

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

UNITED STATES OF AMERICA)	
)	
v.)	
)	Criminal No. 1:21-CR-108 (TSC)
MICHAEL FOY,)	
)	
Defendant)	
)	

**MICHAEL FOY’S MOTION FOR BILL OF PARTICULARS
AND MEMORANDUM IN SUPPORT THEREOF**

Michael Foy, through undersigned counsel and pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure, hereby moves this Court to order the government to provide him with a Bill of Particulars.

Mr. Foy has been detained since January 24, 2021. This Court predicated the grant of the government’s request for pretrial detention on the understanding that the government would furnish Mr. Foy with appropriate notice of the nature and cause of the accusation, including discovery concerning his alleged conduct. While progress has been made, more than 100 days into this case, Mr. Foy has not received all of the discovery to which he is entitled. The lack of discovery compounds the effects of the vague Indictment, which does not provide the essential details—including *any* factual details—of the charges against him, despite a specific request. ECF 19. As such, Mr. Foy respectfully requests that this Court order the government to furnish those details.

FACTUAL AND PROCEDURAL BACKGROUND

Mr. Foy is a 29-year-old veteran who served in the United States Marine Corps from 2015 until June 2020. He was honorably discharged after advancing to the rank of Corporal. For his service, he received the Good Conduct Medal from the Commandant of the Marines and has also

been commended for assisting the Wounded Warrior Battalion in Camp Lejeune, North Carolina. Like many veterans, Mr. Foy suffers from psychological casualties from his service. In 2019, he was diagnosed with unspecified Anxiety Disorder while on Active Duty, the first of three significant diagnoses for which he sought treatment at the Veterans Administration Hospital in Ann Arbor, Michigan. In December 2020, Mr. Foy and his family noticed that things were getting worse. He requested an additional evaluation and was, for the first time, diagnosed with Major Depressive Disorder and Post-Traumatic Stress Disorder. He received this diagnosis on December 23, 2020—just two weeks before January 6th.

After the election, Mr. Foy was repeatedly exposed to conspiracy theories of election fraud crafted and promoted by President Trump. Inundated by these reports, Mr. Foy believed that the election was “stolen” and that the resulting government would be constitutionally invalid. Though clearly misguided, Mr. Foy traveled to Washington, D.C. to peacefully protest what he viewed as a fraudulent usurpation of power.

Following the events on January 6th, Mr. Foy was ordered detained without bond by Magistrate Judge Patricia Morris in the U.S. District Court for the Eastern District of Michigan on January 24, 2021. He was transferred to the D.C. Jail on March 9, 2021. He was arraigned on March 10, 2021 in this Court.

The Indictment charges Mr. Foy with Civil Disorder, in violation of 18 U.S.C. § 231 (a)(3); Obstruction of an Official Proceeding and Aiding and Abetting, in violation of 18 U.S.C. § 1512 (c)(2); Forcibly Assaulting, Resisting or Impeding Certain Officers with a Dangerous Weapon and Aiding and Abetting, in violation of 18 U.S.C. §§ 111 (a)(1), (b) and 18 U.S.C. § 2; Entering and Remaining in a Restricted Building or Grounds with a Dangerous Weapon, in violation of 18 U.S.C. §§ 1752(a)(1), (b)(1)(A); Disorderly and Disruptive Conduct in a Restricted Building or

Grounds, in violation of 18 U.S.C. § 1752(a)(2); Engaging in Physical Violence in a Restricted Building or Grounds, in violation of 18 U.S.C. § 1752(a)(4); and Engaging in an Act of Physical Violence in the Capitol Grounds or Buildings, in violation of 40 U.S.C. § 5104(e)(2)(F).¹

A bill of particulars is necessary because the Indictment fails to notice essential information related to the charged offenses. As such, Mr. Foy requests information relating to: (a) the identity of the officer or officers allegedly obstructed in Count One; (b) whether Mr. Foy is charged as a principal or as an accessory for Counts Two and Three, and, if charged as an accessory, the name or names of the principal(s) he is charged with aiding; (c) whether Mr. Foy is accused of forcibly assaulting, or forcibly resisting, or forcibly impeding an officer or officers for Count Three and whether he is charged with the misdemeanor or felony; (d) the identity of the alleged victim(s) for Count Three; (e) how Mr. Foy “used” his hockey stick within the Capitol building such that the use rendered it a dangerous weapon; and (f) the act that constitutes the alleged act of violence in Counts Seven and Eight, including whether the act concerned people or property, and where it is alleged to have taken place. The Court should order the Government to file a bill of particulars that details how Mr. Foy violated the statutes at issue.

