

transactions, constituting an offense or offenses. Accordingly, and pursuant to Fed. R. Crim. P. 8, the Government intends to file a superseding Information in K. Chwiesiuk's case joining A. Chwiesiuk on four of the five charges currently on that Information.¹

4. The Government has extended a plea offer to A. Chwiesiuk. A. Chwiesiuk is currently considering that plea offer with her attorney. If A. Chwiesiuk decides to reject the plea offer, the government will file a superseding information in K. Chwiesiuk's case, joining the two for a jury trial. The jury trial is currently scheduled to begin on May 1, 2023, and both parties believe that even if A. Chwiesiuk is joined to the Information, the jury trial will be able to proceed before District Court Judge Kollar-Kotelly as scheduled.

5. A. Chwiesiuk has retained Mr. Nishay Sanan as counsel in her case. Mr. Sanan also currently represents her brother and potential co-defendant, Karol J. Chwiesiuk. While the Local Rules for the District of Columbia do not appear to address the Court's responsibility in cases of Joint Representation, Fed. R. Crim. P. 44(c)(2) requires:

The court must promptly inquire about the propriety of joint representation and must personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless there is good cause to believe that no conflict of interest is likely to arise, the court must take appropriate measures to protect each defendant's right to counsel.

6. Like a change of plea hearing or Rule 11 colloquy, a Rule 44(c)(2) colloquy must be prompt, and it must be a discussion between the Court and the defendant. It must establish that the defendant understands her rights, that she understands the risks inherent in a joint representation, and that she knowingly and voluntarily wishes to continue with her counsel of choice. Through the colloquy, the Court must assure itself that the defendant's decision is informed

¹ Count Three of the Information alleges that K. Chwiesiuk unlawfully entered the hideaway office of Senator Jeff Merkley (S140) while inside the Capitol in violation of 40 U.S.C. § 5104(e)(2)(C)(i). At present, the Government is not alleging that A. Chwiesiuk entered S140.

and sound. The Government does not have any reason to believe that a conflict of interest currently exists or is likely to arise, but pursuant to Rule 44(c)(2), that is a finding that must come from the Court after a discussion with the defendant.

7. Since the defendants are not currently joined, it may make sense for the colloquy to be held by the District Court Judge if the cases become joined. But then again, even under separate cases, both this defendant and her brother are charged with conduct arising out of January 6, 2021. Agnieszka and Karol are side-by-side for nearly all relevant times inside the Capitol, as seen in the Statement of Facts associated with this case. There is perhaps an argument to have the Rule 44(c)(2) hearing at the earliest possible moment, even if it is a finding made by a Magistrate Judge subject to review before the District Court. While the Government believes that such a hearing must be held and such a finding must be made by the Court, the Government leaves the timing of such a hearing in the sound discretion of the Court.

8. The Supreme Court has affirmed that District Courts must be afforded “substantial latitude” in making the decision of whether to allow joint representation. *Wheat v. United States*, 486 U.S. 153, 163 (1988). The District Court should be considering both “those rare cases where an actual conflict may be demonstrated before trial” and also “the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses.” *Id.* “The District Court must recognize a presumption in favor of petitioner's counsel of choice, but that presumption may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict. The evaluation of the facts and circumstances of each case under this standard must be left primarily to the informed judgment of the trial court.” *Id.* at 164.

9. The plea offer is set to expire tomorrow, on January 31, 2023. If the defendant accepts the plea offer, the Government will file an Information as to this defendant alone so that she may plead before a District Court Judge. As indicated above, if the defendant rejects the plea offer, the Government will file a superseding Information in 21-CR-536 (CKK), joining A. Chwiesiuk to the relevant four counts of that Information. **As to this Court, the parties propose that this Court schedule this case for a Status Hearing on or about thirty days from now, specifically Wednesday, March 1, 2023.**

10. Consistent with the attached proposed Order, the government requests, and the defendant through her counsel consents to

- a. the Court excluding all time between today and the next status report from calculation under the Speedy Trial Act, and
- b. waive her right under 18 U.S.C. § 31651(b) to be charged by indictment or information within thirty days of her arrest.

Respectfully Submitted,

MATTHEW M. GRAVES
United States Attorney
DC Bar No. 481052

By:



SEAN P. MURPHY
Assistant United States Attorney
Detail, Capitol Siege Section
D.C. Bar No. 1187821
Torre Chardon, Ste 1201
350 Carlos Chardon Ave
San Juan, PR 00918
787-766-5656
sean.murphy@usdoj.gov

/s/

NISHAY SANAN, ESQ.
Attorney for Agneiska Chwiesiuk
Bar ID: IL0083
53 W. Jackson, Ste 1437
Chicago, IL 60604
312-692-0360
nsanan@aol.com