

## STATEMENT OF FACTS

Your affiant, [REDACTED], is a Special Agent with the Federal Bureau of Investigation (FBI) and assigned to the Joint Terrorism Task Force. In my duties as a Special Agent, I investigate criminal matters involved with domestic terrorism. Currently, I am tasked with investigating criminal activity in and around the Capitol grounds on January 6, 2021. As a federal law enforcement officer, I am authorized by law or by a Government agency to engage in or supervise the prevention, detection, investigation, or prosecution of a violation of Federal criminal laws.

The U.S. Capitol is secured 24 hours a day by U.S. Capitol Police. Restrictions around the U.S. Capitol include permanent and temporary security barriers and posts manned by U.S. Capitol Police. Only authorized people with appropriate identification were allowed access inside the U.S. Capitol. On January 6, 2021, the exterior plaza of the U.S. Capitol was also closed to members of the public.

On January 6, 2021, a joint session of the United States Congress convened at the United States Capitol, which is located at First Street, SE, in Washington, D.C. During the joint session, elected members of the United States House of Representatives and the United States Senate were meeting in separate chambers of the United States Capitol to certify the vote count of the Electoral College of the 2020 Presidential Election, which had taken place on November 3, 2020. The joint session began at approximately 1:00 p.m. Shortly thereafter, by approximately 1:30 p.m., the House and Senate adjourned to separate chambers to resolve a particular objection. Vice President Mike Pence was present and presiding, first in the joint session, and then in the Senate chamber.

As the proceedings continued in both the House and the Senate, and with Vice President Mike Pence present and presiding over the Senate, a large crowd gathered outside the U.S. Capitol. As noted above, temporary and permanent barricades were in place around the exterior of the U.S. Capitol building, and U.S. Capitol Police were present and attempting to keep the crowd away from the Capitol building and the proceedings underway inside.

At such time, the certification proceedings were still underway and the exterior doors and windows of the U.S. Capitol were locked or otherwise secured. Members of the U.S. Capitol Police attempted to maintain order and keep the crowd from entering the Capitol; however, around 2:00 p.m., individuals in the crowd forced entry into the U.S. Capitol, including by breaking windows and by assaulting members of the U.S. Capitol Police, as others in the crowd encouraged and assisted those acts.

Shortly thereafter, at approximately 2:20 p.m. members of the United States House of Representatives and United States Senate, including the President of the Senate, Vice President Mike Pence, were instructed to—and did—evacuate the chambers. Accordingly, the joint session of the United States Congress was effectively suspended until shortly after 8:00 p.m. Vice President Pence remained in the United States Capitol from the time he was evacuated from the Senate Chamber until the sessions resumed.

During national news coverage of the aforementioned events, video footage which appeared to be captured on mobile devices of persons present on the scene depicted evidence of

violations of local and federal law, including scores of individuals inside the U.S. Capitol building without authority to be there, in violation of federal laws. Photographs and videos of many of these persons were disseminated via social media and other open source online platforms.

*1. Identification GARY*

Among the photographs disseminated online were images of a white male with white or gray hair wearing a black jacket, blue jeans, a black Nike backpack, and black shoes, identified by the FBI as BOLO (“Be On the Look Out”) #74, who had entered the U.S. Capitol Building on January 6, 2021. *See* Image 1.



*Image 1: BOLO #74*

On April 20, 2021, a law enforcement officer with Montgomery County Maryland Police Department submitted a tip to the FBI regarding the identity of BOLO #74. The law enforcement officer ran BOLO #74 against facial recognition software, which positively identified DAVID MICHAEL GARY as the subject. The law enforcement officer also identified a public Instagram account, “davetv31,” which matched the visual depiction of BOLO #74 from the FBI’s Capitol Violence Wanted list. Review of that public-facing Instagram account revealed that the subscriber of “davetv31” posted that he was in Washington D.C. on January 5 and 6, 2021. Additional photographs including “selfies” posted to the davetv31 Instagram account also matched the visual depiction of BOLO #74 from the FBI’s Capitol Violence Wanted list. *Compare* Images 2 and 3 (photographs posted to Instagram account “davetv31”) *with* Image 1 (BOLO photograph).