LEGAL STANDARD

Federal Rule of Criminal Procedure 7(f) provides that the Court may direct the filing of a bill of particulars upon the motion of a defendant. Fed. R. Crim. P. 7(f). The purpose of a bill of particulars is to apprise defendants of the nature of the charges against them so as to ensure that they: (1) understand the charges, (2) can prepare a defense, (3) can avoid prejudicial surprise at trial, and (4) can be protected against retrial for the same offense. *See United States v. Butler*, 822 F.2d 1191 (D.C. Cir. 1987). When deciding whether a requested a bill is warranted, courts should

¹ Indictment, ECF 6 at 1.

consider the complexity of the crime charged, the clarity of the indictment, and the degree of discovery and other sources of information otherwise available to the defendants.² The determination as to whether a bill of particulars should be provided is within the discretion of the trial court. *Id.* at 1194. Unlike civil orders for particulars, criminal orders should be liberally granted. Indeed, Rule 7(f) was amended in 1966 to eliminate the requirement that defendants show cause when seeking a bill of particulars—for the express purpose of encouraging widespread use. *See United States v. Barrett*, 153 F. Supp. 3d 522, n.17 (E.D.N.Y. Dec. 23, 2015).

ARGUMENT

This Motion for a Bill of Particulars is made on the grounds that this information is necessary to inform the Defendant of the charges against him with sufficient particularity to enable him to prepare his defense, to avoid the danger of surprise at trial, and to enable him to plead his acquittal or conviction in a manner that would prevent successive prosecution for the same offense. *See Butler*, 822 F. 2d at 1191.

A. A Bill of Particulars is Needed Where the Indictment Provides Insufficient Notice of the Specific Charges Against the Defendant

An indictment may use the language of a statute, but that language must be supplemented with enough detail to apprise the accused of the particular offense with which he is charged. *See United States v. Concord Mgmt. & Consulting LLC*, 385 F. Supp. 3d 69, 73 (D.D.C. 2019); *see also United States v. Conlon*, 628 F.2d 150, 155 (D.C. Cir. 1980). At a bare minimum, an indictment must—“fully, directly,” and without “any ambiguity”—set forth the elements necessary to constitute the offense charged. *Hamling v. United States*, 418 U.S. 87, 117 (1974);

² Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 130 (4th ed. 2015). Here, as the Court is aware, there is deficient access to discovery, compounding the notice issues related to the insufficiency of the Indictment.

see also Conlon, 628 F.2d at 155 (observing that the need for the government to clarify such details *ex post* is evidence of insufficiency of the indictment itself).

In the Indictment filed against Mr. Foy, the charges are so general that Mr. Foy cannot discern the specific elements that form the basis of the charged offenses, much less the factual allegations that support them. *See United States v. White*, 753 F. Supp. 432 (D. Conn. 1990); *see also United States v. Facciolo*, 753 F. Supp. 449 (S.D.N.Y. 1990). Mr. Foy is entitled to clarity as to the elements he must disprove.

Count One

Count One charges Mr. Foy with committing *and* attempting to commit an act to obstruct, impede, *and* interfere with a law enforcement officer, during the commission of a civil disorder that obstructed, delayed, and adversely affected the conduct and performance of the function.³

It is unclear from this language what charges Mr. Foy faces: the Indictment charges two separate crimes in the same count. Count One charges both civil disorder *and* attempted civil disorder, though they are distinct crimes with distinct elements. Because they are different bases for liability *in the alternative*, the statute lists them in the disjunctive. 18 U.S.C. § 231(a)(3). This distinction is central: whereas the third prong of civil disorder, as defined by the Code, is a general intent crime requiring only knowledge, attempt is an inchoate offense that always requires specific intent—a higher evidentiary burden for the government to carry. 18 U.S.C. 232(1); *see also United States v. Bailey*, 444 U.S. 394, 405 (1980). Mr. Foy is entitled to notice regarding which *mens rea* standard will apply. Without knowing which crime is charged, he cannot prepare a defense and also faces unfair surprise at trial. *See Butler*, 822 F. 2d at 1191.

