UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
	)	No. 21 CR 536
v.	)	
	)	
KAROL J. CHWIESIUK & AGNIESZKA CHWIESIUK	)	Hon. Kollar-Kotelly
	)	

DEFENDANTS' RESPONSE TO GOVERNMENT'S MOTION *IN LIMINE* TO PRECLUDE ARGUMENTS AND EVIDENCE ABOUT LAW ENFORCEMENT

The defendants, Karol J. Chwiesiuk and Agnieszka Chwiesiuk, through their counsel, respond in opposition to the government's motion *in limine* to preclude defense arguments and evidence about law enforcement. Dkt. 72. Defendants respectfully request that this Court deny the motion. In support, the Chwiesiuks state:

I. The Motions to Preclude Law Enforcement Evidence Should be Denied

The government moves to preclude the defendants from (1) arguing or introducing evidence to support an entrapment by estoppel theory, (Dkt. 72 at 1-3); (2) arguing that "any failure to act by law enforcement rendered their conduct legal," (*Id.* at 4); and (3) arguing or presenting evidence "of alleged action or inaction by law enforcement officers unless the defendants specifically observed or were otherwise aware of such conduct." *Id.* at 4-5. The Court should deny each motion.

A. The Motion Precluding a Theory of Entrapment by Estoppel Should be Denied as Moot

The government seeks to preclude the defendants from "making arguments or attempting to introduce evidence that law enforcement gave the defendants permission to enter the U.S. Capitol on January 6, 2021," in support of a theory of entrapment by estoppel. *Id.* at 1. This is a "narrowly tailored defense," available in "very limited circumstances," that requires a defendant to 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, 30-31 (D.D.C. 2021) (quoting *United States v. Cox*, 906 F.3d 1170, 1191 (10th Cir. 2018). The defendants have no intention of introducing evidence nor argument that a government agent actively misled them, rendering their conduct legal on a theory of entrapment by estoppel. Thus, this motion should be denied as moot. *See, e.g., United States v. Rhine*, No. 21-CR-0687, 2023 U.S. Dist. LEXIS 27764, at *31 (D.D.C. Feb. 17, 2023) (denying the same motion as moot). However, argument and evidence of law enforcement action is otherwise relevant and must not be barred, as is addressed below.

B. The Motion to Preclude Argument that Inaction Rendered Conduct Legal Should be Denied as Moot

The government seeks to preclude the defendants from arguing that "inaction by law enforcement officers made their conduct legal." Dkt. 72 at 4. The government relies again on *Chrestman,* suggesting that it seeks to bar the defendant from arguing an entrapment by estoppel theory based on law enforcement's inaction. *Id.* (citing *Chrestman*, 525 F. Supp. 3d at 33). The defendants will not argue that law enforcement's inaction rendered their conduct lawful on a theory of entrapment by estoppel. Thus, the motion should be denied as moot. However, argument and evidence of law enforcement inaction is otherwise relevant and must not be barred, as is addressed below.

C. The Motion to Preclude the Defendant from Arguing or Presenting Evidence of Law Enforcement Action and Inaction Should be Denied Because Such Evidence is Plainly Relevant

The government concedes that "the conduct of certain police officers may be relevant to the certain defendants' state of mind on January 6, 2021," but argues that the Chwiesiuks must first show "at a relevant time, they specifically observed or were otherwise aware of some alleged action

or inaction by law enforcement." Dkt. 72 at 4. The government's motion thus seeks to preclude all argument and evidence of any law enforcement conduct unless the defendants first demonstrate their knowledge of that conduct at a particular moment in time. The motion should be denied because evidence concerning the conduct of law enforcement is plainly relevant. 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. The bar for relevance is low. *United States v. Foster*, 986 F.2d 541, 545 (D.C. Cir. 1993). Here, the government attempts to raise that bar considerably by suggesting the defendants must first offer evidence concerning their specific observations and subjective knowledge before the bar can be met.

The proponent of evidence must demonstrate only that it "has *any* tendency to make a fact of consequence more or less probable." Fed. R. Evid. 401 (*emphasis added*). Even without an initial showing that the defendants personally witnessed law enforcement conduct at the time it occurred, this standard can be met. The government does not identify any particular action or inaction that it wants to preclude. However, for example, if law enforcement removed barriers surrounding the Capitol an hour before the defendants arrived, this fact would still have *some* tendency to make it less probable that the defendants "knowingly entered," a particular restricted area. This is true regardless of whether they personally witnessed the removal or knew that barriers had once stood in that location. Considering the low bar for relevance, the Court should deny the government's motion to preclude all evidence of law enforcement conduct that is not accompanied by a prior showing of the defendant's subjective awareness of such conduct.

