

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	CASE NO. 21-CR-536 (CKK)
v.	:	
	:	
[1] KAROL J. CHWIESIUK,	:	
[2] AGNIESZKA CHWIESIUK,	:	
	:	
Defendants.	:	

**GOVERNMENT’S RESPONSE
TO DEFENDANT’S MOTION IN LIMINE**

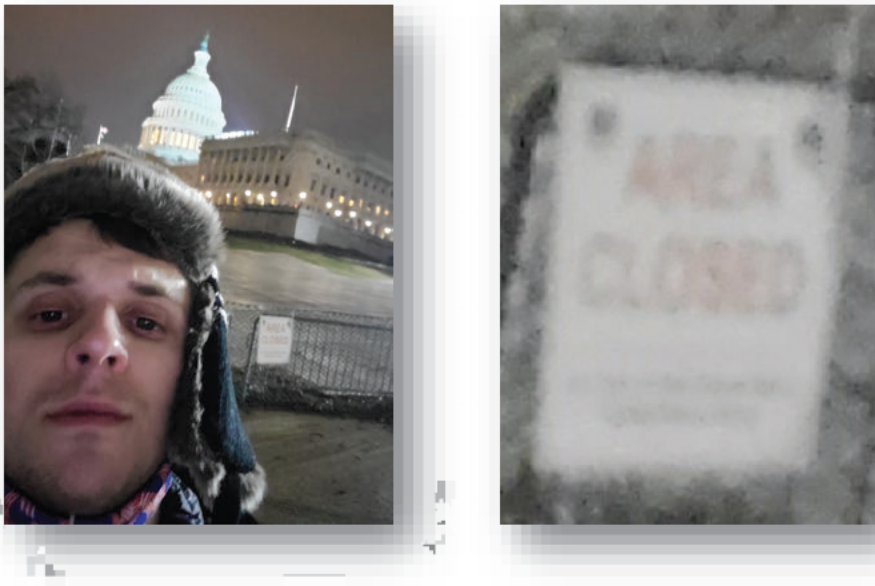
Defendants Karol Chwiesiuk and Agnieszka Chwiesiuk, who are charged in connection with events at the U.S. Capitol on January 6, 2021, have moved to prohibit the government from using what they claim are “prejudicial” terms, including the word “insurrection,” at trial. *Defendants’ Motions in Limine* (“*Motion*”) ECF No. 71. Defendants also seek to exclude some of the defendant Karol Chwiesiuk’s text messages sent between January 3, 2021, and January 13, 2021. *Id.* Except for a few of Karol Chwiesiuk’s texts, which the government does not intend to introduce at trial, the government opposes the defendants’ motion.

I. Background.

On January 6, 2021, a Joint Session of the United States House of Representatives and the United States Senate convened to certify the vote of the Electoral College of the 2020 U.S. Presidential Election. While the certification process was proceeding, a large crowd gathered outside the United States Capitol, entered the restricted grounds, and forced entry into the Capitol building. As a result, the Joint Session and the entire official proceeding of the Congress were

halted until law enforcement was able to clear the Capitol and its grounds of the thousands of unlawful occupants and ensure the safety of elected officials.

In January 2021, Karol and Agnieszka Chwiesiuk—who at the time lived at their family home in Chicago, Illinois—rented a car and travelled together from Chicago to Washington, D.C. In the evening of January 5, 2021, Karol Chwiesiuk walked from the Mayflower Hotel, where he and his sister Agnieszka Chwiesiuk booked a room, to the U.S. Capitol. There, Karol Chwiesiuk took a selfie photograph in front of a barricade and a sign stating AREA CLOSED.