Furthermore, by the text of the instrument, the charge concerns “an act”—singular—and

³ Indictment, Doc. No. 6 at 1-2 (emphasis added).

yet it cites several types of criminal conduct, including obstructing, impeding, interfering, delaying *and* adversely affecting the official duties of a law enforcement officer.⁴ Again, the statutory offense enumerates this conduct in the *disjunctive*, indicating that these are bases *in the alternative*, and the government must specify the type of conduct Mr. Foy allegedly engaged in. 18 U.S.C. § 231(a)(3). Because the Indictment has charged Mr. Foy in the conjunctive, it creates problematic ambiguity as to whether the government purports to charge Mr. Foy with *all* of the enumerated conduct, or whether it simply made a mistake by listing redundant elements. This ambiguity is exacerbated by the lack of supporting facts, as explained *supra* Part B.

Count Two

Similarly, Count Two alleges that Mr. Foy “attempted to, *and* did” corrupted obstruct, influence, *and* impede an official proceeding.⁵ Once again, the statutory offense is written in the disjunctive, and the inclusion of all conduct bases in the conjunctive renders the allegations unspecific and unclear. Moreover, attempt is not even provided for in the statute. 18 U.S.C. § 1512(c)(2). Attempt at federal law requires a statutory basis.⁶

Confusing matters further, the government also charges Mr. Foy with aiding and abetting under this section.⁷ While the charge is written as though Mr. Foy was a principal, the inclusion of the aiding and abetting offense makes it unclear whether the Indictment is charging him as a principal or an accessory.⁸ While it is true that aiding and abetting, unlike attempt, is not a separate

⁴ Indictment, Doc. No. 6 at 1-2 (emphasis added).

⁵ Indictment, Doc. No. 6 at 2 (emphasis added).

⁶ “Unlike state law, federal law does not feature a general attempt statute. Instead, federal law outlaws the attempt to commit a number of federal underlying offenses on an individual basis.” Charles Doyle, Cong. Research Serv., R42001, *Attempt: An Overview of Federal Criminal Law* (2020), <https://fas.org/sgp/crs/misc/R42001.pdf>.

⁷ Indictment, Doc. No. 6 at 2.

⁸ *See id.*

crime, the *actus reus* evidence required to support that theory of criminal liability, as opposed to liability as a principal, is entirely distinct. 18 U.S.C. § 2(b). As such, Mr. Foy is entitled to notice as to which theory of liability the government intends to pursue so that he can adequately prepare his defense.

Count Three

Count Three likewise alleges that Mr. Foy “did forcibly assault, resist, oppose, impede, intimidate, *and* interfere with a federal officer.”⁹ Once again, and the inclusive language—written in a manner inconsistent with the statute—creates ambiguity as to what conduct Mr. Foy is alleged to have engaged in. This is especially important in light of how Section 111(a) has been interpreted: several circuit courts have held that while “forcibly” modifies each of the enumerated conduct bases, the conduct bases describe distinct crimes that involve different elements. *See, e.g., United States v. Gagnon*, 553 F.3d 1021, 1022 (6th Cir. 2009); *see also United States v. Williams*, 602 F.3d 313, 315-16 (5th Cir. 2010). It is an issue of first impression in the District of Columbia, but at least two circuits courts and one district court have held that forcibly resisting, opposing, impeding, intimidating, and interfering do not require establishing the elements of common law assault, whereas forcibly assaulting does. *See id.* By listing *all* offense bases in the conjunctive, the Indictment again charges multiple distinct offenses within a single count.

