UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**Case No. 21-cr-626 (PLF)**
	:	
DEREK COOPER GUNBY	:	
	:	
Defendant.	:	

UNITED STATES' REPLY TO DEFENDANT'S RESPONSE CONCERNING PRECLUSION OF IMPROPER DEFENSE ARGUMENTS AND EVIDENCE ABOUT LAW ENFORCEMENT

The United States of America respectfully submits this reply to Defendant's Response (ECF 72, "Def. Opp.") in Opposition to the United States' Motion (ECF 62, "Govt. Motion") in Limine to Preclude Improper Defense Arguments and Evidence about Law Enforcement. Because Defendant Derek Cooper Gunby ("Gunby") has failed to provide the required notice of his intent to use the at-issue defenses and Defendant's Opposition does not address the relevant factors and case law for assessing the viability of an entrapment-by-estoppel claim, the United States of America again requests the Court issue an order precluding the Defendant Gunby from introducing evidence or arguing any of the following: (1) any entrapment by estoppel defense related to law enforcement; (2) any claim that by allegedly failing to act, law enforcement made the defendant's entry into the United States Capitol Building or grounds or his conduct therein lawful; and (3) any alleged inaction by law enforcement unless the defendant specifically observed or was otherwise aware of such conduct at the time of the crime.

ARGUMENT

I. Defendant Gunby has failed to provide the required notice of his intent to use the at-issue defenses.

As an initial matter, Defendant Gunby has not properly raised the public authority/entrapment-by-estoppel defense under the Federal Rules of Criminal Procedure.[1] Rule 12.3(a)(1) notes

> If a defendant intends to assert a defense of actual or believed exercise of public authority on behalf of a law enforcement agency or federal intelligence agency at the time of the alleged offense, the *defendant must so notify an attorney for the government in writing and must file a copy of the notice with the clerk within the time provided for filing a pretrial motion*, or at any later time the court sets…

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[1] As noted by Judge Lamberth in *Sturgeon*, "[t]here appears to exist some disagreement in this District as to whether the public authority and entrapment-by-estoppel defenses are two distinct defenses or one and the same." *United States v. Bingert Sturgeon*, No. 1:21-CR-91-1-RCL, 2023 WL 3203092, at *5 n. 2 (D.D.C. May 2, 2023) (comparing *United States v. Carpenter*, No. 21-cr-305-JEB, 2023 WL 1860978, at *2 (D.D.C. Feb. 9, 2023) ("The Government next moves to preclude Carpenter from raising as an affirmative defense entrapment by estoppel, also sometimes referred to as the 'public authority' defense.") with *United States v. Navarro*, —— F. Supp. 3d ——, 2023 WL 371968, at *15 (D.D.C. Jan. 19, 2023) ("The entrapment-by-estoppel defense differs from the public authority defense ...." (quoting *United States v. Alvarado*, 808 F.3d 474, 485 (11th Cir. 2015) (internal quotation marks omitted))). However, circuit courts have applied Fed. R. Crim. P. 12.3(a)(1) to entrapment-by-estoppel claims as well. *See, e.g.*, *United States v. Escudero*, No. 21-CR-0256 (WMW/JFD), 2022 WL 17352458, at *1 (D. Minn. Dec. 1, 2022) ("Because the Eighth Circuit treats the public-authority and entrapment-by-estoppel variations as affirmative defenses, a defendant must comply with the pretrial notice requirements of Rule 12.3, Fed. R. Crim. P."); *United States v. Putman*, No. 18-CR-20133, 2019 WL 2173429, at *6 (E.D. Mich. May 20, 2019) ("Although Rule 12.3 is not expressly applicable to an entrapment-by-estoppel defense, the Sixth Circuit has extended the rule to that defense."); *but see United States v. Pitt*, 193 F.3d 751, 758 (3d Cir. 1999), *as amended* (Oct. 15, 1999), and *abrogated by Honeycutt v. United States*, 581 U.S. 443, 137 S. Ct. 1626, 198 L. Ed. 2d 73 (2017) ("Curiously, we find no requirement that a defense based on entrapment by estoppel be the subject of similar pretrial notice and accompanying requirements. However, from a conceptual standpoint, we see little, if any, difference between the defense of apparent public authority and entrapment by estoppel. Since the issue of notice prior to use of the entrapment by estoppel defense has not been briefed, we see no need to rule definitively on that issue at this time").

