

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA :
 :
 v. : **CASE NO. 21-CR-495-ABJ**
 :
DANIEL PAUL GRAY, :
 :
 Defendant. :

**MOTION IN LIMINE TO PRECLUDE ARGUMENTS AND
EVIDENCE ABOUT ALLEGED LAW ENFORCEMENT ACTION/INACTION
AND DEFENDANT’S OTHER NOTICED DEFENSES**

The government respectfully requests that the Court issue an order precluding the defendant, Daniel Paul Gray, from: (1) arguing an entrapment by estoppel defense related to law enforcement; (2) offering evidence or argument concerning any claim that by allegedly failing to act, law enforcement made the Gray’s entry into the U.S. Capitol building or grounds or his conduct therein lawful; (3) arguing or presenting evidence of alleged inaction by law enforcement unless Gray specifically observed or was otherwise aware of such conduct; or (4) raising the affirmative defenses noticed in ECF Nos. 49 and 51.

FACTUAL BACKGROUND

The Court summarized the pertinent facts of this case in its November 2, 2022 Order. ECF No. 60 at 1–3. The government highlights facts relevant to this motion below, some of which were not included in the Court’s November 2, 2022 Order.

By 2:25 p.m., Gray was in the restricted area on Capitol grounds and face-to-face with the police line on the west side of the Capitol building, near the steps of the west plaza. His presence was captured on MPD Officer M.B.'s¹ body-worn camera, shown in Figure 1 below.



Figure 1. Screenshot from MPD Officer M.B.'s body-worn camera at 2:25:51 p.m. Gray's head and phone circled in red.

Soon after the moment recorded in Figure 1, a skirmish erupted between rioters and police officers. It is unclear what happened to Gray or his phone.

As detailed below, Gray later breached the Capitol building through the Upper West Terrace door ("UWT door") at approximately 2:40 p.m. The UWT door was *first* breached at 2:33 p.m. by rioters forcing the door open from the inside.

¹ Officer M.B. is the victim alleged in Count Three of the Superseding Indictment. ECF No. 25.



Figure 2. Screenshot from USCP CCTV at 2:33:43 p.m.

At 2:35 pm, five officers with the U.S. Capitol Police Department (USCP) responded to the breached UWT door. Figure 3 shows five officers walking down a hallway, at the end of which is the UWT door.



Figure 3. Screenshot from USCP CCTV at 2:35:59 p.m. USCP officers circled in blue.

Initially, the officers were unable to re-secure the UWT door and rioters continued to stream into the Capitol building. By the time that Gray first appeared near the UWT door at 2:40 p.m., the officers had stopped rioters from entering the Capitol building.



Figure 4. Screenshot from USCP CCTV at 2:40:08 p.m. Gray circled in red.

Gray walked through the doorway and began an animated conversation with the officers.



Figure 5. Screenshot from USCP CCTV at 2:41:35 p.m. Gray's head and hand circled in red.

Gray did not go through security and there was no indication that this was a legitimate entry to the Capitol building. In fact, there were alarms blaring and the door he entered is clearly marked “Emergency Exit Only.” At 2:44 p.m., the officers began to fall back from the UWT door.



*Figure 6. Screenshot from USCP CCTV at 2:44:20 p.m.
Gray circled in red. Officer's hand circled in blue.*

Gray then took the opportunity to push deeper into the Capitol building.



Figure 7. Screenshot from USCP CCTV at 2:44:33 p.m. Gray circled in red.

At 2:46 pm, a large group of officers with the Metropolitan Police Department re-secured the UWT door from the outside.

