

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

UNITED STATES OF AMERICA	:	
	:	
v.	:	Case No.: 21-cr-274 (RDM)
	:	
JOHNNY HARRIS,	:	
	:	
Defendant.	:	

**MOTION IN LIMINE TO PRECLUDE ARGUMENTS AND
EVIDENCE ABOUT ALLEGED LAW ENFORCEMENT INACTION**

The government respectfully requests that the Court issue an order precluding the defendant, Johnny Harris, from any of the following: (1) arguing any 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 defendant's entry into the United States Capitol building or grounds or their conduct therein lawful; or (3) arguing or presenting evidence of alleged inaction by law enforcement unless the defendant specifically observed or were otherwise aware of such conduct.

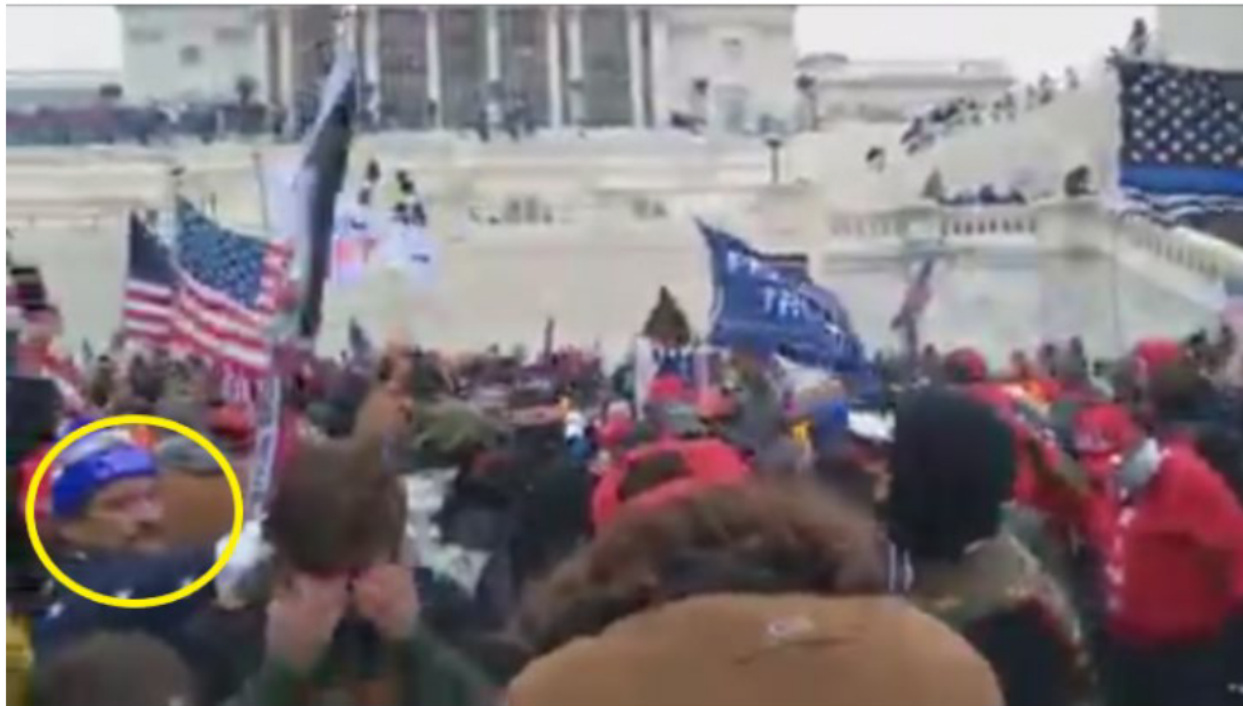
I. Factual Background

Prior to his entry into the United States Capitol, Harris entered the Capitol grounds on the West Lawn.



Harris then approached the Lower West Terrace of the Capitol grounds, where the government proffers he witnessed violent confrontations with law enforcement, flash bombs and pepper spray,

and rioters climbing up the inauguration interior scaffolding.



On the Lower West Terrace – a short distance from where Harris was standing – the MPD was playing a “dispersal order” telling all people to leave the area. A loudspeaker announced the message:

This area is now a restricted access area pursuant to D.C. Official Code 22-1307(b).

All people must leave the area immediately. This order may subject you to arrest and may subject you to the use of a riot control agent or impact weapon.



