

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

v.

DANEAN KIMBERLY MACANDREW,

Defendant.

Criminal No. 21-cr-00730 (CKK)

**DEFENDANT’S MOTION TO DISMISS THE INFORMATION FOR
MULTIPLICITY, OR TO COMPEL THE GOVERNMENT TO ELECT AMONG
MULTIPLICITOUS COUNTS**

Danean MacAndrew, through undersigned counsel, and pursuant to Federal Rule of Criminal Procedure 12(b)(3)(B)(ii) hereby respectfully requests that this Court dismiss the superseding information for multiplicity, or, in the alternative, compel the government to elect between multiplicitous counts.

I. FACTS

On March 10, 2022, the government filed a superseding four-count information charging Danean MacAndrew with violations arising out allegations that she participated in the events at the United States Capital on January 6, 2021.¹ The counts are as follows:

Count One: entering and remaining in a restricted building or ground, in violation of 18 U.S.C. § 1752(a)(1);

Count Two: disorderly and disruptive conduct in a restricted building or ground, in violation of 18 U.S.C. § 1752(a)(2);

¹ The government filed its original indictment on December 31, 2021, alleging the same four counts that appear in the superseding information. The superseding information changes language in Counts One and Two to reflect that the Vice President “was and would be temporarily visiting” rather than “was temporarily visiting.”

Count Three: disorderly conduct in a capital building, in violation of 40 U.S.C. § 5104(e)(2)(D); and

Count Four: parading, demonstrating, or picketing in a capital building, in violation of 40 U.S.C. § 5104(e)(2)(G).

II. ARGUMENT

The Fifth Amendment’s Double Jeopardy Clause bars multiple punishment for the same offense. U.S. CONST. AMEND. V (“nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb”). This protection applies both to successive punishments and to successive prosecutions for the same criminal offense. *United States v. Dixon*, 509 U.S. 688, 696 (1993). Two counts in a charging document are the same offense if they “cannot survive the ‘same elements’ test set forth in *Blockburger v. United States*, 284 U.S. 299, 304 (1932), i.e. “the *Blockburger* test.” *Dixon*, 509 U.S. at 696. The *Blockburger* test inquires whether each offense contains an element not contained in the other. *Id.* (emphasis added). If not, the offenses are the same offense and double jeopardy bars additional punishment and successive prosecution. *Id.*

“[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each [count] requires proof of **an additional fact** which the other does not.” *United States v. Cisneros*, 26 F. Supp. 2d 24, 44 (D.D.C. 1998) (emphasis added) (citing *Blockburger*, 284 U.S. at 304). In Ms. MacAndrew’s case, the four counts in the superseding information arises from the same alleged conduct in the United States Capital. Under the *Blockburger* test, the Fifth Amendment bars prosecution on all four counts because, as it stands, the superseding information fails.

A. Section 1752(a)(1) requires no additional facts compared with Section 1752(a)(2); prosecution under both subsections is barred

Count One and Count Two of the information charge violations under two different subsections of the same statute, namely subsections (a)(1) and (a)(2) of 18 U.S.C. § 1752. Both of the charged offenses ultimately requires that the defendant: (1) “entered or remained in a restricted building or grounds without lawful authority to do so” and (2) did so “knowingly.” 18 U.S.C. § 1752(a)(1); *see* 18 U.S.C. § 1752 (a)(2). In practice, Section 1752(a)(2) includes additional elements to those contained in Section 1751(a)(1), but Section 1752(a)(1) does not include additional elements to those contained in Section 1751(a)(2).

Importantly, no additional facts need to be proved to establish a violation of Section 1752(a)(1) if a violation of Section 1752 (a)(2) has been established. The government intends to prove violations of both of these counts by establishing that Ms. MacAndrew knowingly entered the Capital building during the events of January 6th, and then walked in the building for several minutes. While additional facts are required to prove a violation of Section 1752 (a)(2), establishing that Ms. MacAndrew knowingly entered and remained in the Capital is:

(a) required for the government to win on both subsections; and (b) sufficient alone to win on Section 1752 (a)(1). Thus, under the *Blockburger* test, an additional fact is not required for Count One compared to Count Two, and prosecution under both subsection (a)(1) and (a)(2) of Section 1752 are barred.

B. Section 5104(e)(2)(G) requires no additional facts compared with Section 5104(e)(2)(D); prosecution under both is barred

Count Three and Four of the information charge violations under two different subsections of 18 U.S.C. § 5104(e)(2). To establish a violation of both subsections, however, the government will establish that Ms. MacAndrew walked into the Capital building, walked around the building as part of a political protest related to the 2020 presidential election. If her walking

in the building is found to amount to a violation of Section 5104(e)(2)(D), it will also be found to be a violation of Section 5104(e)(2)(G). No additional facts are required to establish a violation of Section 5104(e)(2)(D). Accordingly, prosecution and punishment under both subsections fails the *Blockburger* test and is barred.