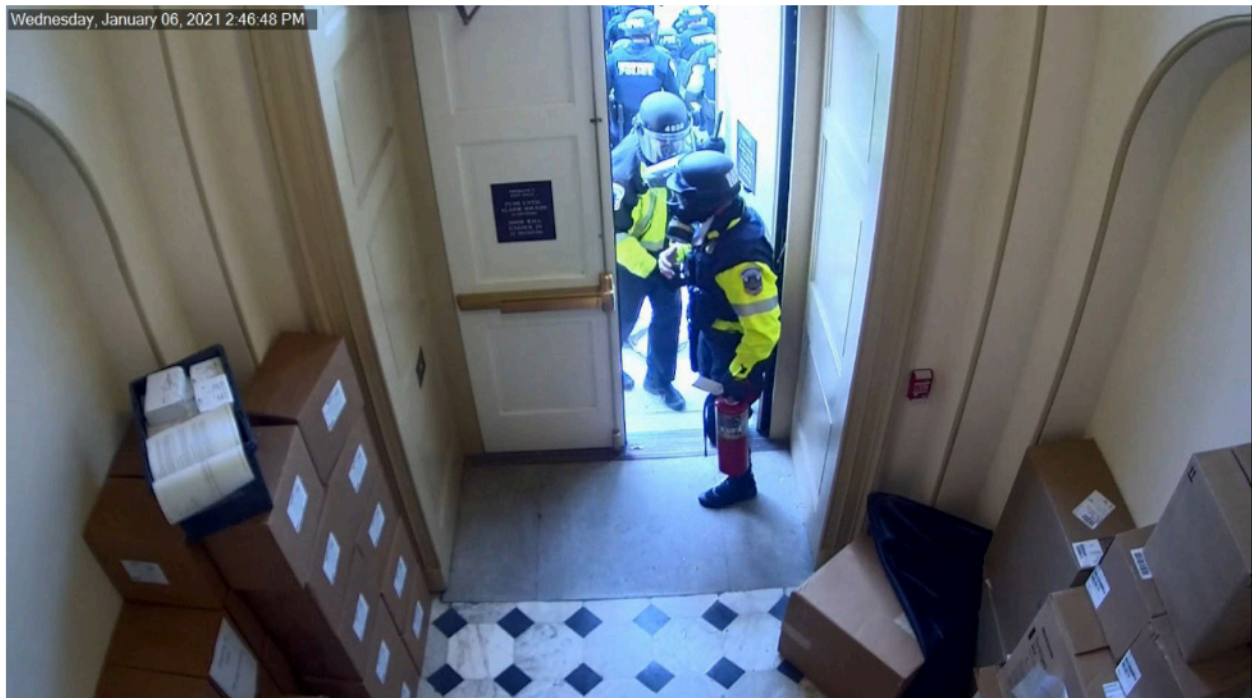


Figure 8. Screenshot from USCP CCTV at 2:46:48 p.m.

All five USCP officers who responded to the breached UWT door have been interviewed about the events of January 6, 2021. All five confirmed that they did not give any rioters permission to enter the Capitol building on January 6, 2021. Rather, officers sought to defend the Upper West Terrace Door and to prevent rioters from entering, but the five officers were unable to contain the crowd and were forced back into the building. At that point, rioters were able to stream in. All of these interviews have been produced to Gray in Global Discovery.

Gray bragged about this incident on social media after the events of January 6, 2021. Gray described being teargassed outside on the west front of the Capitol grounds. In his words, he then regrouped and thought, “you know what, we’re doing this.” Gray explained, “so we literally pushed them from the front steps of the Capitol all the way back . . . so we pushed them all the

f[***]ing way back to the back of the Capitol.” He described his entry into the Capitol through “a back door” standing “in front of 4 or 5 D.C. police officers” whom he told “there’s too many of us, just go home, go find your wife, go find your kids.” According to Gray, an officer replied “I’m just doing my job,” to which Gray responded, “you’re a f[***]ing Nazi . . . we own this f[***]ing building.”

