UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**Case No. 21-cr-134 (CJN)**
	:	
MARK SAHADY	:	
	:	
Defendant.	:	

UNITED STATES' REPLY IN SUPPORT OF ITS MOTION *IN LIMINE*
TO PRECLUDE ARGUMENTS AND EVIDENCE
ABOUT ALLEGED LAW ENFORCEMENT INACTION

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, hereby submits the following reply in support of its motion *in limine* to preclude the defendant from 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; and (3) arguing or presenting evidence of alleged inaction by law enforcement officers unless the defendant specifically observed or was otherwise aware of such conduct. ECF No. 54 ("Gov't's Mot."). In response to the government's motion, the defendant continues to fail to assert whether or not he intends to pursue a defense related to alleged law enforcement inaction. Instead, defendant argues in abstract terms that he should be allowed to present such evidence without specifying what that evidence is. The defendant has therefore failed to proffer sufficient facts to support such a defense, and he should be precluded from presenting evidence of alleged law enforcement inaction at trial.

I. The Defendant Should be Precluded from Asserting an Entrapment by Estoppel Defense at Trial.

The defendant claims that it is premature for the government to raise the question of the availability of an entrapment by estoppel defense pretrial and cites *United States v. Carpenter*, No. 21-CR-305, ECF No. 78, as support. In that case, the defendant had filed a notice of affirmative defense indicating her intention to assert an entrapment by estoppel defense at trial. *Id.* at 4. No such notice has been filed in the instant case. Additionally, a number of other courts in this district have determined the admissibility of an entrapment by estoppel case pre-trial upon the government's filing of a motion *in limine*. *See e.g.*, *United States v. Navarro*, No. 22-cr-200 (APM), 2023 WL 371968, at *15 (D.D.C. Jan. 19, 2023) (granting motion *in limine* to preclude entrapment by estoppel defense); *United States v. Oliveras*, No. 21-CR-738 (BAH), 2023 WL 196525, at *1 (D.D.C. Jan 17, 2023) (granting government's motion *in limine* to preclude entrapment by estoppel defense); *United States v. Sheppard*, No. 21-CR-203 (JDB) , 2022 WL 17978837, at *8 (D.D.C. Dec. 28, 2022) (barring defendant's entrapment-by-estoppel defense pretrial because former President Trump's statements did not amount to an express or implied statement of the law); *United States v. Grider*, No. 21-CR-022 (CKK), 2022 WL 3030974, at *4 (D.D.C. Aug. 1, 2022) (granting government's motion *in limine* and holding that it will not instruct the jury on an entrapment-by-estoppel defense when the defendant failed to proffer facts to establish the first element of the defense: that a government agent actively misled him about the state of the law defining the offense).

Far from being premature, *see* Def.'s Mot. at 2, a motion *in limine* is a proper vehicle by which the government may challenge the sufficiency of an affirmative defense before trial. *See Oliveras*, No. 21-CR-738 (BAH), 2023 WL 196525 at *1 ("Given, however, that a motion *in limine* by its nature does exactly that – rule in advance as to whether certain evidence may be introduced

or argument made- defendant's [argument that the government's motion is premature] falls flat.") In response to the government's motion, the defendant should put forth a factual proffer supporting the affirmative defense in question. *United States v. Tokash*, 282 F.3d 962, 967 (7th Cir. 2002). "To entitle a defendant to present an affirmative defense to the jury, his proffer must meet the minimum standard to each element of the defense, so that if a jury finds it to be true, it would support the defense." *Id*. Furthermore, "the defendant must present 'more than a scintilla of evidence' that demonstrates that he can satisfy the legal requirements for asserting the proposed defense." *Id.* (quoting *United States v. Blassingame*, 187 F.3d 271, 279 (7th Cir. 1999)). Where the evidence proffered in response to a motion *in limine* is insufficient as a matter of law to support an affirmative defense, a pretrial ruling precluding the presentation of the defense at trial is appropriate. *See id.*; *United States v. Robinson*, 180 Fed. App'x 92, 93–94 (11th Cir. 2006) (finding the court did not abuse its discretion in granting the government's motion in limine where the defendant "failed to establish the elements of entrapment-by-estoppel").