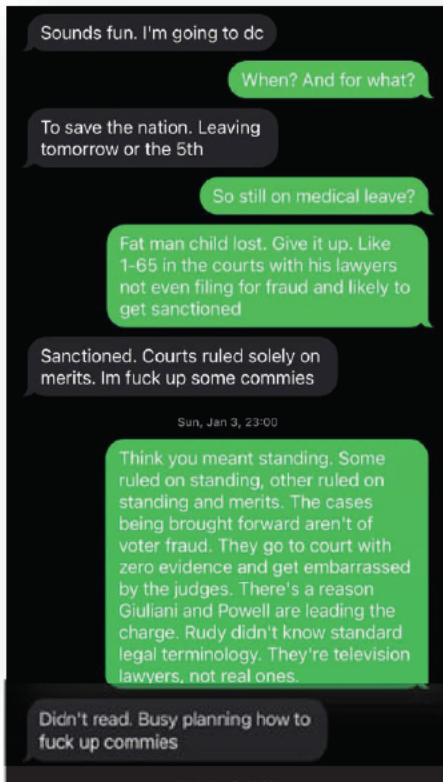
Images 1 and 1a (left to right): A selfie photograph of Karol Chwiesiuk in front of the U.S. Capitol the evening of January 5, 2021; and a close-up of the sign in the photo reads AREA CLOSED.

On January 6, 2021, the Chwiesiuks attended the former President’s rally and speech at the Ellipse, after which they marched down Pennsylvania Ave to the U.S. Capitol. Once they reached the restricted Capitol grounds, they walked together up to the NW Terrace of the Capitol, through the dense and raucous crowd gathered outside a breach point known as the Senate Wing Door, through a broken-out doorway, and unlawfully into the Capitol. Once inside, the Chwiesiuks walked south towards the Crypt, with Karol Chwiesiuk stopping to step into and take a selfie inside of Senator Merkley’s hideaway office. The Chwiesiuks spent approximately ten minutes inside the

Capitol—from approximately 2:58 p.m. to 3:08 p.m.—before leaving through a broken-out window.

On January 3, 2021, Karol Chwiesiuk texted with an acquaintance (identified below as “subscriber”) about his plans to travel to Washington, D.C.:

Sunday, January 3, 2021, @ Unknown Time



CHWIESIUK: Sounds fun. I’m going to dc

SUBSCRIBER: When? And for what?

CHWIESIUK: To save the nation. Leaving tomorrow or the 5th

SUBSCRIBER: So still on medical leave? Fat man child lost. Give it up. Like 1-65 in the court with his lawyers not even filing for fraud and likely to get sanctioned.