ARGUMENT

I. This Court Should Preclude Gray from Arguing Entrapment by Estoppel.

Gray should be prohibited from making arguments or attempting to introduce evidence that law enforcement gave them permission to enter the U.S. Capitol. “To win an entrapment-by-estoppel claim, a defendant criminally prosecuted for an offense must prove (1) that a government agent actively misled him about the state of the law defining the offense; (2) that the government agent was responsible for interpreting, administering, or enforcing the law defining the offense; (3) that the defendant actually relied on the agent’s misleading pronouncement in committing the offense; and (4) that the defendant’s reliance was reasonable in light of the identity of the agent, the point of law misrepresented, and the substance of the misrepresentation.” *United States v. Chrestman*, 525 F. Supp. 3d 14, 31 (D.D.C. 2021) (emphasis added) (quoting *United States v. Cox*, 906 F.3d 1170, 1191 (10th Cir. 2018)).

In *Chrestman*, another judge of this Court rejected an entrapment by estoppel argument raised by a January 6th defendant charged with, *inter alia*, violations of 18 U.S.C. §§ 1512(c)(2), 1752(a)(1) and (b)(1)(A), and 1752(a)(2) and (b)(1)(A). Although *Chrestman* involved an argument that former President Trump gave the defendant permission to enter the Capitol building, the reasoning in *Chrestman* applies equally to an argument that a member of law enforcement gave

permission to the defendant to enter the Capitol building. As reasoned in *Chrestman*, “*Cox* unambiguously forecloses the availability of the defense in cases where a government actor’s statements constitute ‘a waiver of law’ beyond his or her lawful authority.” *Chrestman*, 525 F. Supp. 3d at 32 (*quoting Cox v. Louisiana*, 379 U.S. 559, 569 (1965)).

Just as “no President may unilaterally abrogate criminal laws duly enacted by Congress as they apply to a subgroup of his most vehement supporters,” no member of law enforcement could use his authority to allow individuals to enter the Capitol building during a violent riot, and after “obvious police barricades, police lines, and police orders restricting entry at the Capitol” had already been put in place by the United States Capitol Police and the Secret Service. *Id.* at 32. Indeed, a judge of this Court ruled in another January 6th case that “the logic in *Chrestman* that a U.S. President cannot unilaterally abrogate statutory law applies with equal force to government actors in less powerful offices, such as law enforcement officers protecting the U.S. Capitol Building.” Memorandum and Order, *United States v. Williams*, No. 21-cr-377-BAH, at *2 (D.D.C. June 8, 2022).

Even if Gray could establish that a member of law enforcement told him that it was lawful to enter the Capitol building or allowed him to do so, Gray’s reliance on any such statement would not be reasonable in light of the “obvious police barricades, police lines, and police orders restricting entry at the Capitol.” *Chrestman*, 525 F. Supp. 3d at 32. Moreover, the Gray’s actions belie any argument that he actually relied on any such statement by law enforcement when he made a decision to unlawfully enter the Capitol building through a door broken open with a piercing alarm sounding. Gray approached the Capitol grounds and witnessed police officers trying to block the mob from penetrating further, saw members of the mob fighting with the police, and

observed chemical gas in the air. Despite these clear signs that his presence was unwelcome, Gray was not deterred. Being gassed himself did not deter Gray either.

As he bragged on social media afterward, Gray regrouped after being gassed and thought to himself, “you know what, we’re doing this.” He then explained, “so we literally pushed them from the front steps of the Capitol all the way back . . . so we pushed them all the f[***]ing way back to the back of the Capitol.” He described his entry into the Capitol through “a back door” standing “in front of 4 or 5 D.C. police officers” whom he told “there’s too many of us, just go home, go find your wife, go find your kids.” According to Gray, an officer replied “I’m just doing my job,” to which Gray responded, “you’re a f[***]ing Nazi . . . we own this f[***]ing building.” It is clear from Gray’s statements that he knew his actions were not permitted or encouraged by police. Accordingly, Gray should be prohibited from arguing that his conduct was lawful because law enforcement allegedly told him or suggested to him that it was.

II. This Court Should Preclude Gray from Arguing that Alleged Inaction by Law Enforcement Officers Made His Conduct on January 6, 2021 Legal.

