

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

UNITED STATES OF AMERICA,)	CRIMINAL ACTION NO.
)	
Plaintiff,)	1:21-CR-00119-CJN
)	
v.)	
)	
GARRET MILLER,)	
)	
)	
Defendant.)	
_____)	

**MOTION TO DISMISS COUNTS 7, 9, 10 and 11 OF THE SECOND
SUPERSEDING INDICTMENT**

Defendant Garret Miller hereby moves this Court to Dismiss Counts 7, 9, 10 and 11 of the Second Superseding Indictment as multiplicitous. In support of this motion, he sets forth the facts and argument.

1. An indictment is multiplicitous if it charges a single offense in separate counts. *See, e.g. United States v. Wilkinson*, 124 F.3d 971, 975 (8th Cir. 1997).

2. “There are at least two species of multiplicity challenges....The first type arises when a defendant is charged with violating two different statutes, one of which is arguably the lesser included offense of the other. This is the species of multiplicity challenge addressed in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), and its progeny. Unless each offense requires proof of an element that the other does not, a defendant may not be charged with both. The second type

of multiplicity challenge arises when charges for multiple violations of the same statute are predicated on arguably the same criminal conduct. In that circumstance, the court inquires “whether separate and distinct prohibited acts, made punishable by law, have been committed.” *United States v. Woerner*, 709 F.3d 527, 539 (2016).¹

3. In many ways, “[t]he more precise and useful inquiry is whether the legislature intended multiple punishments for the conduct contained in an indictment.” *United States v. Clarridge*, 811 F.Supp. 697, 702 (D.D.C. 1992). Moreover, “[i]n trying to determine congressional intent, the Supreme Court has noted in a similar context that a court should ‘resolve any ambiguity in favor of lenity when required to determine the intent of Congress in punishing multiple aspects of the same criminal act.’ ” *Id.*, citing, *Helfin v. United States*, 358 U.S. 415, 419 (1959).

4. In this case, Mr. Miller is charged in Counts 7, 8 and 9 of the Second Superseding Indictment with violations of 18 U.S.C. § 1752 and in Counts 10 and 11 of the Second Superseding Indictment with violation of 40 U.S.C. § 5014 (e). All arise out of Mr. Miller’s alleged conduct in joining with a mob to enter the Capitol building on January 6, 2021² and, moreover, Counts 7, 9 and 11 are lesser included

¹See also *United States v. Rentz*, 777 F.3d 1105, 1119 (10th Cir. 2015); 1A C. Wright, Federal Practice & Procedure sec. 143 at 9-10 (2020).

²There is no indication that Mr. Miller moved beyond the Rotunda of the Capitol building on January 6, 2021.

offenses of Count 8.

A. 18 U.S.C. § 1752

5. The respective elements for the violations of the various subsections of 18 U.S.C. § 1752 as alleged in Counts 7, 8 and 9 of the Second Superseding Indictment are as follows:

18 U.S.C. § 1752 (a)(1): (1) the defendant entered or remained in a restricted building without lawful authority to do so; and (2) the defendant did so knowingly.³

18 U.S.C. § 1752 (a)(2): (1) the defendant engaged in disorderly or disruptive conduct in, or in proximity to, any restricted building; (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 defendant's conduct occurred when, or so that, his conduct in fact impeded or disrupted the orderly conduct of government business or official functions.⁴

18 U.S.C. § 1752 (a)(3): (1) the defendant obstructed or impeded ingress or egress to or from any restricted building or grounds; and (2) the defendant did so with the intent to impede or disrupt the orderly conduct of government business or official functions.

³See *United States v. Rivera*, 2022 WL 2187851, *5 (D.D.C., June 17, 2022) (Collar-Kotelly, J.)

⁴*Rivera*, 2022 WL 2187851 at *5.

6. The conduct alleged in Counts 7, 8 and 9 of the Second Superseding Indictment all arise out of the same criminal conduct without any indication that Congress intended that conduct to be punishable under multiple subsections of 18 U.S.C. § 1752. Moreover, if Mr. Miller's conduct violated Count 8 (18 U.S.C. § 1752(a)(3)), he violated Counts 7 and 9 of the Second Superseding Indictment as well.

7. Indeed, if Mr. Miller violated 18 U.S.C. § 1752(a)(2) (Count 8) by knowingly engaging in disorderly or disruptive conduct in the Capitol which impeded or disrupted the orderly conduct of government business or official functions, it follows that he was knowingly remaining in the Capitol without authority given that nobody has authority to remain in the Capitol and impede or disrupt the orderly conduct of government business or official functions and, therefore, he also violated 18 U.S.C. § 1752(a)(1) (Count 9).

8. Also, if Mr. Miller violated 18 U.S.C. § 1752(a)(2) (Count 8) by knowingly engaging in disorderly or disruptive conduct in the Capitol by which he intended and succeeded in impeding or disrupting the orderly conduct of government business or official functions, it follows that impeding ingress or egress from the Capitol is

disorderly conduct⁵ and that this disorderly conduct was done with the intent to impede or disrupt the orderly conduct of government business or official function and, therefore, he also violated 18 U.S.C. § 1752(a)(2) (Count 9).

B. 40 U.S.C. § 5104(e)

9. The respective elements for the violations of the two subsections of 40 U.S.C. § 5104(e) as alleged in Counts 10 and 11 of the Second Superseding Indictment are as follows:

40 U.S.C. § 5104(e)(2)(D): (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.⁶

40 U.S.C. § 5104(e)(2)(E): (1) the defendant knowingly obstructed and impeded passage within the Capitol grounds; and (2) the defendant acted wilfully and knowingly.

⁵“ ‘[D]isorderly’ conduct is that which ‘tends to disturb the public peace, offend public morals, or undermine public safety.’ ‘Disorderly,’ Black’s Law Dictionary (9th ed. 2009; see also ‘Disorderly,’ Oxford English Dictionary (2nd ed. 1989) (‘Not according to order or rule; in a lawless or unruly way; tumultuously, riotously.’). Conduct is ‘disruptive’ if it ‘tend[s] to disrupt some process, activity, condition, etc.’ ‘Disruptive,’ Merriam-Webster.com Dictionary (June 16, 2022).” *Rivera*, 2022 WL 2187851 at *5.

⁶*Rivera*, 2022 WL 2187851 at *5.

10. The conduct alleged in Counts 10 and 11 of the Second Superseding Indictment arise out of the same alleged criminal conduct by Mr. Miller without any indication that Congress intended that conduct to be punishable under multiple subsections of 40 U.S.C. § 5104(e).

11. Also, if Mr. Miller violated 40 U.S.C. § 5104(e)(2)(D) (Count 10) by knowingly engaging in disorderly or disruptive conduct in the Capitol with the intent to impede, disrupt, or disturb the orderly conduct of a session of Congress or either House of Congress, it follows that impeding passage in the Capitol is disorderly conduct, therefore, he also violated 40 U.S.C. § 5104(e)(2)(E) (Count 11).

C. 18 U.S.C. § 1752 and 40 U.S.C. § 5104(e)

12. In addition to the discussion above, there can be no debate that, if the government established a violation of 18 U.S.C. § 1752(a)(2), it also established a violation of 40 U.S.C. § 5104(e)(2)(E) in that, if Mr. Miller violated 18 U.S.C. § 1752 (a)(2) (Count 8) by knowingly engaging in disorderly or disruptive conduct in the Capitol which impeded or disrupted the orderly conduct of government business or official functions it follows that impeding passage in the Capitol is disorderly conduct and, therefore, he also violated 40 U.S.C. § 5104(e)(2)(E) (Count 11)

D. Conclusion

13. Based upon the foregoing, at minimum, Counts 7, 9 and 11 of the

Superseding Indictment should be dismissed as multiplicitous under the *Blockburger* test. Counts 7 and 9 also fail the second species of multiplicity in that, applying the Rule of Lenity, there is no indication that Congress intended multiple punishments for each violation of 18 U.S.C. § 1752 arising out of the same criminal conduct. Similarly, there is no indication that Congress intended multiple punishments for each violation of 40 U.S.C. § 5104(e).

14. Mr. Miller also submits that Count 10 of the Second Superseding Indictment should also be dismissed given that there is no indication that the legislature intended multiple punishments for the same conduct, as alleged in Counts 8 and 10. *Clarridge*, 811 F.Supp. at 702.

WHEREFORE, Defendant Garret Miller respectfully requests this Court to Dismiss Counts 7, 9, 10 and 11 of the Second Superseding Indictment as multiplicitous.

Respectfully submitted,

/s/ F. Clinton Broden
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CERTIFICATE OF SERVICE

I, F. Clinton Broden, certify that on October 17, 2022, I caused the foregoing document to be served by the electronic case filing system (ECF) on all counsel of record.

/s/ F. Clinton Broden
F. Clinton Broden