C. Section 5104(e)(2)(D) requires no additional facts when compared with Section 1752(a)(2); prosecution under both is barred

Counts Two and Three of the information charge violations under two different statutes, but establishing facts that meet the elements of Section 5104(e)(2)(D) (Count Three) will also fulfill the elements of Section 1752(a)(2) (Count Two). Under Section 5104(e)(2)(D), the government must establish that: (1) the defendant engaged in disorderly or disruptive conduct in any of the United States Capitol Buildings; (2) the defendant did so with the intent to impede, disrupt, or disturb the orderly conduct of a session of Congress or either House of Congress; and (3) the defendant acted willfully and knowingly. Under Section 1752(a)(2), the government must establish that: (1) the defendant engaged in disorderly or disruptive conduct in, or in proximity to, any restricted building or grounds; (2) the defendant did so knowingly, and with the intent to impede or disrupt the orderly conduct of Government business or official functions; and (3) the conduct in fact impeded or disrupted the orderly conduct of Government business or official functions.²

If the government establishes that Ms. MacAndrew violated Section 5104(e)(2)(D), then the elements of Section 1752(a)(2) are also met. For both, the government will attempt to prove that Ms. MacAndrew's alleged conduct in the Capital building was disruptive or disorderly, and that she engaged in that conduct with the intent to impede or disrupt a session of Congress. A

² Note that these elements are from jury instructions filed in *United States v. Erik Herrera*, CR 21-619-BAH, at ECF No. 65.

session of Congress by its nature is government business. Section 1752(a)(2) does not require additional facts to establish a violation. Thus, prosecution under both offenses fails the *Blockburger* test and is barred.

D. The Court should dismiss multiplicitous counts, or in the alternative, compel the government to elect between multiplicitous counts

Ms. MacAndrew will suffer harm from allowing the government to proceed on a multiplicitous information. “The law protects an individual against multiplicitous indictments to avoid multiple sentences for a single offense and to eliminate the prejudice which such indictments may generate in the eyes of a jury.” *United States v. Clarridge*, 811 F. Supp. 697, 702 (D.D.C. 1992). Courts in this district have recognized that multiplicitous indictments harm the defendant even prior to sentencing and during the course of trial. *See, e.g., United States v. Phillips*, 962 F. Supp. 200, 201 (D.D.C. 1997) (finding that prosecution for possession of a firearm and possession of ammunition out of the same conduct is multiplicitous and the harm could not be cured by jury instruction); *Clarridge*, 811 F. Supp. at 702 (finding that multiple counts “may falsely suggest to a jury that a defendant has committed not one but several crimes.”).

In Ms. MacAndrew’s case, even if her case proceeds to a bench trial, there is substantial prejudice to her from proceeding on the multiplicitous information. The government has charged the same four misdemeanor counts for all or nearly all the defendants alleged to have participated in January 6th. Not all defendants, however, are similarly situated in terms of their conduct that day. While some defendants charged with the same four misdemeanors, and only these misdemeanors, have engaged in more serious conduct (e.g., participated in mobs, penetrated deeper into the Capital, livestreamed their participation, incited others to join/participate, anticipated and/or prepared for violence, used social media to disparage Capital

police, or made threats to legislators while in the Capital), Ms. MacAndrew's alleged conduct should place her in the lowest category of offender related to January 6th.

Based on the statement of facts filed with the information and the Capital building's video footage of Ms. MacAndrew, there are no allegations that Ms. MacAndrew engaged in or threatened any violence, walked around inside the building more than a few minutes, ventured beyond the chamber containing the Senate West Wing door, incited the crowd or others, anticipated or planned for any violence, or made any threats. Proceeding to trial with all the charges increases the likelihood that Ms. MacAndrew will be viewed the same as all the other January 6th defendants. *See Clarridge*, 811 F. Supp. at 702 ("For when an indictment charges numerous offenses arising from the same conduct it 'may falsely suggest to a jury that a defendant has committed not one but several crimes.'").

Additionally, at the sentencing, if Ms. MacAndrew is convicted of all four counts, she faces a significantly higher statutory maximum. Indeed, Ms. MacAndrew's maximum term of imprisonment doubles.³ Certainly, the higher maximum sentence she contends with if convicted is the most harmful consequence of multiplicitous counts, and the ultimate goal of the double jeopardy bar is to prevent someone from being punished twice over same offense. But, allowing the government to proceed on multiplicitous counts harms a defendant even prior to sentencing. The threat of a significantly higher term of imprisonment affects a defendant's decision-making leading up to and during trial.

³ If the government proceeded on only a single count under 18 U.S.C. § 1752 and a single count under 40 U.S.C. § 5104(e)(2), she would be facing a maximum statutory sentence of 12 months and 6 months under these statutes, respectively. This equates to a total of 18 months if the Court, in its discretion, were to impose the maximum terms and run them consecutively. *See* 18 U.S.C. § 3584 (the Court has discretion to impose concurrent or consecutive terms). If, however, trial results in conviction on four counts, the statutory maximum elevates to three years.

The Court should dismiss the multiplicitous information. Alternatively, the Court can and should compel the government to elect which counts to proceed on. *See United States v. Phillips*, 962 F. Supp. 200, 201 (D.D.C. 1997) (“the decision whether to compel the prosecution to elect among multiplicitous counts before trial is within the discretion of the trial court”). The government should choose between. (1) Count One or Two of the information; and (2) Count Three or Four of the information. If Count Two and Three remain, then the government should be compelled to choose to proceed on either Count Two or Three of the information.

III. CONCLUSION

For the reasons above, Ms. MacAndrew requests that the Court dismiss the superseding information for multiplicity. In the alternative, Ms. MacAndrew requests that the Court compel election between multiplicitous counts.

Respectfully submitted,

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/s/ Lillian Chu

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