*Images 2 and 3 (left and center, posted to Instagram); Image 1 (right, BOLO #74)*

The FBI then confirmed pursuant to legal process that Instagram username “davetv31” (with account number 1536533561) is registered to the user-provided name “David M. Gary”, with an email address containing an abbreviation of GARY’s name, d\*\*\*\*y@pacbell.net, and a phone number ending in 3283. Open source research revealed that GARY also uses a Facebook account with account number 1363117168, which the FBI confirmed through legal process is registered to the user-provided name “David Michael Gary,” with the email addresses d\*\*\*\*y@pacbell.net, and the same phone number ending in 3283.

AT&T records confirmed that GARY is the subscriber for the telephone number ending in 3283, which is the telephone number associated with both the Instagram and Facebook accounts described in the foregoing paragraph.

Review of the public davetv31 Instagram account revealed that the owner of the “davetv31” account posted that he was in Washington D.C. on January 5 and 6, 2021. The first image was posted on January 5, 2021 with the caption “Downtown Washington D.C.” See Image 4. The second image was posted on January 6, 2021, with the caption, “7:30 am Jan 6.” See Image 5. These posts have been deleted from the public-facing page for the “davetv31” Instagram account.

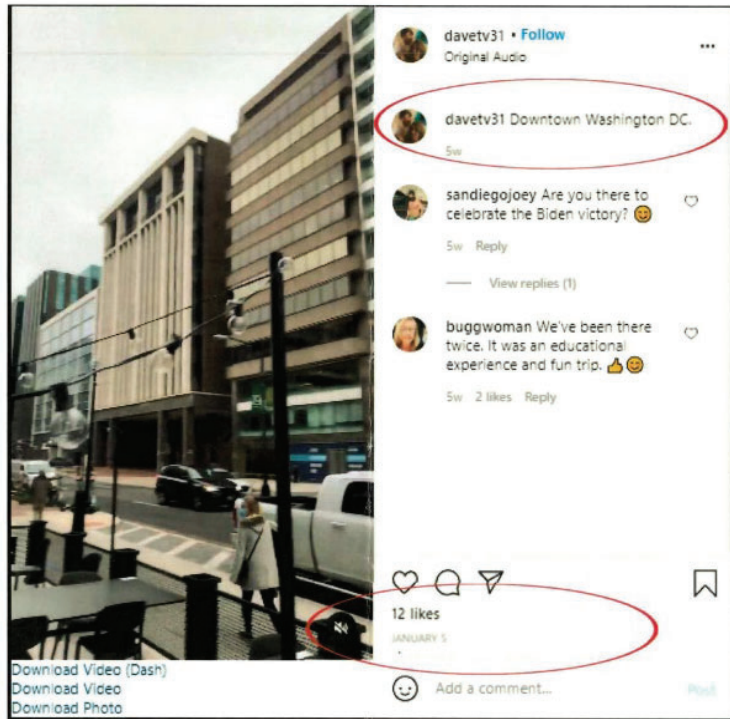


Image 4



Image 5

The FBI confirmed its preliminary identification of BOLO #74 as DAVID GARY on July 6, 2022. On that date, FBI agents approached GARY's supervisor at his place of employment and showed the supervisor photographs depicting BOLO #74, including Image 1, above. This

supervisor stated that the individual previously identified as BOLO #74 was “David Gary.” When asked why the FBI might be interested in GARY, the supervisor stated, “I assume this is about January 6<sup>th</sup>” and then declined to answer further questions.