Here, the defendant has proffered no evidence supporting any element of the entrapment by estoppel defense. Indeed, the defendant appears to concede that he will not pursue an entrapment by estoppel defense but nevertheless indicates his intention to present evidence of law enforcement inaction. *See* Def.'s Mot. at 3 ("Mr. Sahady can certainly argue or attempt to introduce evidence that law enforcement permitted him to enter, and later leave, the U.S. Capitol without consequence without raising an entrapment by estoppel defense." (internal quotation marks and alterations omitted)). In the absence of any evidence supporting such a claim, he should be prohibited from introducing evidence for such a defense. *See*, *Navarro*, No. 22-cr-200 (APM), 2023 WL 371968, at *15 ("This court finds that, without a more precise factual proffer, the entrapment by estoppel defense is not available to Defendant"); *Oliveras* No. 21-CR-738 (BAH),

2023 WL 196525 at *1 (granting motion *in limine* to preclude entrapment by estoppel defense when "defendant has proffered absolutely no evidence supporting any element of the entrapment-by-estoppel affirmative defense").

II. The Defendant Should be Precluded from Arguing that Law Enforcement's Alleged Inaction Made his Illegal Conduct Lawful.

Likewise, the defendant does not proffer any evidence that would establish that law enforcement officers' alleged inaction rendered his conduct on January 6, 2021, lawful—another defense for which a pretrial ruling would be appropriate.

In any case, a Metropolitan Police Officer or Capitol Police Officer cannot "unilaterally abrogate criminal laws duly enacted by Congress" through his or her purported inaction. *United States v. Chrestman*, 525 F. Supp. 3d 14, 33 (D.D.C. 2021). Accordingly, the defendant should also be prohibited from arguing or introducing evidence for the purpose of arguing that his conduct was lawful because law enforcement officers allegedly failed to prevent it or censure it when it occurred.

While the government acknowledged in its motion that the conduct of law enforcement officers may be relevant to the defendant's state of mind at the time of the offenses, Gov't's Mot. at 6, "[a]s a logical matter . . . any action or inaction of which 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." *United States v. Williams*, No. 21-cr-377-BAH, ECF No. 87 at *3 (D.D.C. June 8, 2022). In other words, "law enforcement inaction is only probative as to [the d]efendant's mental state to the extent that he was aware of or could have perceived it." *United States v. Rhine*, No. CR 21-0687 (RC), 2023 WL 2072450, at *10 (D.D.C. Feb. 17, 2023). Contrary to the defendant's suggestions, Def.'s Mot. at 4, he *may* appropriately "establish his awareness of the alleged inaction in 'any number of ways, such as a good faith proffer outside the presence of the

jury or using other evidence to show that [he] was adequately nearby the alleged inaction at the correct time.'" *Id.* (quoting *Williams*, No. 21-cr-377-BAH, ECF No. 87 at *3). And, to the extent the defendant claims that a lack of law enforcement action is relevant and admissible, *see* Def.'s Mot. at 5, the relevant area to assess is necessarily limited to the alleged location of [the d]efendant—he must have been 'in,' 18 U.S.C. § 1752(a)(1), or at least 'within such proximity to,' § 1752(a)(2), the restricted area." *Rhine*, 2023 WL 2072450, at *10. However, in response to the government's motion, the defendant has not proffered any evidence that he was aware of alleged inaction by law enforcement on January 6, 2021, much less the approximate time and location of the alleged inaction. What's more, defendant does not claim that a specific moment of inaction by law enforcement influenced his state of mind such that he did not have the requisite *mens rea* to commit the alleged offenses. In the absence of these showings, defendant should be precluded from arguing that law enforcement's alleged inaction sanctioned his unlawful conduct.

III. The Defendant's Alleged Evidence of Law Enforcement Inaction is Not Sufficient to Support a Defense.

The defendant's response points to a few screenshots of CCTV footage depicting the defendant standing in the interior of the U.S. Capitol building with a line of police officers in front of him. The defendant's response seems to suggest (though does not say so explicitly) that this interaction is the basis for a potential claim of law enforcement inaction. But these screenshots, without more, do not show officer inaction. In fact, the screenshots depict a line of police affirmatively *stopping* rioters, including the defendant, from proceeding further into the U.S. Capitol building. The defendant points to no additional evidence to suggest otherwise. Thus, these screenshots are not sufficient to support presentation of estoppel evidence at trial.

CONCLUSION

For the foregoing reasons, the Court should grant the government's motion to preclude evidence of entrapment by estoppel at trial.

Respectfully submitted,

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