Fed. R. Crim. P. 12.3(a)(1) (emphasis added). The notice must include the law enforcement agency or federal intelligence agency involved; the agency member on whose behalf the defendant claims to have acted; and the time during which the defendant claims to have acted with public authority. Fed. R. Crim. P. 12.3(a)(2). No such notice has been filed in the instant case and the initial deadline for motions in limine was August 22, 2023. *See* Second Amended Scheduling Order, ECF 53 at 2. Also, the deadline for defense counsel to file any motions in limine pertaining to Count One was October 2, 2023. *See* Fourth Amended Scheduling Order, ECF 77 at 2. Accordingly, the timeframe for submitting a notice of intent to assert a public authority/entrapment-by-estoppel defense has passed. Although "the [C]ourt may, for good cause, allow a party additional time to comply with this rule," pursuant to Fed. R. Crim. P. 12.3(a)(5), the Defendant has asserted no such good cause here. Consequently, Defendant's failure to comply with Rule 12.3 permits the Court to exclude the testimony of any undisclosed witness(es) regarding the public authority defense, although it does not limit the defendant's right to testify. Fed. R. Crim. P. 12.3(c); *see also United States v. Seeright*, 978 F.2d 842, 847–49 (4th Cir. 1992) (noting that "[t]he trial court's actions pursuant to Rule 12.3(c) prohibiting the offered testimony *was an appropriate response*" in light of the defendant's failure to notify – until three days before the witnesses were to be called – the government in writing of his intention to use those witnesses to support a public authority defense).

II. Defendant's Opposition does not address the relevant factors and case law for assessing the viability of an entrapment-by-estoppel claim.

Significantly, Defendant's Opposition does not address the relevant factors and case law for assessing the viability of an entrapment-by-estoppel claim. The only case law cited by Defendant in support of his opposition arguments generically asserts that (1) defendants should be allowed to call witnesses, (2) defendants should be allowed to cross examine witnesses, and (3)

material evidence is admissible.[2] *See* Def. Opp. at 3-4. The Government does not contest these legal truisms. However, Defendant's Opposition suggests, incorrectly, that a defendant's ability to present evidence is unrestrained. Contrary to that position, case law confirms that a defendant's ability to present evidence at trial is not limitless:

> We start with some basics. A defendant obviously has a right to offer witnesses in his defense, thanks to the Supreme Court's reading of the Sixth Amendment… But just as obviously, that right (like most rights) is not unlimited and may bow to other competing interests… Among these are the integrity of the adversary process, the danger of unfairly skewing the truth-determining function that lies at the epicenter of that process, and the efficient administration of justice.

United States v. Acosta-Colon, 741 F.3d 179, 189–90 (1st Cir. 2013) (citing *United States v. Brown,* 500 F.3d 48, 57 (1st Cir.2007) and *Taylor v. Illinois*, 484 U.S. 400, 413–14, 108 S. Ct. 646, 655, 98 L. Ed. 2d 798 (1988)) (internal quotes and citations omitted); *see also United States v. Stephanie Marylou Baez*, No. CR 21-0507 (PLF), 2023 WL 6364648, at *2 (D.D.C. Sept. 29, 2023) ("Limiting the scope of cross-examination is within the discretion of a trial court and does not necessarily conflict with the Sixth Amendment's Confrontation Clause, which enshrines the defendant's right to be confronted with the witnesses against him.") (internal quotes and citations omitted).

[2] It is unclear if the discussion regarding cross examining witnesses in the Defendant's Opposition is meant as a discussion in response to the United States' Motion in Limine to Preclude Improper Defense Arguments and Evidence about Law Enforcement (ECF 62), or to the United States' Motion in Limine regarding cross-examination of U.S. Secret Service Witness (ECF 61). Additionally, Defendant's Opposition includes a block quote attributed to the Government ("the Government argues in its Opposition…") and a discussion of that quote. *See* Def. Motion at 7-8. The Government is uncertain of the origin of that quote and to what this discussion refers, and believes that section of Defendant's Opposition brief may have been meant for a reply in another defendant's case.

Recognizing that there are some reasonable limits to a defendant's ability to present evidence, we must search for the guiding principles to use in deciding whether the Defendant's may invoke an entrapment-by-estoppel claim. Courts in this district have adopted the Tenth Circuit's test for a successful entrapment-by-estoppel claim:

> 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)); *see also United States v. Stephanie Marylou Baez*, No. CR 21-0507 (PLF), 2023 WL 6364648, at *6 (D.D.C. Sept. 29, 2023) (adopting the Tenth Circuit's test as well); Govt. Motion p. 2.

Defendant's Opposition failed to address the necessary factors in the above test and in the case law. As stated above, the first requirement is that a government agency *actively* misled the defendant about the state of the law defining the offense. This requires that a government official offer a statement of the law. Mere failure to act or inaction is not enough:

> The defense of entrapment by estoppel is rarely available. In essence, it applies when, acting with actual or apparent authority, a government official affirmatively assures the defendant that certain conduct is legal and the defendant reasonably believes that official. To employ this defense, we have required that the government official actively mislead the defendant; and that the defendant's reliance be actual and reasonable in light of the identity of the agent, the point of law represented, and the substance of the misrepresentation."