CHWIESIUK: Sanctioned. Courts ruled solely on merits. Im f*** up some commies

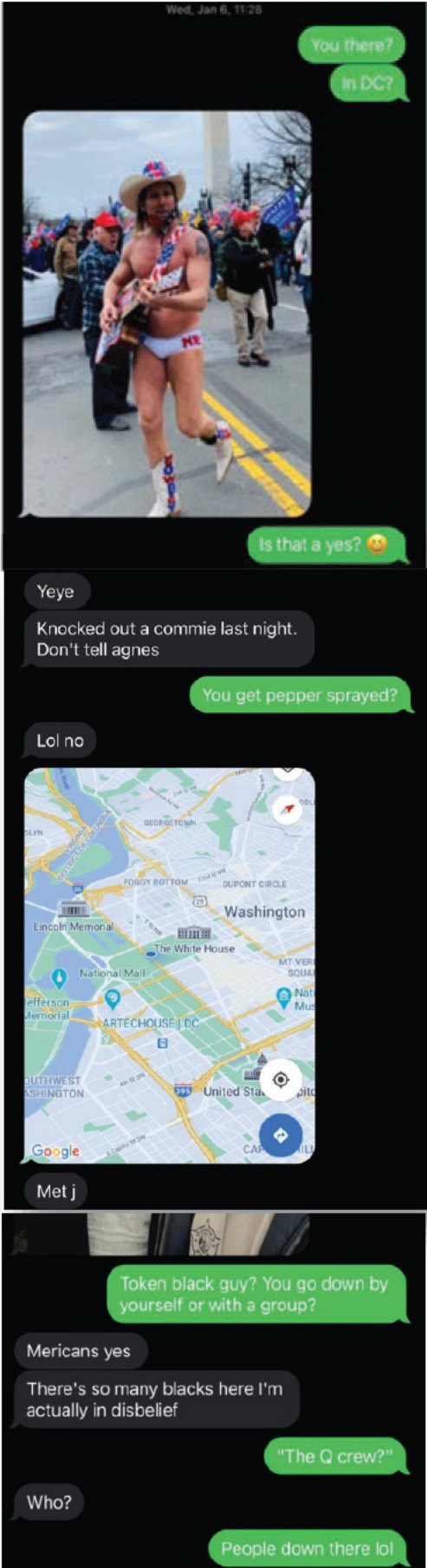
Sunday, January 3, 2021 @ 11:00 PM

SUBSCRIBER: Think you meant standing. Some ruled on standing, other ruled on standing and merits. The cases being brought forward aren’t of voter fraud. The go to court with zero evidence and get embarrassed by the judges. There’s a reason Giuliani and Powell are home leading the charge. Rudy didn’t know standard legal terminology. They’re television lawyers, not real ones.

CHWIESIUK: Didn’t read. Busy planning how to f*** up commies

On January 6, 2021, Karol Chwiesiuk texted the same individual:

Wednesday, January 6, 2021 @ 11:28 AM



SUBSCRIBER: You there? In DC?

CHWIESIUK: [picture of street performer known as the Naked Cowboy¹ in the vicinity of the Washington Monument]

SUBSCRIBER: Is that a yes?

CHWIESIUK: Yeye. Knocked out a commie last night. Don't tell agnes

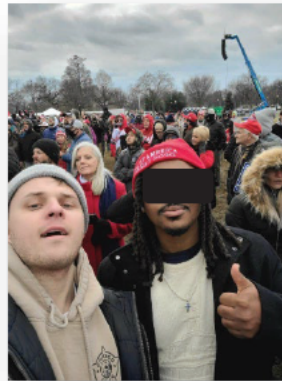
SUBSCRIBER: You get pepper sprayed?

CHWIESIUK: Lol no

CHWIESIUK: [image of a blue location circle on a map of Washington, D.C., in front of The White House]

CHWIESIUK: Met j

CHWIESIUK:



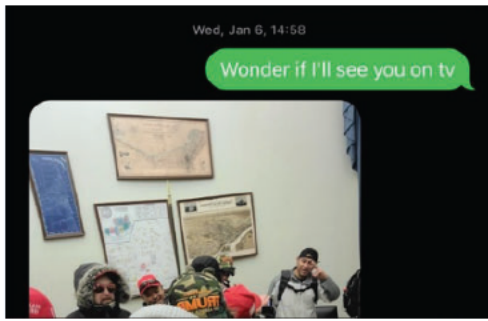
SUBSCRIBER: Token black guy? You go down by yourself or with a group?

CHWIESIUK: Mericans yes. There's so many blacks here I'm actually in disbelief

SUBSCRIBER: "The Q crew?"

CHWIESIUK: Who?

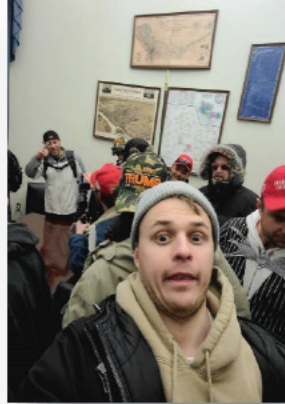
SUBSCRIBER: People down there lol



Wednesday, January 6, 2021 @ 2:58 PM

SUBSCRIBER: Wonder if I'll see you on tv

CHWIESIUK:



SUBSCRIBER: Where's your maga hat?

CHWIESIUK: We inside the capital lmfao

SUBSCRIBER: I know. Guns were drawn in the chamber once window was broken. S***housery.

CHWIESIUK: Yeah I was there

SUBSCRIBER: [image of law enforcement officers with guns drawn in the House chamber from January 6, 2021] S*** I didn't know Agnes went along as well. Managed to radicalize the last Chwiesiuk!



