UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**CASE NO. 1:23-CR-114**
	:	
KYLE ALAN MLYNAREK AND	:	
RONALD MICHAEL BALHORN	:	
	:	
Defendants.	:	

UNITED STATES' REPLY TO DEFENDANT MLYNAREK'S RESPONSE IN OPPOSITION TO GOVERNMENT'S MOTION IN LIMINE REGARDING LAW ENFORCEMENT CONDUCT

In its Motion in Limine (ECF 33), the government requested that this Court preclude the defendants from making argument or eliciting facts related to eight broad categories of evidence: (1) the location of surveillance cameras; (2) Secret Service tactics; (3) the First Amendment; (4) jury nullification; (5) selective prosecution; (6) self-defense and defense of others; (7) the public authority and entrapment by estoppel affirmative defenses; and (8) inaction by law enforcement officers. In his response, defendant Mlynarek makes no argument with regard to the first seven of those categories, so the Court should grant the government's motion with respect to each of them.

With regard to category eight, defendant Mlynarek argues that the conduct of law enforcement is relevant and admissible because the crimes for which he is charged require the government to prove he acted "knowingly." ECF at 38. He reasons that "[t]he fact that law enforcement officers may have allowed some people to enter the Capitol is clearly relevant to the mens rea of these offenses." *Id*. at 1. Seemingly without temporal or geographic limitation, defendant Mlynarek asserts that the law enforcement inaction "relates to [his] knowledge" and is wholesale admissible. *Id*.

The defendant's response raises more questions than it answers. Is he claiming that law enforcement affirmative permissiveness somehow negates his mens rea as a matter of law? If so, that argument must fail because, as the government has already pointed out, "[s]ettled caselaw makes clear that law officer inaction—whatever the reason for the inaction—cannot sanction unlawful conduct." *Williams*, No. 21-cr-377 at *3; s*ee also Garcia v. Does*, 779 F.3d 84, 95 (2d Cir. 2015) (en banc) (entrapment-by-estoppel defense rejected after defendants argued that their prosecuted conduct had been implicitly approved by the police but could not show that it was "affirmatively authorized" by the police).

Or, is the defendant simply claiming that evidence of law enforcement's affirmative permissiveness is one factor (among many) that the jury can weigh in determining if the government has met its burden with regard to the mens rea element? If that is his tack, then the relevant question pivots to whether defendant Mlynarek was actually aware of the alleged permissiveness. *See, e.g., United States v. Oliveras*, No. 21-cr-738, 2023 U.S. Dist. LEXIS 7805 at *4-5 (D.D.C., Jan. 17, 2023; Judge B. Howell). In *Oliveras*, Judge Howell was presented with the identical question now pending before this Court: Under what circumstances is law enforcement permissiveness admissible in a Capitol riot trial? In answering that question, Judge Howell reasoned that "[a]s a logical matter, however, any action or inaction of which the defendant was not aware cannot possibly have had any effect on his state of mind and is inadmissible as irrelevant under Federal Rule of Evidence 401." Thus, insofar as defendant Mlynarek claims that law enforcement permissiveness anywhere and at any time on January 6, 2021, is admissible, he is wrong.

The error in the defendant's logic does not end there. As Judge Howell pointed out, a defendant "must somehow establish his awareness of the alleged permissiveness" before any

testimony about permissiveness is relevant under Rule 401. *Oliveras,* at *5. While the most obvious way to accomplish that task is to testify in his own defense, Judge Howell noted that other avenues are available such as "a good faith proffer outside the presence of the jury" or "using other evidence to show that defendant was adequately nearby the alleged inaction at the correct time to have perceived and understood such permissiveness and giving him permission to be inside the Capitol." *Id*. Short of that, the defendant "cannot present a defense that he is not culpable of otherwise unlawful conduct due to permissiveness by law enforcement officers at the Capitol." *Id*.

Here, defendant Mlynarek has offered this Court nothing establishing that he had any direct awareness of law enforcement permissiveness at the Capitol. There is no proffer detailing what story he might tell on the stand, and the defendant has pointed to no other evidence that establishes that he was adequately nearby the alleged permissive law enforcement conduct that would allow this Court to conclude that he perceived and understood the alleged permissiveness. Unless and until he does so, Rule 401 forbids introduction of any evidence of law enforcement permissiveness.

Wherefore, the United States respectfully renews its request that the Court grant its motion in limine.

Respectfully submitted,

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