Further, the evidence is probative for a purpose other than the defendants' mental state. Law enforcement conduct is relevant to whether the defendants' actions took place in a "restricted building or grounds," a required element for counts 1 and 2 of the superseding information, alleging violations of 18 U.S.C. § 1752(a)(1) and 18 U.S.C. § 1752(a)(2). *See* Dkt. 54. The statute defines

"restricted building or grounds" as a "posted, cordoned off, or otherwise restricted area . . . where the President or other person protected by the Secret Service is or will be temporarily visiting." 18 U.S.C. § 1752(c)(1)(B). The action or inaction of law enforcement is directly relevant to this definition. For example, if law enforcement cordoned off a particular area, it may qualify as a "restricted area" regardless of whether the defendants personally witnessed this event.

In short, the defendants are accused of trespassing, or "entering or remaining…without lawful authority," in multiple counts. Dkt. 54 at 1-2. Law enforcement conduct, as well as law enforcement's failure to act, is directly relevant to demonstrate whether the government took measures to restrict an area, whether those measures made the defendants aware that they were trespassing, and whether the defendants chose to remain in a location despite being made aware that they were trespassing. For these reasons, the evidence that the government seeks to preclude is relevant evidence. Thus, the motion should be denied, and the Court should instead consider relevance objections to specific evidence at trial.

In the alternative, should the Court find that evidence concerning law enforcement action or inaction is only relevant after a showing that the defendants were aware of such conduct, the same ruling should apply to the government's evidence of the conduct of others present on January 6. The government cites *United States v. Rhine* in support of its motion. *United States v. Rhine*, No. 21 CR 0687, 2023 U.S. Dist. LEXIS 27764 (D.D.C. Feb. 17, 2023). There, both the defendant and government brought motions to preclude evidence that was not observed by the defendant - the defendant moved to preclude evidence of the conduct of others who were not in the defendant's view or immediate vicinity (*Id.* at *18-23); the government moved to preclude evidence of the conduct of law enforcement who were not in the defendant's view or immediate vicinity. *Id.* at *31-35. In opposition to the defendant's motion, the government claimed that the nature of these crimes required proof of collective action and thus, the conduct of others "is relevant for these purposes

regardless of whether defendant was aware of it or could have perceived it." *Id.* at *19. However, the government argued in support of its own motion that the inaction of law enforcement was only relevant to *mens rea,* or whether an area was restricted, if it was actually perceived by the defendant. *Id.* at *32.

The Court ultimately found that the relevance of both the conduct of others and the conduct of law enforcement depended on the defendant having some possible level of awareness. *Id.* at *22, 34. The Court found that inaction of law enforcement is relevant to the defendant's mental state or whether an area was restricted "to the extent that he was aware of or could have perceived it." *Id.* at *32. The Court further held that action such as the "removal of barriers," would be relevant based on "proximity to the locations where Defendant is alleged to have entered or been in the Capitol before he was there…" *Id.* at *35. As to the government's ability to present evidence of the conduct of others, the Court required the government to demonstrate that "Defendant was aware of or reasonably could have perceived [the conduct] because it occurred near him such that he could have seen or heard it" *Id.* at *22. However, the Court further held that the "Government may not offer evidence of the conduct of others that Defendant was not aware of and could not have perceived, as any minimal probative value of such evidence is substantially outweighed by a danger of unfair prejudice." *Id.*

Here, the government moves to preclude both law enforcement action and inaction and requires a greater showing of proof than that found appropriate in *Rhine*. Specifically, the government requests a ruling that any action or inaction is only admissible "to the extent the Chwiesiuks are able to show that they specifically observed or were aware of the alleged action or inaction by the police when they committed the offenses charged in the Information." Dkt. 72 at 4. Should the Court rule in favor of the government, the defendants request that the order mirror that of *Rhine* requiring not proof of specific observation or actual awareness, but only that the defendants "could have

perceived it" at the time, or as to barriers "based on "proximity to the locations." *Rhine*, No. 21 CR 0687, 2023 U.S. Dist. LEXIS 27764 at *32, 35. Further, the defendants respectfully request that the Court in fairness likewise limit the government's evidence under the same standard, requiring a showing that the defendant could have perceived the conduct of others prior to admission and precluding "evidence of the conduct of others that Defendant[s] [were] not aware of and could not have perceived." *Id.* at *22.

II. Conclusion

For these reasons, the defendants, Karol J. Chwiesiuk and Agnieszka Chwiesiuk, respectfully request that the Court deny the government's motion *in limine* to preclude law enforcement evidence.

Respectfully submitted,

/s/ Nishay K. Sanan
nsanan@aol.com

/s/ Cece White
cece@sananlaw.com

Nishay K. Sanan, Esq.
53 W. Jackson Blvd., Suite 1424
Chicago, Illinois 60604
Tel: 312-692-0360
Fax: 312-957-0111