On January 9, 2021, Karol Chwiesiuk texted the individual again:

Saturday, January 19, 2021 @ 11:57 AM

CHWIESIUK: Bro lmao² this s*** is getting nuts

CHWIESIUK: [embedded link]³

CHWIESIUK: I can't tell if this is real l.fao



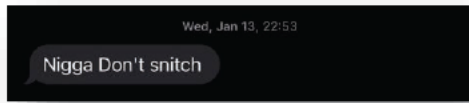
¹ <https://www.usatoday.com/picture-gallery/news/nation/2021/01/06/trump-supporters-protest-election-results-washington/6560880002/#slide:6562626002>

² "lmao" stands for "laughing my ass off."

³ The article is available at <https://www.businessinsider.com/trump-regrets-video-vowing-smooth-transfer-of-power-resign-nyt-2021-1#:~:text=and%20Privacy%20Policy,-.President%20Donald%20Trump%20expressed%20regret%20for%20a%20video%20he%20shared,from%20The%20New%20York%20Times.>

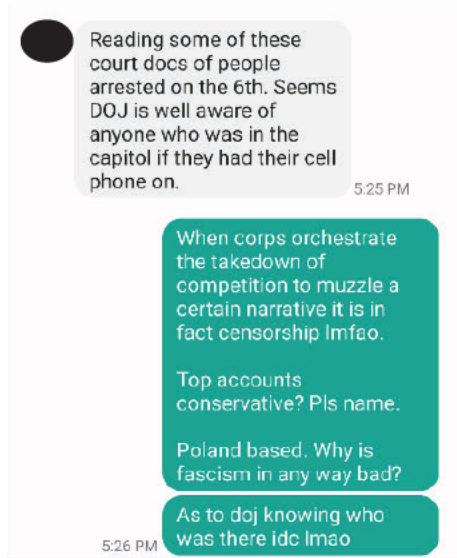
Karol Chwiesiuk texted the same individual again about a week later:

Wednesday, January 13, 2021 @ 10:53 PM



CHWIESIUK: N****⁴ Don't snitch

Their conversation continued the following day:



Wednesday, January 14, 2021 @ 5:25 PM

SUBSCRIBER: Reading some of the court docs of people arrested on the 6th. Seems DOJ is well aware of anyone who was in the capitol if they had their cell phone on.

CHWIESIUK: When corps orchestrate the takedown of competition to muzzle a certain narrative it is in fact censorship lmfao.

Top accounts conservative? Pls name.

Poland based. Why is fascism in any way bad?

CHWIESIUK: As to doj knowing who was there idc lmao⁵

Based on their actions on January 6, 2021, the Chwiesiuks were charged with Entering and Remaining in a Restricted Building, in violation of 18 U.S.C. § 1752(a)(1); Disorderly or Disruptive Conduct in a Restricted Building, in violation of 18 U.S.C. § 1752(a)(2); Disorderly Conduct in a Capitol Building, in violation of 40 U.S.C. § 5104(e)(2)(D); and Parading, Demonstrating, or Picketing in a Capitol Building, in violation of 40 U.S.C. § 5104(e)(2)(G). ECF No. 54. Karol Chwiesiuk was additionally charged with Entering or Remaining in a Room

⁴ Karol Chwiesiuk did not censor the racial slur in his original messages. The government here censors the term to avoid excessive repetition in pretrial litigation, but believes that the term should be allowed at trial for the reasons stated in this response.

⁵ “idc” stands for “I don’t care.”

Designated for the Use of a Member of Congress, in violation of 40 U.S.C. § 5104(e)(2)(C)(i)).
Id.

II. Standard.

Evidence is relevant if “it has any tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action.” Fed. R. Evid. 401. “The general rule is that relevant evidence is admissible,” *United States v. Foster*, 986 F.2d 541, 545 (D.C. Cir. 1993), is a “liberal” standard, *United States v. Moore*, No. 18-cr-198, 2022 WL 715238, at *2 (D.D.C. Mar. 10, 2022). Relevant evidence may be excluded if “its probative value is substantially outweighed by a danger of” unfair prejudice. Fed. R. Evid. 403. The government, however, is not required “to sanitize its case, to deflate its witnesses’ testimony or to tell its story in a monotone.” *United States v. Gartmon*, 146 F.3d 1015, 1021 (D.C. Cir. 1998). Moreover, “Rule 403 does not bar powerful, or even prejudicial evidence. Instead, the Rule focuses on the danger of *unfair* prejudice, and gives the court discretion to exclude evidence only if that danger *substantially* outweighs the evidence’s probative value.” *United States v. Pettiford*, 517 F.3d 584, 590 (D.D. Cir. 2008) (emphasis in original) (cleaned up).