Of relevance to this investigation, the “davetv31” Instagram account also posted on December 24, 2020 a photograph depicting a “Trump 2020” hat and a bottle of “The Kraken” spiced rum with the caption “Have a Merry Christmas and a Happy New Trump Year!! #kraken #2021 #patriots #2021.” *See* Image 6. Another post by the davetv31 account shows GARY wearing the same Trump 2020 hat in a post from April 2020. *See* Image 7.

I know based on my investigation into the events at the U.S. Capitol on January 6, 2021 that “the kraken” refers to a theory publicly espoused by Sidney Powell, a member of former President Trump’s legal team during the former president’s challenge of the 2020 election results. Ms. Powell claimed that the 2020 election had been affected by widespread election fraud such that Mr. Trump was the rightful winner. Ms. Powell claimed that she would “release the kraken” to expose this purported fraud.

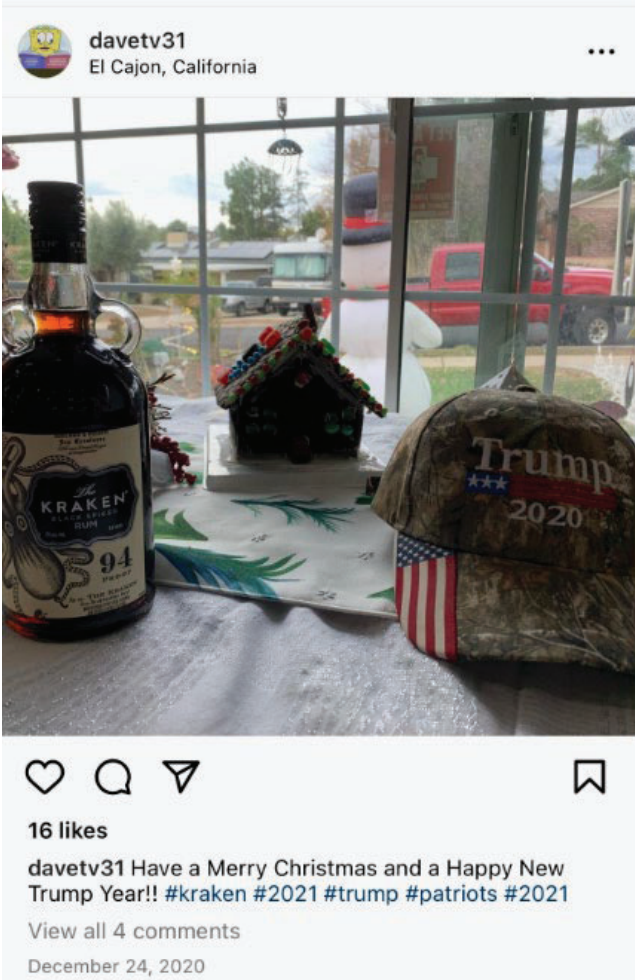


Image 6: December 24, 2020 Instagram Post



Image 7: April 5, 2020 Instagram Post

## 2. Trespass into the U.S. Capitol Building by GARY

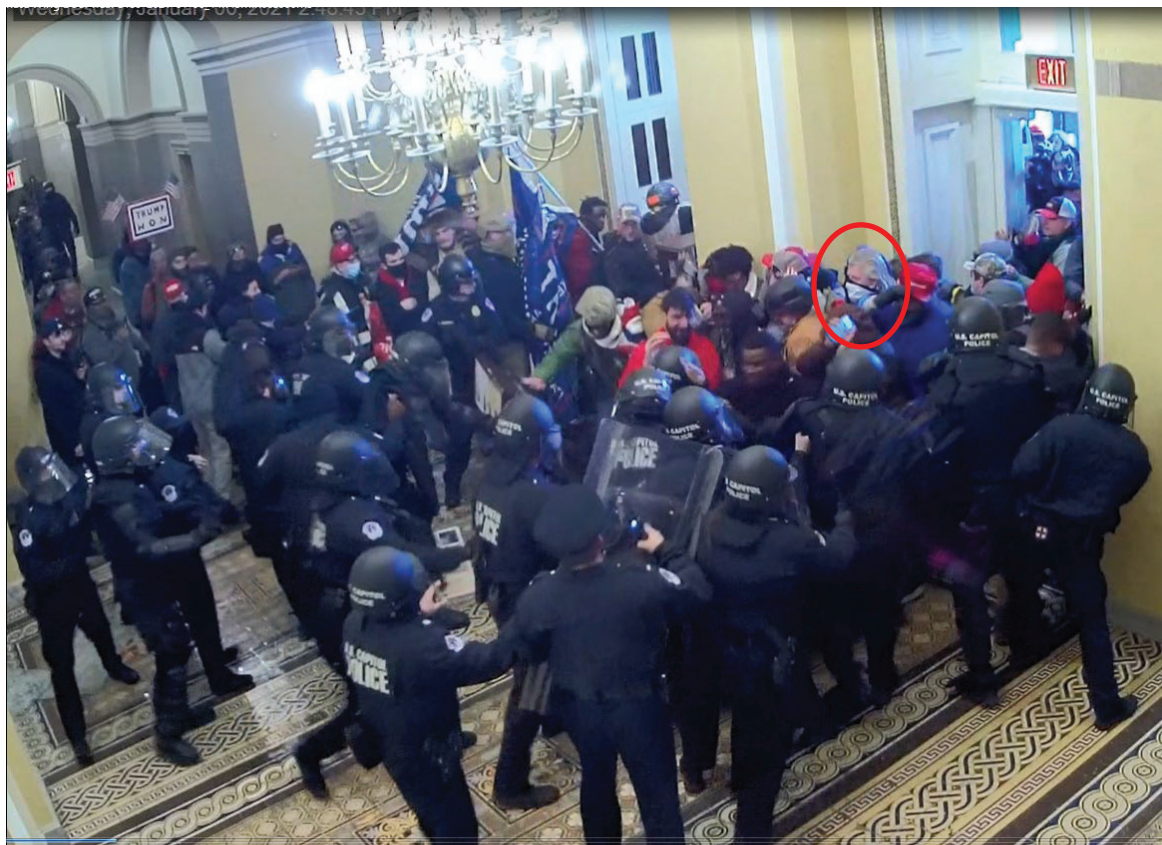