In addition to prohibiting any defense argument that law enforcement actively communicated to Gray that entering the Capitol building or grounds was lawful, the Court should also bar Gray from arguing that any failure to act by law enforcement rendered his conduct legal. The same reasoning that applied in *Chrestman* again applies here. That is, like the Chief Executive, a Metropolitan Police Officer or Capitol Police Officer cannot “unilaterally abrogate criminal laws duly enacted by Congress” through his or her purported inaction. *Chrestman*, 525 F. Supp. 3d at 33. An officer cannot shield an individual from liability for an illegal act by failing to enforce the law or ratify unlawful conduct by failing to prevent it. Indeed, another judge of this District expressly reached that conclusion in *Williams* recently. *Williams*, No. 21-cr-377-BAH, at *3

(“Settled caselaw makes clear that law officer inaction—whatever the reason for the inaction—cannot sanction unlawful conduct.”). This Court should apply the same principle in this case. Accordingly, Gray should be prohibited from arguing that his conduct was lawful because law enforcement officers allegedly failed to prevent it or censure it when it occurred.

III. This Court Should Preclude Gray from Arguing or Presenting Evidence of Alleged Inaction by Law Enforcement Officers Unless Gray Specifically Observed or Was Otherwise Aware of Such Conduct.

The government acknowledges that the conduct of law enforcement officers may be relevant to Gray’s state of mind on January 6, 2021. However, unless Gray shows that, at the relevant time, he specifically observed or was otherwise aware of some alleged inaction by law enforcement, such evidence is irrelevant to his intent. Federal Rule of Evidence 401 states that evidence is relevant if it “has any tendency to make a fact more or less probable ... and the fact is of consequence in determining the action.” Fed. R. Evid. 401. Here, if Gray was not aware of law enforcement’s alleged inaction at the time of his entry onto restricted grounds or into the Capitol building (or at the time they committed the other offenses charged in the Superseding Indictment), any alleged inaction would have no bearing on Gray’s state of mind and therefore would not meet the threshold for relevance. Again, another judge of this district adopted the same reasoning in granting an analogous motion *in limine* in another January 6th case. *See Williams*, No. 21-cr-377-BAH, at *3-4. The Court should reach the same conclusion in this case and should exclude testimony and evidence of any alleged inaction by the police as irrelevant, except to the extent Gray shows that he specifically observed or was aware of the alleged inaction by the police when he committed the offenses charged in the Indictment.

IV. The Court Should Preclude the Various Defenses Raised in Gray's Two Notices.

A. Gray's first notice, ECF No. 49.

In a cursory filing, Gray noticed two defenses: “(1) entrapment; and (2) justification/privilege of recovering stolen property.” ECF No. 49 at 1. The government addresses each in turn.

First, if the notice intends to reference an entrapment-by-estoppel defense, it should be precluded for the reasons explained above. If the notice intends to reference an entrapment defense more generally, it should also be precluded. A valid entrapment defense has two related elements: (1) government inducement of the crime, and (2) the defendant's lack of predisposition to engage in the criminal conduct. *See, e.g., Mathews v. United States*, 485 U.S. 58, 63 (1988). Gray fails to explain how the government induced him to commit the crimes with which he is charged; indeed, his notice does not explain how the facts of this case fit an entrapment defense *at all*. Instead, it appears that he claims that he was trying to recover a lost cell phone, which he claims to believe a police officer had stolen. Even if an officer had taken his phone, that would not be an inducement to trespass; such an argument is nonsensical.

Second, Gray noticed a “justification/privilege of recovering stolen property” defense, which is two separate defenses forced into one. For the justification defense, he cites *United States v. Deleveaux*, 205 F.3d 1292 (11th Cir. 2000) for the proposition that “justification was available as an affirmative defense to defendant's strict liability offense.” ECF No. 49 at 3. In *Deleveaux*, the defendant was a previously-convicted felon who possessed a firearm in his attic. A violent dispute erupted with a neighbor that arguably (in the defendant's view) required the defendant to use the firearm for self-defense. The defendant retrieved the firearm from the attic and fired it

toward the neighbor. After the dispute ended, the defendant placed the firearm back in his attic. At trial, the defendant argued justification—despite being a previously-convicted felon, he was justified in possessing the firearm because he needed to defend himself. Nonetheless, he was convicted at trial of felon in possession, in violation of 18 U.S.C. § 922(g)(1), and appealed the district court’s jury instruction that it was the defendant’s burden to prove the affirmative defense of justification. *Deleveaux*, 205 F.3d at 1295–97.