III. The term insurrection accurately describes the events of January 6, 2021.

The defendants argue that the Court should preclude the government from using the term “insurrection” to describe the events of January 6, 2021, arguing that the term is unfairly prejudicial because the jury may associate the defendants with those accused of seditious conspiracy and acts of violence and “create a risk that the jury will be biased” against them. *Motion*, ECF No. 71, at 3.

Evidence or language is unfairly prejudicial if it has “an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.” *United States v. Sanford Ltd.*, 878 F. Supp. 2d 137, 143 (quoting Fed. R. Evid. 403, advisory committee’s note).

By their very nature, criminal charges involve an accusation that someone has wronged another person or has wronged society. Accordingly, such charges arouse emotion—and there is nothing improper about that. Indeed, while cautioning against prosecutorial misconduct in *United States v. Berger*, the Supreme Court simultaneously recognized that “[t]he United States Attorney . . . may prosecute with earnestness and vigor—indeed, he should do so.” *Berger*, 295 U.S. 78, 88 (1935). “[T]he law permits the prosecution considerable latitude to strike ‘hard blows’ based on the evidence and all reasonable inferences therefrom.” *United States v. Rude*, 88 F.3d 1538, 1548 (9th Cir. 1996) (quoting *United States v. Baker*, 10 F.3d 1374, 1415 (9th Cir. 1993)). When a prosecutor’s comments fairly characterize the offense, fairly characterize the defendant’s conduct, and represent fair inferences from the evidence, they are not improper. *Cf. United States v. Rude*, 88 F.3d 1538, 1548 (9th Cir. 1996) (the use of words like victim, deceit, outlandish, gibberish, charlatan, and scam was not improper); *Guam v. Torre*, 68 F.3d 1177, 1180 (9th Cir. 1995) (“[T]here is no rule [of evidence or ethics] requiring the prosecutor to use a euphemism for [a crime] or preface it by the word ‘alleged.’”).

The government does not intend to refer to the defendants as “insurrectionists” or to impute guilt by association. But the government should not be required to dilute its language and step gingerly around the events of January 6, 2021. “What took place on January 6, was in fact a riot and an insurrection.” *United States v. Carpenter*, 21-cr-305-JEB, 2023 WL 1860978, at * 4 (Feb. 9, 2023) (denying motion in limine to preclude the government from using terms like “insurrection” or “riot”). Indeed, this Court has consistently recognized, including in this very case, that the events of January 6, 2021, were an insurrection. It began its most recent Memorandum Opinion as follows, “This criminal case is one of several hundred arising from the insurrection at the United States Capitol on January 6, 202[1].” *United States v. Chwiesiuk*, No. 21-

536 (CKK), 2023 U.S. Dist. LEXIS 45784, at *1 (D.D.C. Mar. 17, 2023). *See also United States v. Rivera*, 607 F. Supp 3d 1, 10-11 (“[H]is presence was part of the floodwaters that drowned the Capitol in insurrection and destruction.”); *United States v. Eicher*, 22-cr-0038 (CKK), 2022 WL 11737926, at *1 (Oct. 20, 2022) (“This criminal case is one of several hundred arising from the insurrection at the United States Capitol on January 6, 2021.”); *United States v. Grider*, 21-cr-022 (CKK), 2022 WL 17829149, at *9 (D.D.C. Dec. 21, 2022) (“It is equally clear that the insurrection hindered both a federally protected function and commerce within the District of Columbia.”). Indeed, the Supreme Court of the United States recognized almost exactly 160 years ago, “[i]nsurrection against a government may or may not culminate in an organized rebellion.” *Brig Amy Warwick*, 67 U.S. (2 Black) 635, 666 (1863). Just because the events of January 6, 2021, have not yet culminated in further organized rebellion does not render those events any less of an insurrection. Calling the events of January 6, 2021, an “insurrection” is not hyperbole, and the government should not be precluded from accurately describing the events of the day.