At approximately 2:48 pm, GARY entered the U.S. Capitol Building through the Senate Wing doors wearing a black jacket, white facemask, blue jeans, black shoes, and a black Nike backpack. Specifically, at 2:48:37 pm, GARY is visible on U.S. Capitol Police surveillance cameras (“CCTV”) in a crowd of rioters attempting to push through a group of U.S. Capitol Police officer assembled at the Senate Wing Door. *See Image 8.*

CCTV shows GARY body-to-body with a group of rioters at the Senate Wing Door forcefully pushing their way into the building. The rioters can be see straining against the line of officers assembled in front of the door and then breaking through the line of officers using the weight and force of the crowd. Within seconds, the group of rioters, including GARY, were able to overcome the assembled Capitol Police officers, force entry into the building, and leave the door unprotected for still more rioters to stream through. *See Image 10.*

Just a few seconds later, at 2:48:43 pm, GARY crossed the threshold into the Capitol with the crowd that pushed the assembled officers back. *See Image 9.*



*Image 8: GARY (circled in red) entering the Capitol through the Senate Wing Door in opposition to assembled U.S. Capitol Police Officers (in green box) at 2:48:37 p.m.*



*Image 9: GARY (circled in red) as he enters through the Senate Wing Door*



*Image 10: GARY (circled in red) entering the Capitol through the Senate Wing Door in opposition to assembled U.S. Capitol Police Officers at 2:48:45 p.m.*



