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 OMNIBUS REPLY TO
DEFENDANT'S RESPONSES IN OPPOSTION

Defendants Karol J. Chwiesiuk and Agnieszka Chwiesiuk, who are charged in connection with events at the U.S. Capitol on January 6, 2021, responded in opposition (ECF Nos. 76-78) to the government's motions in limine (ECF Nos. 72-74). Defendant Karol J. Chwiesiuk argued that the government's motion *in limine* regarding character evidence (ECF No. 73) should be denied or deferred until trial because Karol J. Chwiesiuk's accolades, awards, medals, commendations, certificates, letters, performance reviews, and other records from his service in the Chicago Police Department are character evidence and character evidence is admissible at trial. ECF No. 76. Defendants further argued that the government's motion *in limine* regarding cross examination of the anticipated U.S. Secret Service witness (ECF No. 74) should be denied because "the location of the Vice President is an essential question in this case." ECF No. 77, p. 2. Regarding the government's motion *in limine* to preclude certain arguments about police action or inaction (ECF No. 72), the defendants argue that should be denied or deferred until trial because (1) they do not intend to avail themselves of the defense of entrapment by estoppel (ECF No. 78, pp. 1-2), and (2) because evidence of police action or inaction is relevant. *Id*. at pp. 2-6.

The government asks the Court to reject the arguments presented by defendants in their response, to grant the government's motions *in limine*, and offers the following in support thereof.

I. WHILE THERE IS NO DISPUTE THAT CHARACTER EVIDENCE MAY BE RELEVANT, THE SPECIFIC CHARACTER/PROPENSITY EVIDENCE THAT THE GOVERNMENT SEEKS TO EXCLUDE IS IMPROPER AND IRRELEVANT

As defendant Karol J. Chwiesiuk recognizes, his intent upon entering the United States Capitol on January 6, 2021, "will be a primary issue at trial." ECF No. 76, p. 2. None of the character evidence the government seeks to exclude is or could be relevant to any of the charges defendant Karol J. Chwiesiuk is facing, nor is the specific evidence in dispute proper character evidence under the Rules. This Court should also preclude Karol J. Chwiesiuk from offering any evidence of or relating to his police service or lack of a criminal record as improper propensity evidence.

In his response to the government's motion *in limine*, defendant cites to this Court's decision in *United States v. Brown*, 503 F. Supp. 2d 239 (D.D.C. 2007) (Kollar-Kotelly, J.). *Brown* sets out "the proper legal framework in which it may permit Defendants to introduce character evidence and the Government to cross-examine Defendants based on specific incidents demonstrating character traits which relate to character evidence offered by Defendants." *Id*. at 240. As the heading for section B of *Brown* recognizes, "Commendations constitute character evidence." *Id*. at 242. But character evidence can only be introduced if it (1) relates to a character trait at issue in the case, based on the nature of the charges, and (2) is offered in the proper form; that is, "by testimony about the person's reputation or by testimony in the form of an opinion." Fed. R. Evid. 405(a); *Brown*, 503 F. Supp. 2d at 241. The Memorandum Opinion in *Brown* did not determine that police commendations were *admissible* character evidence. As it relates to Karol J. Chwiesiuk, (1) any commendations he may have received cannot go to any pertinent trait relevant to the specific charges he faces, and (2) the form of this evidence is improper.

Crucially, in the criminal proceedings in *Brown*, the defendants were police officers and the criminal charges related to their employment. In this case, although Karol J. Chwiesiuk was a

police officer on January 6, 2021, the charges do not relate to his employment. Notwithstanding the fact that he chose to wear a hooded sweatshirt with the Chicago Police Department (CPD) logo, he was not on duty or acting in any official capacity while on restricted Capitol grounds or while inside of the Capitol. In situations comparable to Karol J. Chwiesiuk, "Two circuit court cases (one from this circuit) dealing specifically with defendants' requests to introduce their commendations as police officers have rejected such requests." *Id*. at 243. More specifically, the charges in those previously mentioned circuit cases[1] related to drug dealing and stealing exams, not something within the scope of the police officers' respective duties. Karol Chwiesiuk's alleged trespassing and disorderly conduct at the Capitol during a riot is not part of the duties of a police officer from the CPD.