Moreover, context matters. The fact that the defendants entered the Capitol during an insurrection, that Karol entered the office of a congressman while inside, and that together they went to different locations within the Capitol informs their knowledge and intent. The government should be permitted to fairly describe what was going on around them as it puts on evidence of the defendants’ conduct on January 6. Because “insurrection” is an “accurate descriptor,” its use is not an attempt to provoke or agitate the jury and the government should be permitted to use the term. *Carpenter*, 2023 WL 1860978, at *4.

IV. Defendants may object to improper opinion testimony at trial.

Defendants next ask the Court to preclude all witnesses from using terms like “disorderly conduct,” “demonstrating,” or “trespassing,” because those words may suggest legal conclusions. But the Federal Rules of Evidence do not, wholesale, preclude opinion testimony that embraces

an ultimate fact. “An opinion is not objectionable just because it embraces an ultimate issue.” Fed. R. Evid. 704(a). To be admissible under Rule 704(a), the opinion must also be relevant and helpful to the jury within the confines of Rules 701 and 702 of the Federal Rules of Evidence. *See, United States v. Sutton*, 21-cr-0598 (PLF), 2022 WL 16960338, at *3 (D.D.C. Feb. 16, 2022). Whether a particular question is admissible under Rule 704 is a factually specific inquiry as the “rule makes ultra-fine distinctions, with admissibility often turning on word choice.” *United States v. Perkins*, 470 F.3d 150, 158 (4th Cir. 2006). In making admissibility determinations “the court should first consider whether the question tracks the language of the legal principle at issue or of the applicable statute; then, the court should consider whether any terms employed have specialized legal meaning.” *Perkins*, 470 F.3d at 158; *see also, Sutton*, 2022 WL 16960338 (noting that “privilege” is a term of art separate from the vernacular).

The government does not intend to elicit impermissible legal conclusions. But whether a witness’s use of a word is impermissible may depend on the question asked and the context of the answer. Thus, the Court should not prohibit all witnesses from using the terms “disorderly conduct,” “demonstrating,” or “trespassing.” To the extent the government asks a question that calls for an improper legal conclusion or a witness offers an improper legal conclusion, the defendants may raise an objection at trial. *Herbert v. Architect of the Capitol*, 920 F. Supp. 2d 33, 38 (D.D.C. 2013) (noting that some rulings should be deferred until trial “when decisions can be better informed by the context, foundation, and relevance of the contested evidence within the framework of the trial as a whole.” (alterations omitted)).

V. Karol Chwiesiuk’s Statements Are Admissible.

Relying on Rules 401 and 403, Karol Chwiesiuk seeks to exclude some of his statements made before, during, and after January 6, 2021. As an initial matter, the government does not intend to introduce evidence or elicit testimony of Karol Chwiesiuk’s statement that he “[k]nocked

out a commie last night. Don't tell agnes." Similarly, the government does not intend to introduce evidence or elicit testimony about the following portion of the conversation:

SUBSCRIBER: Token black guy? You go down by yourself or with a group?

CHWIESIUK: Mericans yes. There's so many blacks here I'm actually in disbelief

SUBSCRIBER: "The Q crew?"

CHWIESIUK: Who?

SUBSCRIBER: People down there lol

The government also plans to redact the following:

CHWIESIUK: When corps orchestrate the takedown of competition to muzzle a certain narrative it is in fact censorship lmfao.

Top accounts conservative? Pls name.

Poland based. Why is fascism in any way bad?

Because the government agrees to redact these parts of the conversation, the defendants' Motion on this point should be denied as moot. The rest of the conversation, however, is relevant and admissible.

