

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	Case No. 1:21-cr-00119-CJN
v.	:	
	:	
GARRETT MILLER,	:	
	:	
Defendant.	:	

**GOVERNMENT’S OMNIBUS RESPONSE TO THE DEFENDANT’S
MOTION TO DISMISS COUNTS FIVE AND SIX, MOTION TO DISMISS COUNTS
SEVEN, NINE, TEN, AND ELEVEN, AND FOR BILL OF PARTICULARS AS TO
COUNTS ONE AND TWO OF THE INDICTMENT**

The defendant, Garret Miller, has filed a Motion to Dismiss Counts Five and Six of the Second Superseding Indictment (ECF No. 105), a Motion to Dismiss Counts Seven, Nine, Ten, and Eleven of the Second Superseding Indictment (ECF No. 106), and a Motion for Bill of Particulars as to Counts One and Two of the Second Superseding Indictment (ECF No. 104). The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully submits this omnibus response to the defendant’s motions. For the reasons set forth herein, the government requests that this Court enter an order denying the defendant’s requests.

Factual and Procedural Background

On November 10, 2021, a federal grand jury returned a second superseding twelve-count indictment charging the Defendant with offenses related to the January 6, 2021, attack on the U.S. Capitol. On November 2, 2022, a federal grand jury returned a third superseding thirteen-count indictment. ECF No. 111. The third superseding indictment added an additional charge under 18 U.S.C. § 231(a)(3) (Count Thirteen), amended language to include a named victim from the Metropolitan Police Department (MPD) charging a violation of 18 U.S.C. § 111(a)(1) (Count

Four), and included *knowingly* as the mens rea for violations of 18 U.S.C. § 875(c) (Counts Five and Six). As discussed below, the third superseding indictment resolves Miller’s request in his bill of particulars for the name of the MPD officer forming the basis for Count Two. As to Miller’s remaining objections, the indictment (1) identifies the relevant time period; (2) lists the prohibited conduct in which the Defendant engaged; (3) alleges the requisite *mens rea*; and (4) provides the statutory citation for each offense. Additionally, the indictment has been supplemented with discovery—including multiple videos documenting the Defendant’s conduct on January 6th. This combination allows the Defendant to both understand and defend against the indicted charges.

On January 2, 2021, Garret Miller, a resident of Richardson, Texas, made a Facebook post stating: “*I am about to drive across the country for this trump shit. On Monday . . . Some crazy shit going to happen this week. Dollar might collapse. . . . civil war could start . . . not sure what to do in DC.*”¹ The following day, Miller posted again to Facebook that he was bringing to Washington, D.C., “*a grappling hook and rope and a level 3 vest,*” along with helmets, a mouth guard, and a bump cap.² Miller successfully made it to Washington, and on January 6 was observed on open-source video running toward the steps of the East Front of the U.S. Capitol as the line of United States Capitol Police (USCP) collapsed behind a perimeter of bike fencing:

¹ Material accessed through the Facebook Search Warrant return and previously provided to defense via discovery.

² *Id.*



Available <https://twitter.com/ryanjreilly/status/1577751794754764827> at 1:23.

32 seconds later, Miller was observed on the same video at the front of the line of protesters:



Id. at 1:55.

According to the USCP officers involved,³ Miller broke through the police line, struggled with USCP officers, and had to be restrained. This act to obstruct, impede, and interfere with a USCP officer forms the basis for Count Thirteen of the third superseding indictment. The officers confirmed that the subject they struggled with was the same individual in the photograph below:

³ FBI Summaries of the interviews with these USCP Officers was provided to Miller's counsel through discovery on August 30, 2022.



FBI 302 of USCP Officer J.S., page 7.

Officer J.S. recalled Miller being cooperative once handcuffed, and that Miller smiled at Officer J.S. When he did, Officer J.S. could see that Miller was wearing a mouthguard, which Officer J.S. found extremely odd. It caused Officer J.S. to believe that “something was up” and that Miller came to the U.S. Capitol on January 6, 2021 “ready to fight.”

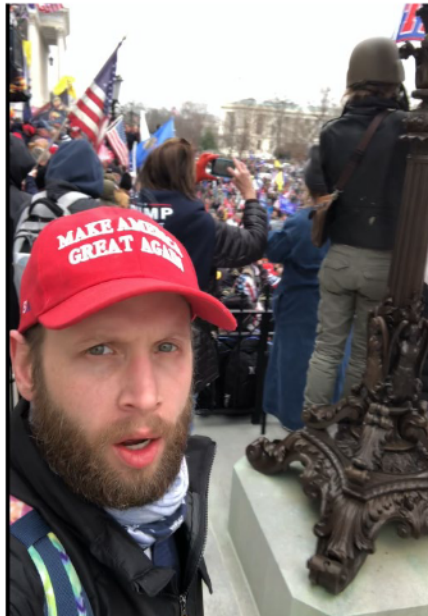
Miller was led up the Capitol steps by Officer J.S. at approximately 1:58 p.m. where he was briefly detained. Miller could be seen on both USCP closed circuit television (CCTV) and open-source video being detained by Officer J.S.:



Source: Freedom News footage

Shortly after being detained, the crowd of rioters overwhelmed law enforcement, and Officer J.S.'s supervisor instructed Officer J.S. to "cut [Miller] loose" in order to help their fellow officers attempting to secure the doors to the Rotunda. According to Lieutenant P.K., Miller apologized for his behavior, and told Lieutenant P.K. "I just want to go home." Once the handcuffs were removed, Officer J.S. told Miller to "get the f*** out of here now and go home." Miller responded by saying "yes, sir, I will," and began apologizing to Officer J.S. for "screwing up" and being there.

Shortly after Miller was released from custody, Miller began filming video and taking pictures on his cell phone, including a selfie-style video of him at 2:17 p.m. on the East Terrace, stating, "*We stormed Congress. We got stopped at the door right now, but we might get in in a minute... This is a real revolution right? Yeah buddy*":



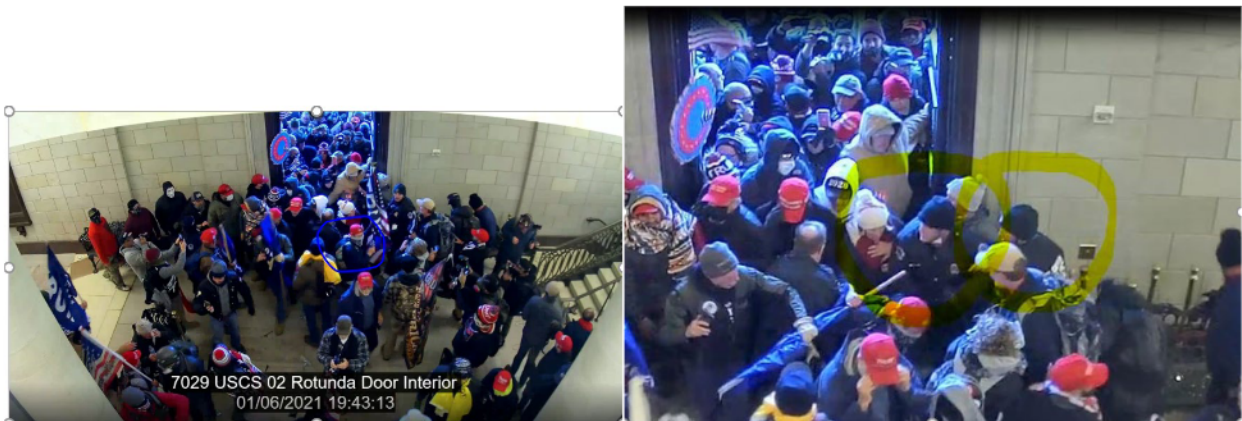
Screenshot of IMG_6573 from Garret Miller's iPhone, Obtained through Search Warrant

Miller took additional pictures and video of the crowd, including videos of him at 2:34 p.m. right outside the Memorial Door prior to being breached by the rioters.



Screenshot of IMG_6580.MOV from Garret Miller's iPhone

At approximately 2:43:13 p.m., Miller entered the United States Capitol through the Rotunda door and was observed pushing past a number of USCP Officers attempting to prevent the crowd, including Miller, from entering. The image on the left shows Miller circled after he pushed past law enforcement, while the image on the right shows USCP officers R.S. and M.C. attempting to stop Miller and other members of the crowd. Miller's act of pushing past these officers guarding the entryway into the Capitol forms the basis for Count One of the third superseding indictment:

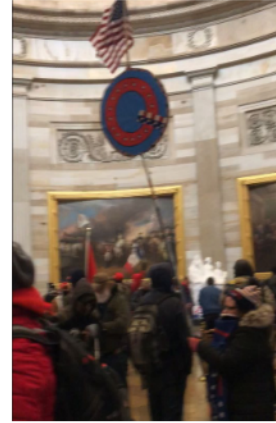


Screenshots from USCP CCTV Camera 7029 at 2:43 p.m.

Miller then made his way to the Rotunda and can be seen on additional USCP CCTV footage. Miller also recorded his own videos of him inside the building:



Screenshot from USCP CCTV Camera 0960 at 2:45 p.m.



Screenshot of Miller's Phone IMG_6582.MOV

Miller continued to be captured on CCTV and take photos and videos of himself in the Capitol. Miller recorded video at 2:46 p.m. of him in the direction of the Small Senate Rotunda.⁴ Approximately 22 minutes after entering the building, at 3:05 p.m., Miller took a selfie photograph of him in the Rotunda with another rioter:



Screenshot of IMG_6585.MOV⁵

By 3:06 p.m., officers with both the USCP and Metropolitan Police Department (MPD) had also made it into the Capitol Rotunda and began removing rioters from the building. While

⁴ See Miller's iPhone IMG_6584.MOV.

⁵ See also USCP CCTV Camera 0960 at 3:05:29.

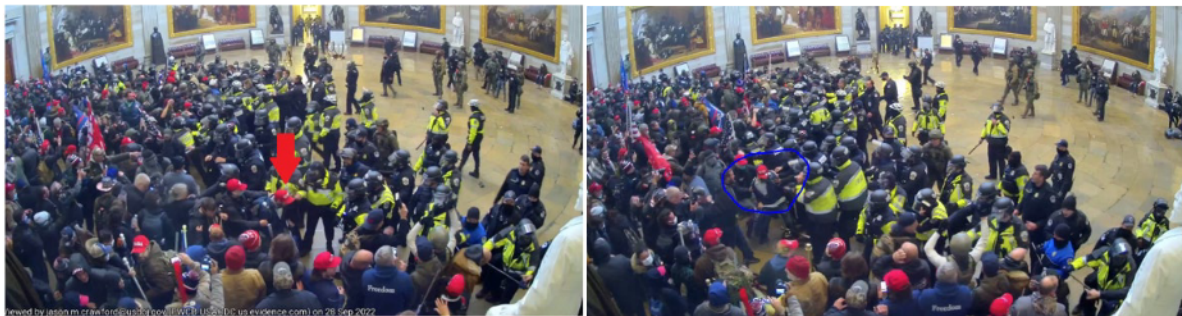
some rioters left willingly and without incident, Miller was not one of them. Miller's encounter with the officers was captured on numerous MPD body worn cameras (BWC), including MPD Officers T.C., J.C., D.T., M.H., and Q.C., all of which has been provided to Miller's attorney through discovery. Miller can be seen on both USCP CCTV and MPD BWC footage in the Capitol Rotunda both obstructing, impeding, or interfering with MPD officers, and forcibly assaulting, resisting, opposing, impeding, intimidating, or interfering with MPD Officer Q.C. Miller's conduct in the Rotunda during this period forms the basis for Counts Two and Four of the third superseding indictment ⁶:



BWC of Officer T.C. at 3:08:57 p.m.



BWC of Officer W.C. at 3:08:55 p.m.



USCP CCTV Camera 0960 at 3:10:04 and 3:10:09 p.m.

⁶ Count Four of the third superseding indictment clarifies that MPD Officer Q.C. is the victim of Miller's violation of 18 U.S.C. 111(a)(1) during this time period.

By 3:36 p.m., Miller had been ejected from the Capitol building and took another selfie:



Screenshot of IMG_6587.MOV

Miller's criminal conduct did not end following his removal from the Capitol. Instead, Miller took to social media glorifying his actions that day. In a series of posts via Twitter on January 6, Miller said what took place that day was "Beutiful" (sic) and "[w]e where (sic) gentle with police...We overwhelmed them but did not injure them."⁷ Following Congresswoman Ocasio-Cortez's call on Twitter to "Impeach," Miller responded directly to the Congresswoman on Twitter by calling for her assassination, a threat forming the basis for Count Five of the third superseding indictment:



See Search Warrant return from Garret Miller's Twitter account

⁷ See Twitter Search Warrant return previously provided through discovery.

Miller followed up his call for violence by replying to others via Twitter and discussing his “storm[ing]” of Congress:



See Search Warrant return from Garret Miller’s Twitter account

Miller continued to use social media to transmit a threat to injure officers involved in defending the United States Capitol on January 6. On January 10, 2021, Miller engaged in a conversation via Facebook with another individual, J.B. During the social media communication, Miller discussed wanting to know the name of the officer who shot Ashli Babbit, and said that “We going to get a hold of him and hug his neck with a nice rope” and calling it “justice.”⁸ In another Facebook communication with Facebook user M.B., Miller sent a photograph of a USCP police officer to M.B. and stated “I think it’s the guy who shot Ashli Babbit.”⁹ Miller later disseminated the same photograph of the officer he thought shot Ashli Babbit to other Facebook users, including E.L. and M.A.¹⁰ During the Facebook conversation with M.A., Miller noted that he has been banned from posting on Facebook.

Miller continued his obsession with finding the USCP officer who shot Ashli Babbit by spreading articles and making videos through Facebook. On January 16, 2021, Miller sent an article purporting to identify the USCP officer to J.E., M.B., and E.L., and also attempted to send

⁸ See Facebook Search Warrant return, Miller conversation with J.B., on 01/10/21 at 17:06 UTC.

⁹ See Facebook Search Warrant return, Miller conversation with M.B., on 01/10/21 at 12:18 UTC.

¹⁰ See Facebook Search Warrant return, Miller conversations with E.L. on 01/11/21 at 12:18 UTC, and M.A. on 01/11/21 at 23:18 UTC.

the article to other users via Instagram¹¹. He then followed up by sending the article via Facebook to J.D., and told J.D. “that cops not going to survive long...so its huntin season.” Miller told J.D. “[m]an wow this shits gota get out fast.” He then followed up by stating “Uhh well I need to be worried about the fbi after saying what I’ve said to you. Of course I don’t live in dc or Virginia. So I just want people to know the truth.” Miller told J.C. “[w]ell we got the traitor cop as a target and as long as we don’t shoot him we don’t get accused of firing the first shot. He shot first. His death prevents civil war by liberal history teller arguments.” He ends his communication by stating “[h]is execution justified.”¹² Miller’s communications on Facebook from January 6, 2021, through January 16, 2021, form the basis for Count Six of the third superseding indictment.

For his role in the January 6, 2021, Capitol riot, Miller was arrested at his home in Richardson, Texas, on January 20, 2021. When Miller was arrested, he was found wearing a t-shirt commemorating January 6, which read in part: “Take America Back” and “I was There, Washington, DC January 6, 2021:”



Booking Photograph of Miller taken 01/20/21

¹¹ See Facebook Search Warrant return conversations from 01/16/21.

¹² See Facebook Search Warrant return, Miller conversation with J.D. on 01/16/21 from 00:30 – 21:10 UTC.

Through his attorney, Clinton Broden, on January 25, 2021, Miller issued the following statement regarding his conduct on January 6, 2021, and its aftermath:

First, let me say that I was in Washington, D.C. on January 6, 2021, because I believed I was following the instructions of former President Trump and he was my president and the commander-in-chief. His statements also had me believing the election was stolen from him. Nevertheless, I fully recognize Joe Biden is now the President of the United States and that the election is over. Donald Trump is no longer president and I would not have any reason to continue to follow his lead.

Second, while I never intended to harm Congresswoman Ocasio-Cortez nor harm any members of the Capitol police force, I recognize that my social media posts were completely inappropriate. They were made at a time when Donald Trump had me believing that an American election was stolen. I want to publicly apologize to Congresswoman Ocasio-Cortez and the Capitol police officers. I have always supported law enforcement and I am ashamed by my comments.

Third, while it does not excuse my actions on January 6, I want to reiterate that I was not armed when I entered the Capitol and that I stayed in the Capitol's rotunda. I also left Washington and started back to Texas immediately after President Trump asked us to go home.

Until very recently, I really had never been very interested in nor involved with politics. Nevertheless, what Donald Trump had been saying about the election really got to me and I felt I had to support him. Still, I recognize that I am solely responsible for my actions and that there are no excuses for what I did.

I come from a good and supportive family. My parents and brothers do not deserve the pain I have caused them. I accept full responsibility for my actions and I am prepared to testify at any trial or Congressional proceeding.¹³

Argument

I. Defendant's Motion to Dismiss Counts Five and Six is Moot in Light of the Third Superseding Indictment

The government respectfully submits that this Court deny Miller's motion as moot. Miller seeks dismissal of Counts Five and Six of the second superseding indictment which charge him

¹³ Available <https://www.brodenmickelsen.com/blog/clint-broden-criminal-defense-lawyer-for-garret-miller-updates-media-statement-regarding-garret-miller/>.

with two counts of making interstate threats to injure in violation of 18 U.S.C. § 875(c). In his motion, Miller claims that Counts 5 and 6 are infirm and must be dismissed because they are silent on *mens rea* and criminal intent. Miller's motion is moot in light of the filing of the third superseding indictment. ECF 111.

The Federal Rules of Criminal Procedure require that an indictment provide a “plain, concise and definite written statement of the essential facts constituting the offense charged.” Fed. R. Crim. P. 7(c)(1). The rule was designed to “eliminate technicalities in criminal pleadings and [is] to be construed to secure simplicity in procedure.” *United States v. Debrow*, 346 U.S. 374, 378, (1953). To that end, “an indictment need only inform the defendant of the precise offense of which he is accused so that he may prepare his defense and plead double jeopardy in any further prosecution for the same offense.” *United States v. Verrusio*, 762 F.3d 1, 13 (D.C. Cir. 2014).

Here, Counts Five and Six of the third superseding indictment allege that “Garret Miller, knowingly did transmit in interstate and foreign commerce a communication using a social media service...” Counts Five and Six of the third superseding indictment comply with the requirements of Fed. R. Crim. P. 7(c)(1) by putting Miller on notice of the conduct with which he is charged and guarding against any double jeopardy concerns.

II. Counts Seven, Nine, Ten, and Eleven are Not Multiplicitous

In his motion, Miller argues that Counts Seven, Eight, and Nine¹⁴ as well as Counts Ten and Eleven¹⁵ all arise out of Miller's “alleged conduct in joining with a mob to enter the Capitol building on January 6, 2021” (Br. at 2) and are multiplicitous under the controlling *Blockburger*

¹⁴ 18 U.S.C. §§ 1752(a)(1)-(3).

¹⁵ 40 U.S.C. §§ 5104(e)(2)(D)-(E).

test. Because each count charged requires proof of a fact which the other does not, none of the counts are multiplicitous and Miller is wrong.

A defendant may be convicted of and sentenced under different statutory provisions for multiple offenses arising out of the same single act or course of conduct so long as Congress authorized the imposition of such multiple punishments. *See United States v. McLaughlin*, 164 F.3d 1, 8 (D.C. Cir. 1998) (“If the legislature intends to impose multiple punishment, imposition of such sentences does not violate Double Jeopardy.”). “To determine multiplicity *vel non*, courts generally apply the *Blockburger* test: ‘[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 provision requires proof of a fact which the other does not,’ *i.e.*, whether either is a lesser included offense of the other.” *United States v. Mahdi*, 598 F.3d 883, 888 (D.C. Cir. 2010) (quoting *United States v. Weathers*, 186 F.3d 948, 951 (D.C. Cir. 1999), and *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). If the two offenses each require proof of a fact the other does not, then the charges are not multiplicitous. *Id.* at 890.¹⁶ The *Blockburger* “test focuses on the statutory elements of the offense, not on the proof offered in a given case.” *United States v. McLaughlin*, 164 F.3d 1, 8 (D.C. Cir. 1998). Thus, it is irrelevant whether there is significant overlap in the factual proof of each count at trial, or even whether two counts “are based upon the exact same set of facts and circumstances,” so long as each count’s

¹⁶ On the other hand, if two offenses fail the *Blockburger* test—because one is a lesser-included offense of the other—that is not the end of the inquiry. In that scenario, the “*Blockburger* test . . . provides only a canon of construction, not a ‘conclusive presumption of law,’ *id.* at 888 (quoting *Garrett v. United States*, 471 U.S. 773, 779 (1985)), because there “‘is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and *punishing also the completed transaction.*’” *Id.* (quoting *Garrett*, 471 U.S. at 779) (emphasis in original). Here, the offenses clearly each require proof of a fact the others do not, so it is not necessary to conduct this further analysis.

elements require proof of a fact that the others do not. *United States v. Manafort*, 313 F. Supp. 3d 311, 314 (D.D.C. 2018); *see id.* (“[T]he test for multiplicity is not whether two counts are based on the same set of facts; rather, it is whether the statutory elements of the two offenses are the same.”).

Here, Miller’s multiplicity arguments fail because each of the offenses charged in the indictment “requires proof of a fact which the other does not.” *Blockburger*, 284 U.S. at 304.

A. Counts Seven, Eight, and Nine

First, Count Seven charges a violation of Section 1752(a)(1) of Title 18, which applies to a defendant who “knowingly enters or remains in any restricted building or grounds without lawful authority to do so.” 18 U.S.C. § 1752(a)(1), (b)(1)(A). The elements of that offense are:

- 1) The defendant entered or remained in a restricted building or grounds as defined in 18 U.S.C. § 1752(c) without legal authority to do so; and
- 2) The defendant did so knowingly.

Count Eight charges a violation of Section 1752(a)(2) of Title 18, which applies to a defendant who “knowingly, and with intent to impede or disrupt the orderly conduct of Government business or official functions, engages in disorderly or disruptive conduct in, or within such proximity to, any restricted building or grounds when, or so that, such conduct, in fact, impedes or disrupts the orderly conduct of Government business or official functions.” 18 U.S.C. § 1752(a)(2). The elements of that offense are:

- 1) The defendant engaged in disorderly or disruptive conduct;
- 2) The conduct was in, or within such proximity to, a restricted building or grounds as defined in 18 U.S.C. § 1752(c);
- 3) It was done when, or so that, such conduct in fact impeded or disrupted the orderly conduct of government business or official functions; and
- 4) The defendant did so knowingly.

Count Nine charges a violation of Section 1752(a)(3) of Title 18, which applies to a defendant who “knowingly, and with intent to impede or disrupt the orderly conduct of Government business or official functions, obstructs or impedes ingress or egress to or from any restricted building or grounds.” 18 U.S.C. § 1752(a)(3). The elements of that offense are:

- 1) The defendant obstructed or impeded ingress and egress to or from a restricted building or grounds as defined in 18 U.S.C. § 1752(c); and
- 2) The defendant did so knowingly, and with intent to impede or disrupt the orderly conduct of Government business and official functions.

Miller argues that the conduct alleged in Counts Seven, Eight, and Nine “all arise out of the same criminal conduct without any indication that Congress intended that conduct to be punishable under multiple subsections” of the statute. (Br. at 4.) But that is not the test. Applying the appropriate *Blockburger* test, Counts Seven, Eight, and Nine each “require[] proof of a fact which the other does not,” which is all that is required to survive a multiplicity objection. *Manafort*, 313 F. Supp. 3d at 314 (applying *Blockburger*). For instance, Section 1752(a)(1) requires entering or remaining in a restricted building or grounds, while (a)(2) only requires proximity to such building or grounds and (a)(3) is silent on location so long as ingress or egress to or from a restricted building or grounds is impeded or obstructed. Section 1752(a)(2) requires disorderly or disruptive conduct and that such conduct, in fact, impedes or disrupts the orderly conduct of Government business or official functions, while (a)(1) has no such requirement and (a)(3) requires the intent to impede or disrupt the orderly conduct of government business or official functions, but is silent on whether that conduct must in fact do so.

Miller also argues that Counts Seven and Nine are lesser included offenses of Count Eight. Specifically, Miller argues that if his conduct violated Count Eight (§ 1752(a)(2)), “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),” which is Count Seven. (Br. at 4.) Miller also argues that if he violated Count Eight, by the same reasoning, “it follows that impeding ingress or egress from the Capitol is disorderly conduct 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, Miller also violated Count Nine (§ 1752(a)(3)).¹⁷

In rejecting this exact multiplicity argument in the January 6 context, another judge of this Court recently concluded that “Section 1752(a)(1) ‘criminalizes ‘enter[ing] or remain[ing] in any restricted building without lawful authority,’ while (a)(2) penalizes ‘engag[ing] in disorderly or disruptive conduct in, or within such proximity to, any restricted building or grounds.’” *United States v. Ballenger, et al.*, No. 21-719-JEB, slip op. (D.D.C. October 26, 2022) (finding that “[a]s a result, the former is not a lesser-included offense of the latter since violating (a)(1) requires one to be in the restricted area, while (a)(2) does not; and violating (a)(2) requires that one engage in disruptive conduct, while the same is not true for (a)(1)”). This same reasoning applies to Miller’s argument that Count Nine is a lesser included offense of Count Eight because Section 1752(a)(3) requires that Miller’s conduct obstructed or impeded ingress or egress, while (a)(2) just requires that Miller engaged in some form of disorderly or disruptive conduct, regardless of whether it hindered ingress or egress specifically. Furthermore, (a)(3) requires the additional intent to obstruct or impede government business, while (a)(2) does not—but instead requires that such

¹⁷ In paragraph 7 of his brief, Miller incorrectly refers to 18 U.S.C. § 1752(a)(1) as “Count 9” and in paragraph 8 incorrectly refers to § 1752(a)(2) as “Count 9,” but the statutory language quoted in his arguments matches the correct charges per the Second Superseding Indictment where Count Seven is § 1752(a)(1), Count Eight is § 1752(a)(2), and Count Nine is § 1752(a)(3) of Title 18. (Br. at 4-5.)

conduct in fact impeded or disrupted government business. While these provisions may govern different aspects of the same troubling conduct, each count requires proof of at least one fact the others do not. Therefore, Counts Seven, Eight, and Nine all pass the *Blockburger* test.

B. Counts Ten and Eleven

In addition, Miller argues that Count Eleven arises out of the same alleged criminal conduct as Count Ten, and that if Miller violated Count Ten, then he necessarily violated Count Eleven making Count Eleven multiplicitous. (Br. at 5-6.) Miller further argues that if the government established a violation of Count Eight (18 U.S.C. § 1752(a)(2)), Miller would necessarily also have violated 40 U.S.C. § 5104(e)(2)(E), which is Count Eleven. (Br. at 6.) This is incorrect.

Count Ten charges a violation of Section 5104(e)(2)(D) of Title 40, which applies to a defendant who “willfully and knowingly utter[s] loud, threatening, or abusive language, or engage[s] in disorderly and disruptive conduct in any of the Capitol Buildings with the intent to impede, disrupt, and disturb the orderly conduct of a session of Congress and either House of Congress, and the orderly conduct in that building of a hearing before or any deliberation of, a committee of Congress or either House of Congress.” 40 U.S.C. § 5104(e)(2)(D). The elements of that offense are:

- 1) The defendant uttered loud, threatening, or abusive language, or engaged in disorderly or disruptive conduct in any of the Capitol Buildings;
- 2) The defendant had the intent to impede, disrupt, or disturb the orderly conduct of a session of Congress or either House of Congress, or the orderly conduct in that building of a hearing before, or any deliberations of, a committee of Congress or either House of Congress; and
- 3) The defendant did so willingly and knowingly.

Count Eleven charges a violation of Section 5104(e)(2)(E) of Title 40, which applies to a defendant who “willfully and knowingly obstruct[s], or impede[s] passage through or within, the

Grounds or any of the Capitol Buildings.” 40 U.S.C. § 5104(e)(2)(E). The elements of that offense are:

- 1) The defendant obstructed or impeded passage through or within the Grounds or in any of the Capitol Buildings;
- 2) The defendant had the intent to impede, disrupt, or disturb the orderly conduct of a session of Congress or either House of Congress, or the orderly conduct in that building of a hearing before, or any deliberations of, a committee of Congress or either House of Congress; and
- 3) The defendant did so willingly and knowingly.

Just as with Counts Seven and Nine, Count Eleven is also not a lesser included offense under Count Eight. Unlike Count Eight under Section 1752(a)(2), Counts Ten and Eleven each require proof of a separate mens rea, namely willful conduct—in addition to knowing conduct—on Miller’s part. This alone is enough to override Miller’s objection per the *Blockburger* test.

Judge Boasberg recently rejected the argument that another section of 40 U.S.C. § 5104 was multiplicitous of Section 1752(a)(2) where “the former does not require entry into or proximity to a restricted area, while the latter does” and “in addition, § 1752(a)(2) requires disorderedly or disruptive conduct, which § 5104 does not.” *Ballenger*, 2022 WL 14807767 (D.D.C. October 26, 2022), at *2.

Miller unpersuasively attempts to rely on *United States v. Woerner*, 709 F.3d 527 (5th Cir. 2016), which is not binding on this Court and which affirmed the district court’s denial of a similar attempt by the defendant in that case to suppress the indictment as multiplicitous. *Id.* at 530. Similarly, Miller’s attempt to rely on *United States v. Clarridge*, 811 F.Supp. 697, 702 (D.D.C. 1992), is unpersuasive because it is not consistent with governing Supreme Court precedent, including *Blockburger*. See *United States v. Watt*, 911 F.Supp. 538, 548 (D.D.C. 1995) (specifically rejecting the multiplicity argument raised in *Clarridge* based on analysis under *Blockburger*, 284 U.S. at 299 and *Albernaz v. United States*, 450 U.S. 333, (1981)).

Miller also briefly suggests that “applying the Rule of Lenity, there is no indication that Congress intended multiple punishments for each violation” of either 18 U.S.C. § 1752 or 40 U.S.C. § 5104. (Br. at 7.) However, as a threshold issue, Miller has provided no evidence of ambiguity, let alone a “grievous ambiguity” such that the court would be forced to “guess as to what Congress intended” as required under *Barber v. Thomas*. See 560 U.S. 474, 488 (2010) (citing *Muscarello v. United States*, 524 U.S. 125, 139 (1998) and *Bifulco v. United States*, 447 U.S. 381, 387 (1980)) (internal quotation marks omitted). Therefore, the rule of lenity does not apply here.

In any event, Miller misunderstands that the *Blockburger* multiplicity analysis refers to the elements of the offenses, not whether a single act could violate multiple statutes. The very premise of *Blockburger* and its progeny is that the “same act or transaction”—here, Miller’s presence and disruptive conduct at the Capitol Grounds—can form the basis of multiple criminal charges so long as each Count requires proof of a fact that the others do not. *Mahdi*, 598 F.3d at 888; *Manafort*, 313 F. Supp. 3d at 314 (counts can be “based upon the exact same set of facts and circumstances,” if *Blockburger* is satisfied). That Miller’s conduct on January 6, 2021, has led to multiple related charges is unsurprising.

III. Through the Discovery Process and This Filing, Miller Has Sufficient Notice of the Charges in Order to Understand Them and Prepare a Defense

An indictment need only include “a plain, concise, and definite written statement of the essential facts constituting the offense charged,” but a court may, in its discretion, “direct the government to file a bill of particulars” clarifying the allegations in the indictment. Fed. R. Crim. P. 7(c)(1), (f). A bill of particulars “ensure[s] that the charges brought against a defendant are stated with enough precision to allow the defendant to understand the charges, to prepare a defense, and perhaps also to be protected against retrial on the same charges.” *United States v. Butler*, 822

F.2d 1191, 1193 (D.C. Cir. 1987). It is not required, however, if the indictment “is sufficiently specific, or if the requested information is available in some other form.” *Id.*; see *United States v. Lorenzana-Cordon*, 130 F. Supp. 3d 172, 179 (D.D.C. 2015) (denying motion for bill of particulars and noting that the government had provided extensive discovery that “allows Defendants to adequately prepare for trial”).

A bill of particulars “is not a discovery tool or a device for allowing the defense to preview the government’s theories or evidence.” *United States v. Ramirez*, 54 F. Supp. 2d 25, 29 (D.D.C. 1999); see also *United States v. Brodie*, 326 F. Supp. 2d 83, 91 (D.D.C. 2004) (same). Rather, a bill of particulars “is intended to give the defendant only that minimum amount of information necessary to permit the defendant to conduct his own investigation and not to provide the defendant with the fruit of the government’s investigation.” *United States v. Sanford Ltd.*, 841 F. Supp. 2d 309, 316 (D.D.C. 2012) (internal quotation marks and citation omitted, emphasis in original). Therefore, a bill of particulars “properly includes clarification of the indictment, not the government’s proof of its case.” *United States v. Martinez*, 764 F. Supp. 2d 166, 173 (D.D.C. 2011) (internal quotation marks and citation omitted); *United States v. Savoy*, 889 F. Supp. 2d 78, 115 (D.D.C. 2012) (same); see also *United States v. Taylor*, 17 F. Supp. 3d 162, 178 (E.D.N.Y. 2014) (bill of particulars “may not be used by the defense as a fishing expedition or to force the government to reveal all its evidence before trial”).

Applying this principle, judges of this Court have consistently denied motions for a bill of particulars where, as here, the motion seeks details about the nature of the government’s evidence. Thus, for example, in *United States v. Han*, 280 F. Supp. 3d 144, 149 (D.D.C. 2017), the Court denied a motion for a bill of particulars requesting information about the basis for fraud and tax charges against the defendant, including the precise representations allegedly made by the

defendant and the amount of taxes allegedly owed. The Court explained that the requested information had already been provided to the defendant in discovery and elsewhere, and a “bill of particulars is meant to allow a defendant to properly prepare for trial, not provide a method to force the prosecution to connect every dot in its case.” *Id.*

Similarly, in *Brodie*, the Court denied a motion for a bill of particulars requesting “the circumstances surrounding the alleged acts” of fraud committed by the defendants as well as “other evidentiary details.” 326 F. Supp. 2d at 92. The Court reasoned that the charges set forth in the indictment were “detailed and alleged with particularity” and “the discovery provided by the government has been voluminous,” and therefore there was “no reason for any further particularization of the overt acts.” *Id.*

Finally, in *Sanford Ltd.*, the Court denied a motion for a bill of particulars regarding the “substance, time, place and date” of allegations regarding falsification of records and other charges against a corporate defendant. 841 F. Supp. 2d at 315. The Court explained that “the general rule in conspiracy cases is that the defendant is not entitled to obtain detailed information about the conspiracy in a bill of particulars.” *Id.* at 317 (internal quotation marks and citation omitted). Accordingly, the Court denied the defendant’s request for information about the identities of its employees alleged to have participated in the conspiracy and other details about the overt acts charged in the indictment. *Id.* at 317-18.

The same result is appropriate here for three reasons. First, the indictment provides sufficient detail outlining the allegations against the Defendant. See *Mejia*, 448 F.3d at 445 (no bill of particulars required where the superseding indictment identified, among other things, the object of the charged conspiracy, the conspiracy’s “time period,” the applicable mens rea, and locations where conspirators acted). Along with providing a specific date for the alleged conduct,

the indictment language tracks closely that of the applicable statutes. Nothing in the indictment's language is vague, unclear, or lacking in specificity, especially in light of the Defendant's recorded conduct.

Second, through discovery previously provided to Miller, and by way of today's filing, Miller is able to (1) prepare his defense; (2) avoid prejudicial surprise at trial; and (3) guard against double jeopardy concerns. Defendant Motion, ECF No. 104, at 1-2 (Citing *United States v. Hubbard*, 474 F.Supp. 64, 80 (D.D.C. 1979)). The government has named the two USCP officers guarding the entryway of the Capitol building,¹⁸ and Miller's act of entering the building while these USCP officers attempted to stop Miller and other rioters forms the basis for Count One of the third superseding indictment. The government has also provided the name of the MPD Officer whom the government alleges Miller forcibly assaulted, resisted, opposed, impeded, intimidated, or interfered with in Count Four of the third superseding indictment, as well as the MPD officers involved in removing Miller from the Rotunda forming the basis for Count Two. Miller's conduct forming the basis for Count Thirteen, and the names of the USCP officers involved, has likewise been provided to Miller and detailed above.

The government will provide any *Jencks* material by the Court's November 14, 2022, deadline. Any summaries of any of these officers' interviews are already available through the global discovery database, and much of it has been provided through discovery disclosures specific to Miller. As the government prepares for trial, it will continue to supplement any reports, videos, or other evidence that it believes to be either relevant or subject to discovery.

¹⁸ The government will supplement this filing by emailing Defense Counsel and providing the full names of all individuals referenced by their initials.

Conclusion

For all these reasons, the Defendant's Motion to Dismiss Counts Five and Six, Motion to Dismiss Counts Seven, Nine, Ten, and Eleven, and Motion for a Bill of Particulars should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was filed electronically on November 3, 2022, and served upon all parties of record through ECF.

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