After entering the building, GARY proceeded to the front of the group and began yelling and gesturing at Capitol Police officers. *See Image 11.* At 2:49:25 pm, GARY removed his mask to continue yelling at officers. *See Image 12.*

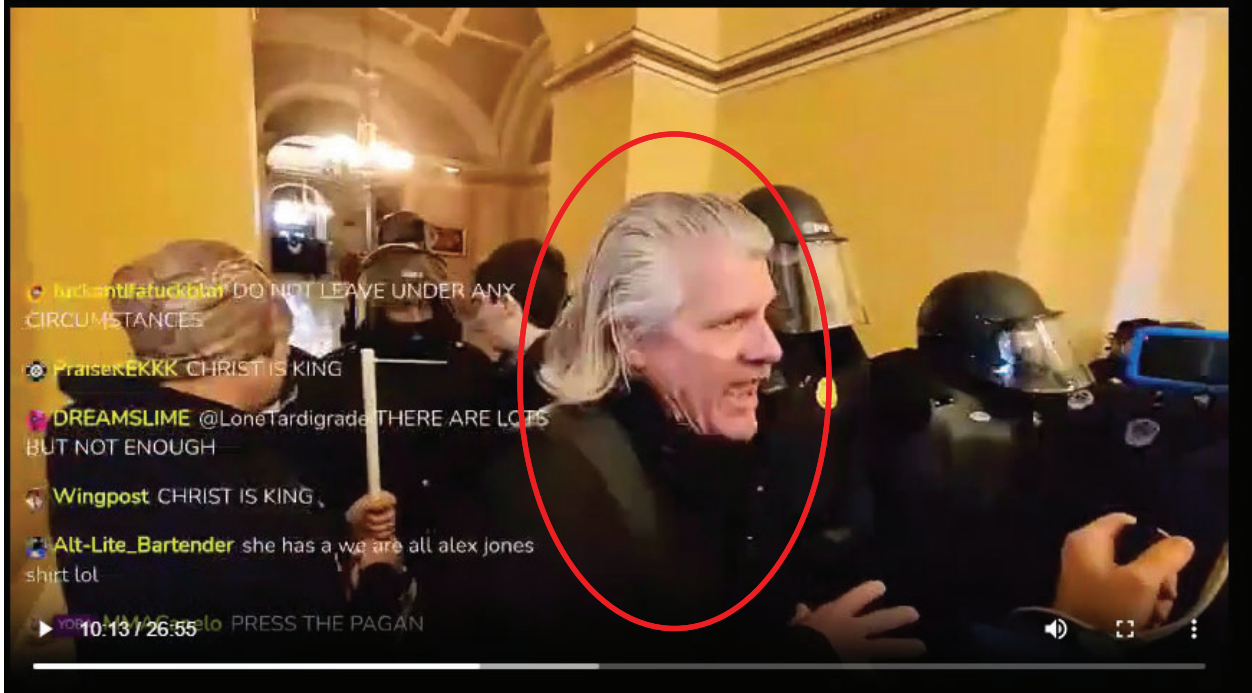


*Image 11: GARY (circled in red) gesturing at officers as he appears to yell at them*



*Image 12: GARY (circled in red) removing his mask to yell at officers*

GARY remained in the corridor just inside the Senate Wing Doors for several minutes, yelling and gesticulating at the assembled Capitol Police officers. At approximately 3:01 p.m., GARY also appeared on another rioter's livestream from the Capitol Building. *See Image 13.* During that livestream, GARY can be heard saying: "I'm sure they had to evacuate. If we came in, they evacuated. For security. They're going to evacuate, that's just the rules. We breached the building ... we're gonna go. ... Nobody here. It's a vacant building." I believe this conversation took place at approximately 3:01 p.m. based on a comparison of the third party video with CCTV footage. *See Image 14.*



*Image 13: GARY (circled in red) in the corridor outside the Senate Wing Door (Third Party Video)*



*Image 14: GARY (circled in red) in the corridor outside the Senate Wing Door (CCTV)*

U.S. Capitol CCTV captured GARY in several locations within the building, including in the Crypt at approximately 3:04 pm, where he appeared to have his cell phone in his hand. See Images 15 and 16.