*a. The defendant's statements about planning to "f*** up commies" is relevant to intent.*

Defendant Karol Chwiesiuk, who authored the texts, has been charged by information in this case with violating 18 U.S.C. § 1752(a)(1) and (a)(2), by knowingly entering or remaining on restricted grounds without lawful authority. The statute defines "restricted buildings or grounds" to include any posted, cordoned off, or otherwise restricted area of a building or grounds where a person being protected by the Secret Service is or will temporarily be visiting. 18 U.S.C. § 1752(c)(1)(B). He has also been charged with violating 40 U.S.C. § 5104(e)(2)(D), for engaging in disorderly or disruptive conduct in any of the United States Capitol Buildings, with the intent to impede, disrupt, or disturb the orderly conduct of a session of Congress, and acting willfully and knowingly. A person acts "knowingly" if he realizes what he is doing and is aware of the nature

of his conduct, and does not act through ignorance, mistake, or accident. A person acts “willfully” if he acts with the intent to do something that the law forbids, that is, to disobey or disregard the law.

One way that the government intends to prove that Karol Chwiesiuk acted willfully and knowingly is by introducing the statements he made three days before January 6, 2021. In the same conversation where he says that he is “going to dc” he states, “Im f*** up some commies” and “busy planning how to f*** up commies.” These statements are relevant to the defendant’s purpose for traveling to Washington D.C. They show that he was not simply planning to travel to D.C. as a tourist—he intended to engage in disruptive behavior. While his statements do not advocate an express intent to enter restricted grounds, the statements are directly relevant to what the government claims is Karol Chwiesiuk’s intent in traveling to D.C. and committing the charged offenses.

Moreover, the term “commie” is not so inflammatory that exclusion of these statements is warranted under Rule 403. *See, United States v. Duran*, 884 F. Supp. 534, 537 (D.C. Dist. Ct. 1995) (finding that statements glorifying serial killers and mass murderers and likening the defendant to Jeffrey Dahmer was excludable under Rule 403 because of their tenuous relevance and the likelihood that they would arouse very strong feelings among jurors).

The defendant claims that the jury will not know whether these statements were made in jest. But the defendant is free to ask the witness whether the witness knows whether Karol Chwiesiuk was joking. Next, the defendant claims that introduction of this evidence may make the

defendant feel compelled to testify to explain his incriminating statements. But a defendant's desire to explain his incriminating statements does not make them any less relevant or admissible.

It is clear from the context of the conversation that his statements about "planning how to f*** up commies" are related to Karol Chwiesiuk's travel to Washington, D.C. These statements meet the low threshold of relevance under Rule 401 and do not create a risk of unfair prejudice.

b. The defendant's entire expression of consciousness of guilt is admissible.

Based upon the information obtained by the government, the conversation between Karol Chwiesiuk and the acquaintance between January 3, 2021, and January 14, 2021, primarily involved discussion about the events of January 6, 2021. His statement "N***** Don't snitch" within the context of the conversation shows consciousness of guilt. It plainly meets the minimal standard of relevance, making it more probable that he was in the Capitol on January 6 and knew what he did was unlawful.

Moreover, the fact that the defendant uses the term "N*****" is relevant to the jury's evaluation of the weight it should give to the defendant's statements. His use of this offensive term shows that he is speaking frankly and candidly. It makes the statements within the conversation more compelling because it shows that the defendant did not believe that he needed to censor himself. Rather, the jury could infer from the free way in which he expressed himself that he believed this to be a confidential communication with someone he trusted. The government intends to use this portion of the sentence solely for this purpose, and not, as the defendants' claim, to "suggest that Mr. Chwiesiuk holds racist beliefs." The government would not object to an appropriate limiting instruction should the defendants request one. Because this statement is relevant to the weight the jury should give this evidence, it should not be redacted.

VI. Conclusion.

To accurately present the context of what took place at the Capitol on January 6, 2021, the government should be permitted to use the term insurrection and the government requests the Court deny the defendants' motion to exclude this term. In addition, the Court should deny the defendants' request to bar witnesses from using what they call "other prejudicial terms" as premature. As it relates to the Karol Chwiesiuk's text messages, the government should be able to introduce the conversation from January 3, 2021, about his plan to travel to Washington, D.C., with the redactions noted above. In addition, the government should be able to introduce his complete statement "N**** Don't snitch" as the statement relates both to consciousness of guilt and to the weight the jury should give to the conversation. The government respectfully requests that the Court deny the motion.

Respectfully submitted,

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DATED: April 7, 2023

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