JUDGE KELLY'S BASIS FOR HIS "TOOLS" DETERMINATIONS

Since the beginning of the Proud Boys case, there has been an ongoing dispute about the government's "tools" theory of the conspiracy, which argued that there were a bunch of people (which was trimmed after pre-trial hearings) whom Proud Boy leaders used to execute their conspiracy. This post explains that dispute.

These people are not accused or alleged to be part of one of the parallel conspiracies charged against the Leaders, and so normal hearsay rules will not apply as normal. But they are people who, the government alleges, the Leaders pulled together as recruits to make the attack happen.

Part of this dispute pertains to whose actions at the Capitol can be shown, as video evidence, to the jury in association with the Proud Boy Leaders. I think the case presents what I call a "view-say" exception, in which assaults committed by associates in places at the Capitol where no Leader was present, may or may not be shown to the jury. On the first day of trial, for example, Judge Kelly deferred on whether assaults that took place in the Tunnel should be shown, since no Leader was present.

But a big part of the debate pertains to how many of the communications on one or another of the Telegram threads the Leaders used to organize the Proud Boys can be introduced as evidence.

Last Friday, Judge Kelly issued his order on the issue verbally in what takes up about 80 pages of transcript. I wanted to lay out his logic here, so it is broadly accessible.

> First, let me clarify an issue that came up on Monday, as we argued this, about who might count as a tool. On the one hand — it seems to me that the tools

> fall into two buckets for purposes of this case generally, as the Government has argued it. On the one hand, you have people whom the defendants or their cooperator – or their co-conspirators marched toward the Capitol on January 6th to whom they had some alleged nexus or relationship in the, sort of, physical effort of what happened that day on January 6th. And in – separately, you have the group we're dealing with here, which is Proud Boys whom the defendants and their co-conspirators hand-selected to join the MOSD. Of course, there's some overlap between these two groups of people. But I certainly don't think, over the argument of some defendants, that someone ultimately had to be in one group for their statement to – or their conduct to be relevant for the – to this case. In other words, to be a tool, you didn't have to necessarily believe – belong to both of those, sort of, groups.
>
> I'll next note that, again, by and large with regard to the tools evidence, I didn't see any true hearsay issues there. It's clear to me that the bulk of these statements, at least, were not offered as assertions but rather as circumstantial evidence of the tools' motive and intent in the days leading up to January 6th. And to the extent they are assertions of the tools, they would fall under Rule 803(3) which allows statements expressing the declarant's motive, intent, or plan to be admitted for the truth of the matter asserted.
>
> But, of course, after clearing the hearsay bar, statements must still be relevant and satisfy Rule 403 balancing. So here's the line I drew on that front. Where a purported MOSD tool's statement expressed a more specific, concrete intent to use force or to act unlawfully

on January 6th, I admitted them. But — or at least where the statement could — where you could infer that. But where, in my view, a statement was less specific, or tended to be more — a general reference to violence or perhaps even to a joke, I excluded them.

For — as for those I admitted, I think the statements are relevant/admissible because they do shed light on what the purpose of the MOSD was, which is a central issue in the trial. As I mentioned, the defendants have consistently argued — and even opened on the idea — that the MOSD was intended to create more of an organizational structure and a hierarchy at rallies for defensive purposes. And in short, the Government's theory is that, at least with regard to January 6th, it was intended for an offensive purpose.

Thus, I think that the state of mind, in the days leading up to January 6th, of those that the co-conspirators and the defendants in this case vetted to be in the MOSD is relevant. And it's an important factor supporting — and it is an important factor that, sort of, reinforces their relevance that the evidence shows that the defendants and their co-conspirators did select them. In fact, as Mr. Rehl says in Exhibit 503-10, everyone in the group was, quote, Represented by someone who trusted them to be there. That's a little bit of a butchering of that quote, but I think that's the essence of it.

The relevance of these exhibits is further buttressed by the fact that these statements were not rebuked by any of the defendants or their co-conspirators that were present in these chats as MOSD organizers. Now, we've

> talked about this a lot. I think, ordinarily, the idea that a single individual's failure to respond to a comment in a chat — the idea that that can be relevant or some kind of adoptive admission in some way is a stretch in general, and it's probably not a theory that would fly in a typical situation. Certainly, the bigger the chat that there is, the more public it is, and all the rest. But I think, here, that the failure to do so — not of one person, but collectively of all the people at issue, the four defendants here who were in those chats, plus their alleged co-conspirators — all those people's non-responsiveness to some of these things is relevant, and it bolsters the overall relevance of the exhibits I decided to admit, especially because it's clear that at least some of the defendants — again, there is evidence here — some of the defendants were monitoring the MOSD chats to ensure they stayed on topic.
>
> Indeed, the stated rules of the MOSD chat made clear that the members had to stay on topic, and on a couple of occasions to which the Government has directed me, defendants or co-conspirators did, either in the group or amongst themselves, rebuke members' suggestions that they viewed as outside the MOSD's parameters. For example, in Exhibits 505-20 and 505-21, Mr. Stewart, Mr. Bertino, and Mr. Tarrio criticize an MOSD member in the MOSD Op group for suggesting that the group discuss what to do about, quote, Unaffiliated Proud Boys wearing colors, closed quote. Stewart admonished that there was nothing to talk about because the MOSD has a mission; either get with it or eff off, and that they were there for a reason. And Mr. Tarrio followed up by instructing everyone to focus. Mr. Bertino stepped in to emphasize that the

member's comment was not appropriate in the MOSD chat because the group had a mission and they didn't want to be distracted from it. And in Exhibit-525-7, Defendant Biggs messaged Defendant Tarrio expressing in the — that the MOSD chat had already become annoying because members were talking about other events.

So importantly, in weighing whether to admit certain tools exhibits and drawing the line I did, I admitted only those exhibits where I thought there was a stronger inference that the comment would have drawn a rebuke from one of the defendants or one of their co-conspirators if the mission of the MOSD had truly only been defensive in nature.

So for all those reasons, I found the handful of the exhibits I admitted on this theory — the tools theory — were relevant, and also, satisfied Rule 403.

Before I move on to the categories of the documents, as one more offshoot of the tools issue — it doesn't go to the admissibility of these documents, but it goes to the grounds for admissibility of statements made to — by other people, including the defendants, to the tools — I want to address one additional point that came up on Monday. Counsel for Mr. Nordean argued to me that several exhibits that the Government offered as co-conspirator statements could not have been in furtherance of the conspiracy simply because the statements at issue were made to non-co-conspirators, including tools. But in the United States v. Tarantino, the D.C. Circuit explained that if a statement, quote, Can reasonably be interpreted as encouraging a co-conspirator or another person to advance the conspiracy, or as enhancing a co-conspirator or another —

> or other person’s usefulness to the conspiracy, then the statement is in furtherance of the conspiracy and may be admitted. That case is 846 F.2d 1384 at 1412, a D.C. Circuit case from 1988. So to the extent that Mr. Nordean objected on that basis to several of the exhibits I’m about to discuss, particularly those involving the defendants’ or the co-conspirators’ statements to tools, that argument is foreclosed by Circuit precedent.