The Eleventh Circuit affirmed the district court’s jury instruction, and as relevant here, reiterated the required elements of a justification defense:

(1) that the defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury; (2) that the defendant did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) that the defendant had no reasonable legal alternative to violating the law; and (4) that there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

Id. at 1297 (collecting cases). Even accepting Gray’s account—that a police officer stole his phone and he entered the U.S. Capitol building in an attempt to recover it—his claimed defense fails on its face. For example, Gray is not claiming he was “under unlawful and present, imminent, and impending threat of death or serious bodily injury.” Moreover, he had already trespassed into the restricted area of Capitol grounds by the time he lost his phone. The Court should preclude Gray from arguing any “justification” defense to the jury.

For the “privilege of recovering stolen property” defense, Gray references “ancient settled law” surrounding certain civil liability theories involving “stolen property” on “another’s land,” and a person’s right to remove his property “at a reasonable time and in a reasonable manner.” ECF No. 49 at 2–3. But, Gray’s property was not “stolen,” the U.S. Capitol building is not “another’s land,” and there was nothing “reasonable” about the time or manner of defendant’s

illegal entry into the Capitol and assault on officers therein. Moreover, the cases cited by Gray for this defense are all *civil* cases, and Gray does not even attempt to explain how those cases apply to this *criminal* prosecution. *See id.* Instead, courts nationwide hold that civil liability theories cannot insulate criminal defendants from prosecution for the crimes they commit. *See, e.g., United States v. Del Campo*, 695 F. App'x 453, 460 (11th Cir. 2017) (“King argues that the banks had ‘unclean hands’ and could not possibly be victims entitled to restitution because they themselves were engaged in predatory lending practices. But, while unclean hands may be a defense to receiving the equitable remedy of restitution in a *civil* case, no principle of *criminal* law allows a criminal defendant to assert unclean hands as a defense” in the criminal context.).

Gray, in effect, cobbles together three inapposite legal theories to suggest “attempting to recover a stolen phone is an affirmative defense,” but the precariously built defense does not bear the weight of Gray’s argument and the Court should preclude it.

B. Gray’s second notice, ECF No. 51.

Gray later filed a second notice of another affirmative defense, the “alternative perpetrator” defense. ECF No. 51. For the reasons the government argued in its response, ECF No. 63, the Court should preclude this defense as well. To the extent the government’s response was not styled as a motion requesting relief, the government now respectfully moves for preclusion of the alternative perpetrator defense.

CONCLUSION

For the reasons set forth herein, the government respectfully requests that this Court preclude Gray from: (1) arguing an entrapment by estoppel defense related to law enforcement; (2) offering evidence or argument concerning any claim that by allegedly failing to act, law

enforcement made Gray's entry into the U.S. Capitol building or grounds or their conduct therein lawful; (3) arguing or presenting evidence of alleged inaction by law enforcement unless Gray specifically observed or was otherwise aware of such conduct; or (4) raising the affirmative defenses noticed in ECF Nos. 49 and 51.

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

By: */s/ Michael L. Jones*
MICHAEL L. JONES
DC Bar No. 1047027
Trial Attorney
Capitol Riot Detailee
601 D St. NW Washington, DC 20530
(202) 252-7820
michael.jones@usdoj.gov

SAMANTHA R. MILLER
Assistant United States Attorney
New York Bar No. 5342175
United States Attorney's Office
For the District of Columbia
601 D Street, NW 20530
Samantha.Miller@usdoj.gov