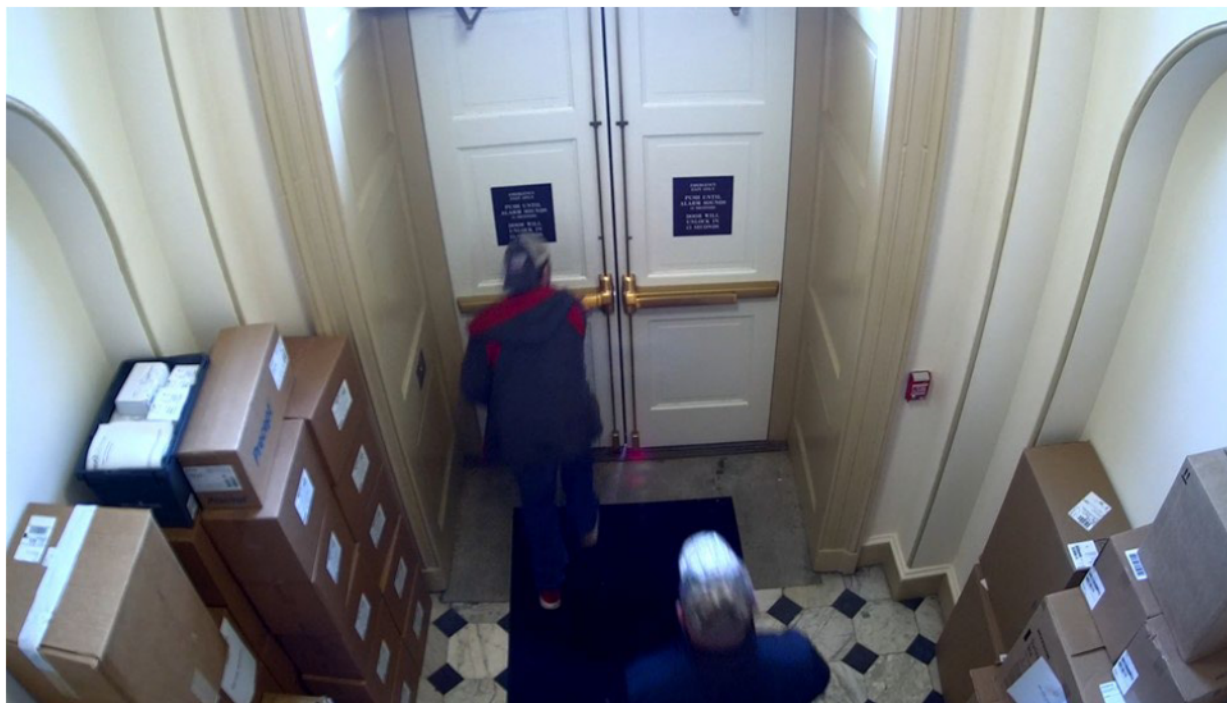
Despite the violent assaults on law enforcement occurring around Harris, and the obvious efforts by law enforcement to repel the rioters, Harris did not leave.

After the police line on the Lower West Terrace was broken, Harris entered the Lower West Terrace, walked up a staircase to the Upper West Terrace, and climbed on a viewing platform erected for the inaugural ceremony.





The Upper West Terrace (UWT) door through which Harris gained entry to the U.S. Capitol building was breached at approximately 2:33 pm by rioters forcing the door open from the inside.



At approximately 2:35 pm, five officers with the U.S. Capitol Police Department (USCP) responded to the breached UWT door.



The five USCP officers formed a line and attempted to resecure the UWT door.



As further detailed below, the five USCP officers retreated from their position at the UWT door.



Approximately one minute later at 2:45 pm, Harris entered the U.S. Capitol building through the UWT door, while a piercing alarm was sounding.



Harris did not pass through security and there was no indication that this was a legitimate entryway to the U.S. Capitol building. In fact, there were alarms blaring and the door that he entered through is clearly marked "Emergency Exit Only." There were no law enforcement officers on the outside of the doors, and no officers on the inside of the UWT door when Harris made entry.



After making entry, Harris walked down a hallway towards a set of interior doors that led to a stairway to the Rotunda.

At 2:46 pm – approximately one minute after Harris entered the U.S. Capitol building – a large group of officers with the District of Columbia Metropolitan Police Department (MPD) resecured the UWT door from the outside.



All five USCP officers who responded to the breached UWT door have been interviewed, and those interviews were produced in Global Discovery.

Officer 1 stated:

On January 6, 2021, I was assigned to the Inaugural Task Force at GPO building. Upon hearing the protest situation at the Capitol become dire, I responded over to assist... Arrived at Upper West Terrace door. Protestors were entering and exciting door. Door was in fire alarm mode. Sgt. Millard called over radio and asked for a key to secure. No radio response. I looked for a lockdown button but nothing but a phone was nearby. The door is a push bar, opening outward, with no way to even stick an object in the handles to prevent opening. Attempted to hold a line at the door to prevent further entry. Protestors formed on the outside. Other protestors inside appeared at our rear to exit or remained at rear. Crow[d] size significantly outnumbered officers. Decision was made to fall back. I was under the impression that CDV was nearby inside. We did not have the resources to effect any arrests, as only a few officers, few pair of handcuffs between the officers, significantly more protestors, no way to safely get the protestors if arrested to a transport. An[y] attempt to go hands on with the protestors would have yielded injury to officers and no achievable objective. Crowd flow entered building. Additional protestors exited, which again allowed protestors outside to recognize the door was open. Additional protestors entered. Began to make another attempt at a police line. Was able to hold crowd temporarily. [Fellow Officer] tried to rationalize with the crowd to no avail.

Rear of crowd began pushing, causing front of group to advance on the line. Another decision was made [to] fall back. With no safe and achievable objectives, the goal was to find a larger contingent of officers and push the crowd outside the building. Moved back to the OAP hallway and responded to the House Chamber for the call of "shots fired."