United States v. Neville, 82 F.3d 750, 761 (7th Cir. 1996). The Defendant cannot point to a government interpretation of the statutes he is charged with violating on which he reasonably relied. There is no such assertion that a government official offered a statement of the law in the

instant case.[3] Instead, Defendant's Opposition notes such "evidence" as a reporter for The New Yorker Magazine who spent time inside the Capitol Building not being arrested. Def. Opp. at 5-6. The Defendant's Opposition also cites to six allegedly permitted protests on the Capitol grounds that took place on January 6, 2021 as evidence of his own permission to enter the Capitol Building (Def. Opp. at 9). However, those permitted protests did not take place inside the Capitol Building, nor were they inside the Capitol's restricted perimeter.

Defendant's Opposition also states that "It is clear error to assert that a law enforcement officer cannot render lawful what would otherwise be [un]lawful." Def. Opp. at 5. However, in *Cox v. Louisiana*, 379 U.S. 559 (1965), the Supreme Court made clear that a defendant cannot reasonably rely on a law enforcement official's attempt to provide "a waiver of law," which the Court described as "beyond the power of the police." 379 U.S. at 569. *Cox* reversed the conviction of a protester who had led a group of large group (2,000) in a civil rights march across the street from a courthouse and was later prosecuted for violating an anti-picketing statute prohibiting demonstrations "near" a courthouse. *Id.* at 560, 564-65. The statute did not define that term. *Id.* at 560. The protesters had been "affirmatively told" by "the highest police officials of the city, in the presence of the Sheriff and Mayor," that protesting across the street from the courthouse was lawful under that statute. *Id.* at 571. The Court determined that the statute's ambiguous term "near" necessarily "foresees a degree of on-the-spot administrative interpretation by officials charged with responsibility for administering and enforcing it," and thus found that the demonstrators "would justifiably tend to rely on [the police's] administrative interpretation of how 'near' the courthouse a particular demonstration might take place." *Id.* at 568-69. The Court concluded that

[3] Defense counsel concedes that there was no basis on which to argue entrapment-by-estoppel based on former President Trump's speech on January 6, 2021, although they assert this based on a belief that the former president's speech "did not tell anyone to go the Capitol" and assert that some rioters may not have heard the speech clearly due to audio issues. *See* Def. Opp. at 3 n. 1.

the local officials' interpretation of "near" was a "limited administrative regulation of traffic" that the protesters reasonably relied on. *Id.* at 569. But again, as noted above, the Court also made clear that a defendant cannot reasonably rely on a law enforcement official's attempt to provide a waiver of law that was beyond the power of the police. *Id.*

Here, the Defendant has not pointed to any similar statement of law that he relied on in committing his crimes on January 6. He was not actively misled. No officials "affirmatively assure[d] the defendant[s] that certain conduct [was] legal." *United States v. Howell*, 37 F.3d 1197, 1204 (7th Cir. 1994); *United States v. Troncoso*, 23 F.3d 612, 615 (1st Cir. 1994) (defense fails absent advice from official that conduct "was actually legal"); see also *United States v. Chrestman*, 525 F. Supp. 3d 14, 32; *United States v. North*, 910 F.2d 843 (D.C. Circuit 1990) (noting that "North does not even claim that he relied on *any* 'conclusion or statement of *law*'"); *United States v. Smith*, 940 F.2d 710, 715 (1st Cir. 1991) (rejecting entrapment-by-estoppel defense because federal agent allegedly encouraged defendant to keep firearms to assist with undercover operation, but never was alleged "to have represented that keeping the guns was, in fact, *legal*"). Any assertions that Capitol Police temporarily lifted standard limitations as a some sort of gesture of goodwill towards rioters is both false and contrary to the Supreme Court's explicit warning in *Cox* about "waiver[s] of law" which are "beyond the power of police." 379 U.S. at 569.

Additionally, two of the three requests for relief made by the Government focus on (a) precluding arguments that law enforcement's alleged failure to act made the defendant's entry into the United States Capitol Building or grounds or his conduct therein lawful and (b) precluding evidence of law enforcement's alleged inaction unless the defendant specifically observed or was otherwise aware of such conduct at the time of the crime. Defendant has not provided any explanation for why such evidence would be material.

CONCLUSION

For the reasons set forth herein, the United States respectfully requests that this Court preclude improper argument or evidence related to entrapment by estoppel, that law enforcement's alleged inaction rendered the defendant's actions lawful, and any evidence or argument relating to alleged inaction by law enforcement except to the extent that the defendant specifically observed or was otherwise aware of such conduct at the relevant time.

Dated: October 5, 2023

Respectfully submitted,

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