*Image 15: GARY (circled in red) inside the Capitol Crypt*

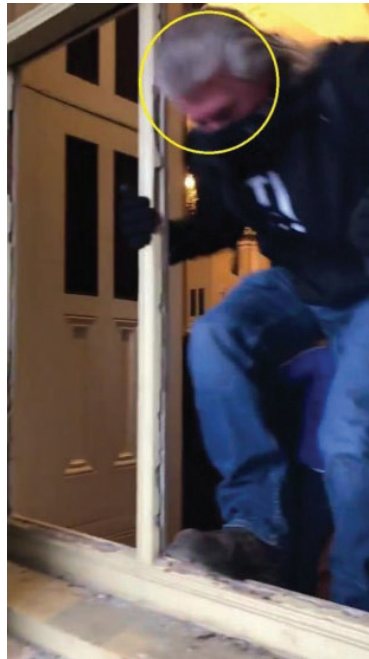


*Image 16: GARY (circled in red) inside the Capitol Crypt*

At approximately 3:13 p.m., GARY returned to the Senate Wing area and exited the building at approximately 3:14 p.m. through a broken Senate Wing window. See Image 17 and 18.



*Image 17: GARY (circled in red) outside the Senate Wing Door*



*Image 18: GARY (circled in yellow) exiting the building through a window*

In addition to the telephone number ending in 3283 (the phone number associated with the “davetv31” Instagram and David Michael Gary Facebook accounts), open-source checks revealed a second known phone number for GARY, ending in 5115. According to lawfully obtained records from AT&T, DAVID MICHAEL GARY is the subscriber of the phone number ending in 5115. AT&T records further show that on January 6, 2021, the telephone number ending in 5115 and IMEI 3564381068870222 was identified as having utilized a cell site consistent with providing

service to a geographic area that included the interior of the United States Capitol building at some point from approximately 1:00 p.m. to 6:30 p.m. on January 6, 2021.

**Conclusion**

Based on the foregoing, your affiant submits that there is probable cause to believe that GARY violated 18 U.S.C. §§ 1752(a)(1) and (2), which makes it a crime to (1) knowingly enter or remain in any restricted building or grounds without lawful authority to do; and (2) knowingly, and with intent to impede or disrupt the orderly conduct of Government business or official functions, engage in disorderly or disruptive conduct in, or within such proximity to, any restricted building or grounds when, or so that, such conduct, in fact, impedes or disrupts the orderly conduct of Government business or official functions; or attempts or conspires to do so. For purposes of Section 1752 of Title 18, a “restricted building” includes a posted, cordoned off, or otherwise restricted area of a building or grounds where the President or other person protected by the Secret Service, including the Vice President, is or will be temporarily visiting; or any building or grounds so restricted in conjunction with an event designated as a special event of national significance.

Your affiant submits there is also probable cause to believe that GARY violated 40 U.S.C. §§ 5104(e)(2)(D) and (G), which makes it a crime to willfully and knowingly (D) utter loud, threatening, or abusive language, or engage in disorderly or disruptive conduct, at any place in the Grounds or in any of the Capitol Buildings with the intent to impede, disrupt, or disturb the orderly conduct of a session of Congress or either House of Congress, or the orderly conduct in that building of a hearing before, or any deliberations of, a committee of Congress or either House of Congress; and (G) parade, demonstrate, or picket in any of the Capitol Buildings.

  
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Federal Bureau of Investigation

Attested to by the applicant in accordance with the requirements of Fed. R. Crim. P. 4.1 by telephone, this 16th day of January 2024.

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HONORABLE MOXILA A. UPADHYAYA  
UNITED STATES MAGISTRATE JUDGE