Furthermore, and more importantly, Section 111(a) captures both a misdemeanor simple assault as well as felony assault. The misdemeanor and the felony have distinct elements and as such, the government must specify which it is charging here. In fact, the Tenth Circuit held that to sustain a felony conviction under Section 111(a), the charging indictment itself *must include* either an allegation of actual physical contact or the intent to commit murder or intent to commit

⁹ Indictment, Doc. No. 6 at 2 (emphasis added).

any felony other than those referred to in § 113(a)(2)—as “essential elements” of the crime. *United States v. Perea*, 818 F. Supp. 2d 1293 (D. N.M. 2010) (citing *United States v. Hathaway*, 318 F.3d 1001 (10th Cir. 2003)). In *Hathaway*, the Tenth Circuit found that because the indictment did not specifically quote the language of § 111(a) to differentiate between simple assault and felony assault, it failed to set forth all of the elements of the offense and thus did not provide constitutionally adequate notice. 318 F.3d at 1010. The statute’s text was subsequently amended by Congress to endorse the holding in *Hathaway*. See *Perea*, 818 F. Supp. 2d at 1300. As such, Mr. Foy is entitled to a bill of particulars that clarifies the § 111(a) offense type he faces.

B. A Bill of Particulars is Needed Where the Indictment Provides Insufficient Notice of How the Government Intends to Prove the Specific Criminal Conduct at Issue

Under controlling Supreme Court precedent, an indictment must also contain sufficiently specific facts concerning conduct to provide the defendant “with reasonable certainty[] of the nature of the accusation against him” so that he knows “what he must be prepared to meet.” *Russell v. United States*, 369 U.S. 749, 764-65 (1962). Factual allegations in support of the indictment are especially important where criminal statutes are broad in scope, such that it captures a variety of offenses with different elements. See *Hamling*, 418 U.S. at 117-18 (“Undoubtedly the language of the statute may be used in the general description of an offence, *but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence*”) (quoting *United States v. Hess*, 124 U.S. 483, 487 (1888)) (emphasis added); see also *United States v. Davidoff*, 845 F.3d 1151, 1154 (2d Cir. 1988). As such, under *Hamling*, a bill of particulars is necessary where an indictment generically tracks the language of a statute and merely concludes, without factual detail, that the statute has been violated. 418 U.S. at 117-18.

Here, the Indictment is almost entirely devoid of factual allegations. Indeed, there is so little factual information included that it could be read as a general form Indictment for January

6th cases. The government must furnish sufficient factual detail so that Mr. Foy may understand the specific offense charged and how the government intends to prove its case. *See id.*; *see also Russell*, 369 U.S. at 764-65.

Count One

As noted *supra* Part A, Count One of the Indictment charges Mr. Foy with committing and attempting to commit an act to obstruct officers during and incident to a “civil disorder.”¹⁰ The Indictment includes no facts in support, only conclusions. Specifically, the Indictment does not list any actions—specific time, place, or manner details—that serve as the basis for either the attempt or the obstruction allegations, nor does it clarify the predicate “acts of violence” that are an essential element of the charge:

The term “civil disorder” means any public disturbance *involving acts of violence* by assemblages of three or more persons, which causes an immediate danger of or results in damage or injury to the property or person of any other individual.¹¹

The government must provide sufficient factual detail, including (1) the identity of the specific officers Mr. Foy is charged with obstructing, (2) the conduct of obstruction, if Mr. Foy is charged as a principal, and (3) the factual basis for the predicate acts of violence. *Russell*, 369 U.S. at 764-65.

Count Two

Count Two charges Mr. Foy with attempting to and actually “corruptly” obstructing an official proceeding by entering the Capitol. It also charges Mr. Foy with aiding and abetting.¹²

The government provides no factual detail or allegations of conduct other than the charge that Mr. Foy entered the Capitol building. It is not clear (1) who, exactly, the alleged obstruction

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¹¹ 18 U.S.C. 232(1).

¹² Indictment, Doc. No. 6 at 2.

was committed against, (2) whether Mr. Foy obstructed or encouraged someone else to obstruct or both, (3) who Mr. Foy allegedly aided and abetted, and (4) whether the alleged obstruction was committed prior to or after entering the Capitol building. Indeed, because the Indictment predicates the obstruction on an “act of civil disorder,” it is impossible to discern from Counts One and Two whether the Indictment charges one single act of civil disorder giving rise to two offenses—putting the charges within the ambit of the Double Jeopardy proscription on multiple punishment—or whether the charges describe two *separate* acts of civil disorder at distinct times and in distinct locations. Since it cannot be determined what conduct the Grand Jury intended to charge under Count Two, Mr. Foy cannot prepare a defense, minimize his surprise at trial, or invoke double jeopardy for concurrent sentencing if convicted on both counts. Thus, the government must provide sufficient factual detail of conduct to distinguish between two acts of civil disorder or must clarify that the Indictment charged just one act of civil disorder.