The officers in the two circuit cases, *Washington* and *Nazzaro*, were seeking to introduce commendations *less* as character evidence and *more* as never-would-I-ever or propensity evidence. Federal Rule of Evidence 404(a) establishes the baseline rule that character evidence is generally not admissible in a criminal trial for the purpose of showing propensity—that is, for the purpose of showing that the person likely acted in a way that is consistent with a character trait on a particular occasion. Just as it is no defense to a murder that the accused knows what murder is, knows that murdering is illegal, and had never before murdered, so too is it no defense to charges of trespass and disorderly conduct that thanks to his time as a police officer, Karol J. Chwiesiuk knows what the charges are that he faces, knows that they are illegal, and never before participated in an insurrection. There is a first time for everything.

[1] *United States v. Washington*, 106 F.3d 983 (D.C. Cir. 1997); *United States v. Nazzaro*, 889 F.2d 1158 (1st Cir. 1989).

Defendant proffers that "Mr. Chwiesiuk's career as a police officer demonstrates his prior adherence to the law." ECF No. 76, p. 3. This is precisely the kind of improper propensity evidence that this Court should not allow to be presented to the jury. The Court should preclude defendant Karol J. Chwiesiuk from making any sort of propensity argument to the jury based on "prior adherence to the law."

Brown homes in on the central issue by recognizing that, "[C]ommendations themselves are arguably neither opinion nor reputation testimony and accordingly are more akin to specific instances of conduct which may only be offered '[i]n cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense.' Fed. R. Evid. 405(b)." *U.S. v. Brown*, 503 F. Supp. 2d at 244. That is not the case here; the elements of the charged offenses do not encompass any aspect of the defendant's character or traits. Accordingly, evidence of specific instances of conduct that would be contained in CPD awards, medals, commendations, or performance reviews are improper avenues for introducing any relevant character evidence here (as opposed to, for example, testimony about the defendant's reputation for law-abidingness or a witness's opinion thereof). The government's position is consistent with several rulings from other Judges in this District. *Ex. United States v. Carpenter*, Crim. No. 21-CR-305 (JEB), ECF No. 78, pp. 2-3 (D.D.C. Feb. 9, 2023) (Boasberg, C.J.) (prohibiting defendant from introducing specific prior acts of peacefulness or nonviolence, including from her time as an NYPD officer); *United States v. Webster*, Crim. No. 21-CR-208 (APM), ECF No. 75, pp. 1-2 (D.D.C. 2022) (Mehta, J.) (holding that defendant "shall not be permitted to offer specific prior acts of peacefulness or nonviolence, as those character traits are not an element of any offense charged nor any defense" and "shall not be permitted to offer extrinsic evidence of prior professional commendations").

To be clear, to the government's knowledge, the defendant has not yet identified to the government or to the Court any commendations or awards that he intends to offer up to the jury at trial. As such, this issue may be denied generally with the option to revisit once specific commendations are proposed. Even then, the government would ask that consistent with *Brown*, the commendation is excluded, and the witness only be allowed to testify to the specific instance of conduct that is an essential element of the charge, claim, or permissible defense. To the extent that Karol J. Chwiesiuk identifies specific department issued commendations that he desires to introduce as evidence, the government requests that defense provide the government with that evidence as well as the defendant's full CPD personnel file, to include any warnings issued to or disciplinary actions taken against the defendant during his employment.[2]

Consequently, this Court should grant the government's motion *in limine* to preclude the introduction of any commendations Karol J. Chwiesiuk's may have received while employed by the Chicago Police Department and the use of any aspect of his public service as improper propensity evidence.

II. NO FURTHER QUESTIONING IS NECESSARY ONCE THE GOVERNMENT ESTABLISHES HOW AND WHERE THE VICE PRESIDENT WAS PROTECTED BY THE U.S.S.S.

In their response in opposition, defendants assert that they "do not intend to question the witness about the general nature of [U.S.S.S.] protective details." ECF No. 77, p. 1. They do assert that they "must be permitted to inquire into the location of the vice president in this emergency, including when and to what location he was taken." *Id*. at 2. The government agrees but asks the Court to preclude all questioning that would inquire of the witness in any greater detail beyond

[2] Irrespective of whether the defendant's full personnel file is provided to the government by the defendant, the government intends to subpoena the file from the Chicago Police Department. Should the full file be provided in a timely manner, this request would be moot.

whether the former Vice President was at the Capitol or would temporarily be visiting the Capitol, during the relevant period. This is as far as the government's burden of proof extends. *See* ECF No. 54, Count One and Count Two. Any further questions about the former Vice President's precise movements within the Capitol or the timing of those movements is unnecessary. Put differently, for purposes of section 1752 charges, only the former Vice President's presence in the Capitol or whether he would be temporarily visiting the Capitol is relevant. Precisely how and where he was protected at each moment of January 6, 2021, is not relevant. *Cf. United States v. Griffith*, Crim. No. 21-CR-244 (CKK), 2023 U.S. Dist. LEXIS 26709, at *11 (D.D.C. Feb. 16, 2023) (Kollar-Kotelly, J.) (once evidence establishes Capitol grounds were restricted, whether additional measures could have been taken to further restrict area is not relevant).

As such—and given the security risks at hand should the defendants be allowed greater latitude in their inquiry—this Court should reject defendants' arguments in opposition and grant the government's motion *in limine* seeking to limit any cross examination of their anticipated U.S. Secret Service witness.

III. DEFENDANTS' ARGUMENTS ABOUT THE RELEVANCY OF POLICE ACTION OR INACTION ARE UNAVAILING

Defendants proffer that they are not seeking to introduce a defense of entrapment by estoppel, rendering the government's motion *in limine* moot. ECF No. 78, pp. 1-2. The defendants object to the preclusion of evidence about police action or inaction unless defendants can show personal awareness of such action or inaction. *Id*. at 2-6. Their arguments on this point, however, are unavailing, and the government's position is consistent with rulings from other judges in this District. *Ex. United States v. Rhine*, Crim. No. 21-CR-687 (RC), 2023 U.S. Dist. LEXIS 27764, at *34-35 (D.D.C. Feb. 17, 2023) (Contreras, J.) (holding "evidence of law enforcement inaction or removal of barriers is relevant and admissible only to the extent that Defendant was aware of it or

reasonably could have perceived it, or that it occurred in close proximity to the locations where Defendant is alleged to have entered or been in the Capitol before he was there such that it reasonably bears on whether the area was restricted, as established through presentation of evidence or by proffer to the Court"); *United States v. Williams*, Crim No. 21-CR-377 (BAH), ECF No. 87, pp. 3-4 (D.D.C. 2022) (Howell, J.) (before introducing evidence of police inaction before jury, defendant "must somehow establish his awareness of the alleged inaction" in "any number of ways").

Unless and until the defendants provide a good faith proffer outside the presence of the jury or use other evidence to show that they were adequately nearby the alleged inaction at the correct time to have perceived and understood such inaction as giving permission to the defendants to enter the Capitol, the government asks this Court to grant its motion *in limine* and preclude any testimony about police action or inaction. To be clear, the government does not object to the introduction of this type of evidence for a purpose that is proper and has a foundation that relates to that purpose.

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IV. CONCLUSION

For the foregoing reasons, the government asks the Court to grant its motions *in limine* and preclude Karol J. Chwiesiuk from admitting improper character evidence, preclude certain topics of cross examination from the U.S.S.S. witness, and preclude the defendants from introducing evidence of law enforcement action or inaction unless the proper foundation is laid.

Respectfully submitted,

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