Officer 2 stated:

On January 6, 2021, I was assigned to the Inaugural Task Force (ITF) responsible for various duties in preparation for the 59th Inaugural Ceremonies... We began to fall back to the area inside the Upper West Terrace door where there were no support elements. When the group arrived at the door, I began attempting to direct the crowd to the nearest exit which was the Upper West Terrace door. I believed the door to be in alarm and to have been breached. Several people exited out of the door from the group where then I observed people from the crowd outside begin to enter the door. I along with [the other officers] made an initial effort to repel the group of people that were entering the door. A physical confrontation occurred where we began pushing and hitting the leading edge of the crowd in an attempt to expel them from the building. There was an older lady in the front of the group carrying a protest sign that began to scream in pain as she was crushed between us. The group stopped their physical effort to push into the building and this is where I made a second attempt to de-escalate the situation and attempted to convince the group to leave. At some point, I specifically told the group that the building was closed and that's why they were not allowed in. During this dialogue, the main individual in the group is using language to provoke me to respond with physical force. He's stating and repeating all the political rhetoric that the election was stolen, that the process was unconstitutional, that President Trump told us to come here and occupy the building that we (police) were on the wrong side of history. The group began chanting to let us in. Throughout the entire dialog with the group, I used techniques to attempt to calm the group, I told the group that what they were doing was wrong, that in their arguments of defending the constitution that they were disrespecting the [Capitol] building and disrespecting the process. At this point, an individual in the group asked if I was ready to die to protect these people, I immediately attempted to deflect the question and de-escalate, [when] the same individual asked for a second time if I was ready to die for this place at which point I responded that I swore an oath to protect this place and that's what I'm going [to] do. At this point [the senior officer] grabs me by the shoulder, and pulls me back away from the crowd where the people at the door then begin to enter the building. I believe at this point I voiced a request over the USCP radio to have the key brought to the door to re-secure it. As the crowd begins to enter, I recall standing there looking for weapons and did not see any. It's at this point that is captured in media and social media videos that someone from the crowd thanks me for supporting their cause which then prompted me to respond, "I don't support you, but respect it, respect the building." The video that was captured edits and removes the question

that was asked as well as the clarifying point of “respect the building,” which was then attached to a headline falsely asserting that I showed respect for the rebellious action the group was taking. At this point, the group is entering, those of us at the door have exhausted all levels of force, with the exception of deadly force, in an attempt to expel the group. My mindset at this exact moment was a plea that those who were entering would respect the building and not physically harm it. I believe mindset is also key in the actions I took at the Upper West Terrace door. I was prepared to fight, I recognized that we were outnumbered by an adversary that was provoking a violent confrontation. I resolved that had a second confrontation to expel this group occurred, that the end result would have been lethal force. When [the senior officer] pulled me back, it caused me to break the cycle of thought of preparing to fight where I then transitioned in my mind to do what was necessary to preserve life. This included a strategic fall back and regroup to a position where we had better numbers and were in a better position to engage another effort to remove these people from the Capitol. Shortly after falling back to regroup, a “shots fired” call with officer in distress was broadcast over the radio where then either [Officer 3 or senior officer] said we need to get to the House Floor and defend it.

The other three USCP officer interviews are consistent and have been produced in Global Discovery. In short, no officers invited the defendant into the U.S. Capitol on January 6, 2021.¹

II. This Court Should Preclude the Defendant from Arguing Entrapment by Estoppel

Harris should be prohibited from making arguments or attempting to introduce evidence that law enforcement gave him 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

¹ Many defendants who entered the Capitol through the UWT door near the time Harris made entry have specifically acknowledged that they “knew at the time [they] entered the U.S. Capitol Building that that [they] did not have permission to enter the building. *See United States v. Nicole Prado*, No. 21-CR-403 (RC), ECF No. 33, *United States v. Jordan Revlett*, No. 21-cr-281, ECF No. 34, *United States v. Josiah Colt*, No. 21-cr-74, ECF No. 22, *United States v. Andrew Rigley*, No. 21-cr-42 (ABJ), ECF No. 29, *United States v. Ryan Suleski*, No. 21-CR-376 (RDM), ECF No. 40, *United States v. Chance Uptmore*, No. 21-CR-149, ECF No. 49.

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 the defendant 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, the defendant’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 defendant’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.

III. This Court Should Preclude the Defendant 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 Harris that entering the Capitol building or grounds was lawful, the Court should also bar Harris 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, Harris 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.

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

The government acknowledges that the conduct of law enforcement officers may be relevant to Harris’ state of mind on January 6, 2021. However, unless a defendant 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 the defendant’s 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 Harris 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 he committed the other offenses charged in the Information), any alleged inaction would have no bearing on the defendant’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*. 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 the defendant shows that he specifically observed or was aware of the alleged inaction by the police when he committed the offenses charged in the information.

CONCLUSION

For the reasons set forth herein, the government 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.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2022, I caused a copy of the foregoing motion to be served on counsel of record via electronic filing.

/s/ Will Widman

WILL N. WIDMAN

Trial Attorney