Count Three

Count Three charges Mr. Foy with forcibly assaulting, resisting, opposing, impeding, intimidating, *and* interfering with an officer “of *any* branch of the United States Government” and “*any* person assisting such officer.”¹³ Once again, no factual conduct is alleged. Is it one officer? Two? Several? That the Indictment does not even attempt to specify the branch of government with which the alleged victim(s) are affiliated suggests that the Indictment is intended to a catch-all for *ex post* factual development. Indeed, it calls into question whether the indictment itself is constitutionally valid—a shortcoming that a bill of particulars cannot cure. *See Russell*, 369 U.S. at 764-65; *see also Conlon*, 628 F.2d at 155. Mr. Foy is entitled to know the specific factual conduct allegations that support the charge, including the identities of the alleged victims and the

¹³ Indictment, Doc. No. 6 at 2.

principal he is alleged to have aided.

Count Four

Count Four charges Mr. Foy with entering a restricted area of the Capitol, where he allegedly “used” a dangerous weapon.¹⁴ No factual conduct is included concerning “use,” which is a critical element for *all* charges involving a dangerous weapon. Under controlling case law, an item with a non-dangerous ordinary use is not an “inherently dangerous instrument,” and therefore can only qualify as a dangerous weapon through particular usage. *United States v. Chansley*, 2021 WL 861079, at *7 (D.D.C. Mar. 8, 2021) (Lamberth, J.) (collecting cases) (“[A dangerous weapon is an] object that is either inherently dangerous or is used in a way that is likely to endanger life or inflict great bodily harm”); *see also United States v. Broadie*, 452 F.3d 875, 881–82 (D.C. Cir. 2006). That usage must rise to the level of threatening death or great bodily injury. *See id.* Here, the Indictment provides no detail whatsoever about the actions Mr. Foy allegedly took within the Capitol building that would support such a finding of use for his hockey stick, which is a non-inherently dangerous instrument. Mr. Foy is entitled to factual information concerning the “use” charge, including specifics as to place and manner of use and the identity of the victim that he allegedly threatened.

Counts Seven and Eight

Counts Seven and Eight both charge Mr. Foy with engaging in an act of physical violence on restricted grounds.¹⁵ Count Seven charges Mr. Foy with knowingly engaging in an act of physical violence against “*any person and property in a restricted building and grounds.*”¹⁶ Once again, without any facts, it is unclear whether the alleged violence was against a person, multiple

¹⁴ Indictment, Doc. No. 6 at 3.

¹⁵ Indictment, Doc. No. 6 at 4.

¹⁶ *See id.*

persons, or against property. There is also no detail as to what “act” of violence is alleged and whether the alleged physical violence occurred on the Capitol grounds or inside the building.

Count Eight is even less clear. Count Eight charges Mr. Foy with willfully engaging in an act of physical violence “within the United States Capitol Grounds *and any* of the Capitol Buildings.”¹⁷ The act alleged is not described, there are no victims alleged, and the location of the act alleged is not specified. In fact, it appears as if the charge is a placeholder for further factual development that could support *any* violation of this statute, not Mr. Foy’s particular alleged violation: a plain reading of the charge clearly indicates that the government does not appear to know where, when, or how the conduct took place, if at all. The government must furnish Mr. Foy with information that clarifies these details.

CONCLUSION

For the foregoing reasons, Mr. Foy respectfully requests that the Court grant this Motion and order the Government to provide a bill of particulars that specifically details the information requested herein.

Respectfully submitted,

A. J. KRAMER
FEDERAL PUBLIC DEFENDER

¹⁷ See *id.*

/s/

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FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA

v.

MICHAEL FOY,

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Criminal No. 1:21-CR-108 (TSC)

ORDER

Upon consideration of Michael Foy's Motion for Bill of Particulars, it is hereby ORDERED that the Motion is GRANTED and the Government is ORDERED to provide to the defense particularized details about the specific criminal conduct charged and at issue in the Indictment.

So ordered.

Date: _____

THE HONORABLE TANYA CHUTKAN
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA