible until the Government meets its burden of proving facts that would make them relevant.

iv. More Prejudicial Than Probative

Finally, even if this Court finds that the statements in the Zello Chat are relevant, they should be excluded pursuant to Fed. R. Evid. 403 because they are more prejudicial than probative because:

1. The statements in the Zello Chat were not made by Mr. Isaacs or any of his co-Defendants in this trial;
2. The statements in the Zello Chat were not heard by Mr. Isaacs or any of his co-Defendants in this trial; and

3. The statements in the Zello Chat were not known to exist by Mr. Isaacs or any of his co-Defendants in this trial.

Indeed, the prejudicial effect of these statements would be tremendously harmful. Some of these statements appear to threaten violence toward elected officials and the federal government, and even if admitted for a limited purpose, could easily be misused or misinterpreted by the jury to the Defendants' detriment. In cases where the risk of misuse is so high, as here, it is appropriate for the court not only to consider that risk, but also to assess the true motivations of the Government for proffering the evidence. *See U.S. v. Robinson*, No. 16-98 (CKK), 2017 WL 11496711, at *2 (D.D.C. June 21, 2017) (finding that the government's true motive for offering evidence was likely an impermissible purpose because the proffered motive did not seem relevant to the case and the evidence was highly prejudicial).

Because the Zello Chat lacks any evidentiary value and is highly prejudicial to Mr. Isaacs and his co-Defendants, this Court should preclude admission of the Zello Chat and its corresponding transcript.

E. MOTION IN LIMINE TO PROHIBIT WITNESSES FROM EXERCISING THEIR FIFTH AMENDMENT PRIVILEGE IN THE PRESENCE OF THE JURY

It is well-established that a witness may not be "put on the stand for the purpose of having him exercise his [Fifth Amendment] privilege before the jury." *Bowles v. United States*, 439 F.2d 536, 542 (D.C. Cir. 1970); *see also, United States v. Duran*, 884 F. Supp. 573, 574 (D.D.C. 1995). To allow a party to call such a witness permits that party to bolster its case out of inferences arising from the use of the privilege. *See Fletcher v.*

United States, 332 F.2d 724, 727 (D.C. Cir. 1964) (“inferences from [the witness's] refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced [the defendant].”). Indeed, a witness invoking the Fifth Amendment in the presence of the jury “will have a disproportionate impact on their deliberations” and “the probative value of the event is almost entirely undercut by the absence of any requirement that the witness justify his fear of incrimination and by the fact that it is a form of evidence not subject to cross-examination.” *Bowles*, 439 F.2d at 541–42. As the Supreme Court has explained,

If the privilege claimed by the witness be allowed, the matter is at an end. The claim of privilege and its allowance is properly no part of the evidence submitted to the jury, and no inferences whatever can be legitimately drawn by them from the legal assertion by the witness of his constitutional right. The allowance of the privilege would be a mockery of justice, if either party is to be affected injuriously by it.

Johnson v. United States, 318 U.S. 189, 196–97 (1943).

Moreover, numerous other federal courts have also widely rejected attempts by both the prosecution and the defense to call witnesses to invoke the Fifth Amendment privilege in front of the jury. *See, e.g., United States v. Rivas-Macias*, 537 F.3d 1271, 1276 (10th Cir. 2008) (“Because a jury may not draw any legitimate inferences from a witness’ decision to exercise his Fifth Amendment privilege, we have repeatedly held that neither the prosecution nor the defense may call a witness to the stand simply to compel him to invoke the privilege against self-incrimination”); *United States v. Reed*, 173 F. App’x 184, 189 (3d Cir. 2006) (“This rule is well grounded as allowing a witness to testify for the purpose of invoking the Fifth Amendment would only invite the jury to

make an improper inference"); *United States v. Deutsch*, 987 F.2d 878, 883 (2d Cir. 1993) (same); *United States v. Roberts*, 503 F.2d 598, 600 (9th Cir.1974) (same); *United States v. Johnson*, 488 F.2d 1206, 1211 (1st Cir. 1973) (following *Bowles* and holding that "[i]f it appears that a witness intends to claim the privilege as to essentially all questions, the court may, in its discretion, refuse to allow him to take the stand"); *San Fratello v. United States*, 340 F.2d 560, 565 (5th Cir.1965) (finding reversible error in permitting prosecution to call witness so as to require her to claim Fifth Amendment privilege in the presence of the jury).

Similarly, in the matter at bar, neither the Government nor co-defendants should be permitted to call a witness to the stand for the purpose of posing a series of questions that will undoubtedly provoke the witness to assert the Fifth Amendment privilege. Any attempt to do so would serve no purpose other than to present irrelevant and unduly prejudicial information to the jury. Indeed, Mr. Isaacs would not have the ability to redress the resulting impermissible inferences and an instruction from this Court would be inadequate to repair the damage.

The proper course when a witness intends to assert her Fifth Amendment privilege is for it to be done outside the presence of the jury. For example, in *Bowles*, the District of Columbia Circuit upheld the trial court's decision to exclude a witness "after it had ascertained, out of the presence of the jury, that [the witness] intended to invoke his privilege against self-incrimination." *Bowles*, 439 F.2d at 541.

Accordingly, Mr. Isaacs respectfully requests that this Court rule in limine that the Government nor co-defendants may call a witness to the stand for the purpose of

having the witness invoke the privilege against self-incrimination as provided by Fifth Amendment to the United States Constitution.

IV. Request to Suspend Use of Ankle Monitor During Trial

Mr. Isaacs respectfully requests that this Court enter an order suspending the use of his ankle monitor during his trial. First, the jury's view of his ankle monitor could be prejudicial to him, as it could convey a sign of "guilt" to the jury. Moreover, Mr. Isaacs has been fully compliant with the terms of his supervised release. In addition, Mr. Isaacs will be in the courtroom during trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that Omnibus Motion in Limine was filed with the Clerk of the Court via ECF on Friday, December 16, 2022.

Respectfully submitted,

A handwritten signature in blue ink that reads "Gene Rossi". The signature is written in a cursive, flowing style. The first name "Gene" is written in a larger, more prominent script, and "Rossi" follows in a similar but slightly smaller script. The signature is positioned above a horizontal line.

Gene Rossi, Esquire